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Considering a Juvenile Exception to the Felony Murder Rule

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— Note —

CONSIDERING A JUVENILE EXCEPTION TO THE FELONY MURDER RULE

CONTENTS

INTRODUCTION

When Lakeith Smith was fifteen years old, he accompanied four of his friends to burglarize a home in Millbrook, Alabama.[1] Smith's friend and accomplice in the burglary, sixteen-year-old A'Donte Washington, engaged in a shootout with the police as the boys attempted to flee.[2] A

1. Jessica Lussenhop, *In the US, You Don't Have to Kill to Be a Murderer*, BBC NEWS (Apr. 9, 2018), https://www.bbc.com/news/world-us-canada-43673331 [https://perma.cc/7D74-4LWF].

2. *Id.*

police officer shot and killed Washington.[3] Smith did not have a gun and did not participate in the shootout; yet he was charged with felony murder on the principle that intentionally acting as an accomplice in the burglary implied an intent to kill his friend.[4] Smith turned down a plea deal for twenty-five years in prison, expecting a lesser sentence at the end of a jury trial because he did not have a gun, did not participate in the act that caused Washington's death, and did not intend to kill his friend.[5] Instead, the jury sentenced Smith to thirty years in prison for felony murder, fifteen years for burglary, and two ten-year sentences for theft.[6] The chief assistant district attorney expressed his pleasure with Smith's severe sentence: "Because the sentences are consecutive, it will be a long time before he comes up for even the possibility for parole, at least 20 to 25 years."[7] Andre Washington, the deceased teen's father, sat with Smith's mother as a symbol of his rejection of the felony murder rule's application to Smith[8]: "I went there to show him and his family some support. What the officers did—it was totally wrong . . . . I don't feel [Smith] deserves that. No. Not at all."[9]

Smith was apparently unaware of the frequency with which juve–niles in circumstances strikingly similar to his have been charged with and convicted of felony murder.[10] In 1992, fourteen-year-old Timothy Kane agreed to go along with a group of his friends to break in to a neighbor's house.[11] Kane hid in fear under the dining-room table as two of his friends killed the home's occupant. Kane received a life sentence

3. *Id.*

4. Portia Allen-Kyle, *The Lakeith Smith Case Demonstrates the System's Brokenness*, ACLU (Apr. 12, 2018, 1:00 PM), https://www.aclu.org/blog/smart-justice/lakeith-smith-case-demonstrates-systems-brokenness [https://perma.cc/K8DJ-5CDP]; *see also* 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, 304–05 (2012).

5. "The officer shot A'Donte, not Lakeith Smith . . . . Lakeith was a 15-year-old child, scared to death. He did not participate in the act that caused the death of A'Donte. He never shot anybody." Paula Rogo, *Lakeith Smith Was Sentenced to 65 Years for a Murder He Did Not Commit*, ESSENCE (Apr. 9, 2018), https://www.essence.com/news/lakeith-smith-sentenced-65-years/ [https://perma.cc/3A7U-68E9].

6. Allen-Kyle, *supra* note 4.

7. Rogo, *supra* note 5.

8. Lussenhop, *supra* note 1.

9. Rogo, *supra* note 5 (second alteration in original).

10. *See* Lussenhop, *supra* note 1.

11. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 FUTURE CHILDREN 15, 21 (2008).

for felony murder.[12] In 1995, Curtis Brooks, a homeless teenager, agreed to help a new acquaintance steal a car.[13] Brooks was given a gun and his only role was to serve as a distraction by firing the gun into the air. Brooks's acquaintance unexpectedly shot the victim, and Brooks subsequently received an automatic life sentence for felony murder.[14]

Juveniles are frequently charged with felony murder, as their immaturity makes them prone to engaging in dangerous crimes, like robbery, that carry with them a risk of death.[15] The doctrine's purposes and rationales are fundamentally inconsistent with juveniles' capacity for reasoned decision-making, thus assigning juveniles an inappropriate level of culpability.[16]

This Note advocates for the exclusion of juveniles from the felony murder rule in light of the fundamental "differentness" between juveniles and adults. The Supreme Court has recognized this differentness by categorically excluding juveniles from certain severe types of punishments and sentences—just as the Court has exempted other categories of offenders from the death sentence, such as the mentally disabled.[17] In light of the developing understanding of juveniles' culpability and behavior, and the acceptance that certain classes of citizens should be excluded from capital punishment, states have created "categorical" exceptions for juveniles in order to prevent excessive punishment. "Romeo and Juliet" laws, for instance, protect juveniles under many statutory rape and anti-child pornography laws that would otherwise, if violated by an adult, impose severe sentences.[18] Those laws are in line with the national standard of excluding juveniles from the most severe sentences by accounting for an adolescent's impulsive behavior, their inability to evaluate consequences, and their susceptibility to peer pressure.[19] That standard is further illustrated by states' sentences that account for the offender's age when deciding what

12. *Id.*

13. Katie Rose Quandt, *A Killer Who Didn't Kill*, SLATE (Sept. 18, 2018, 10:00 AM), https://slate.com/news-and-politics/2018/09/felony-murder-rule-colorado-curtis-brooks.html [https://perma.cc/J2T2-K4LU].

14. *Id.*

15. *See* Scott & Steinberg, *supra* note 11, at 15, 21; Keller, *supra* note 4, at 315 (discussing, in the felony murder context, juveniles' immaturity and propensity for committing dangerous crimes).

16. *See* Keller, *supra* note 4, at 309 ("[T]he rationale underlying felony murder does not apply to juveniles and no penological goal justifies a life-without-parole sentence when applied to juveniles.").

17. *See infra* notes 185–208 and accompanying text.

18. *See infra* notes 209–238 and accompanying text.

19. *See infra* Part II.A.

punishment is appropriate.[20] The felony murder doctrine has been limited and reconsidered in many states, indicating a new willingness by courts and legislatures to re-evaluate the rule's reach. Despite these advances, the doctrine persists and, while it is potentially justified as applied to adults, it should not be applied to juveniles in the same way because it is fundamentally at odds with juveniles' culpability. Indeed, applying the doctrine to juveniles amounts to excessive, cruel, and unusual punishment.

Part I of this Note outlines the felony murder doctrine and its modern purposes and rationale. Part II explores juveniles' capacity for reasoned behavior in light of social science research and Supreme Court jurisprudence that recognize the fundamental differentness between adults and categorically less-culpable juveniles. Part III analyzes juvenile felony murder in both the cruel-and-unusual and excessive-or-disproportionate punishment contexts. It addresses the Supreme Court's willingness to categorically exclude the less culpable from certain sentences given states' reconsiderations of the felony murder doctrine and its application to juveniles. Part III also discusses state laws exempting juveniles from severe sentences imposed on adults for the same acts, as well as states' practices of limiting and reevaluating sentencing based on the perpetrator's age. Part IV discusses excluding juveniles from adult sentencing under the felony murder rule through a standard that uses life-expectancy predictions to limit the length of sentences courts may impose on juveniles.

I. FELONY MURDER DOCTRINE

The felony murder rule varies in its details under different statutory schemes, but in its broadest form it provides that *any* killing is murder when occurs during the perpetration or attempted perpetration of a felony.[21] The felony murder rule transfers the intent to commit the underlying felony to the intent to commit the homicide,[22] satisfying the

20. *See* Jana L. Kern, *Trends in Teen Sex Are Changing, but Are Minnesota's Romeo and Juliet Laws?*, 39 WM. MITCHELL L. REV. 1607, 1611–12 (2013) (discussing "age-gap provisions" that account for age and limit punishments accordingly).

21. CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 147, at 295 (15th ed. 1994), Westlaw (database updated Sept. 2019) ("At common law, the author of an unintended homicide is guilty of murder if the killing takes place in the perpetration of a felony."); *id.* § 147, at 301 ("Although a given felon is not the actual killer, he is nevertheless responsible for the homicide—and hence, murder—if his co-felon was the actual killer.").

22. *Id.* § 147, at 296–97 (stating that the requisite "malice is supplied by the 'law'" and further noting that "[t]he malice which plays a part in the commission of the felony is transferred by the law to the homicide"); *see also* Keller, *supra* note 4, at 305.

malice-aforethought requirement for murder. The intent to commit the underlying felony thus establishes an "implied malice"[23] and eliminates the prosecution's need to otherwise prove any intent to cause the resulting death, making it easier for the state to obtain convictions.[24] This transferred intent is the outlier compared to the other mental-state requirements for murder (including express intent to kill, intent to cause serious bodily harm, and extreme reckless murder) because it does not require any intent to cause a death.[25]

Proponents of the felony murder rule argue that it is justified because it deters potential offenders from committing dangerous felonies out of fear of the severe punishment that would result should someone die during that felony's commission.[26] Consequently, the deterrent effect forces offenders to perpetrate potentially violent crimes more carefully or prevents offenders from engaging in violent crimes altogether.[27] The second main justification for the felony murder rule is retribution. A person convicted of felony murder, whether they were an accomplice to the murder or the perpetrator of it, intended to commit the underlying felony, which had the possibility of resulting in a death.[28] A reasonable person perpetrating a dangerous felony would predict that it might result in death.[29] Therefore, all perpetrators of the underlying felony are morally blameworthy for any resulting death.[30]

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23. TORCIA, *supra* note 21, § 147, at 297 (explaining that "[a]s a result of the fictional transfer [of malice from the underlying felony to the homicide], the homicide is deemed committed with malice"); Keller, *supra* note 4, at 305 ("[T]he intent to commit the underlying felony constitutes 'implied malice.'").

24. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.06(B)(5), at 519 (3d ed. 2001).

25. *See* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 64 (2004); Keller, *supra* note 4, at 312.

26. *See* Alison Burton, Note, *A Commonsense Conclusion: Creating a Juvenile Carve Out of the Massachusetts Felony Murder Rule*, 52 HARV. C.R.–C.L. L. REV. 169, 172 (2017).

27. *See* HAVA DAYAN, FEMICIDE AND THE LAW 54–55 (2018) (countering the argument that the felony murder rule "reinforc[es] the notion of the sanctity of human life" by noting that the rule's ultimate deterrent effect is unclear); *see also* Roper v. Simmons, 543 U.S. 551, 571–73 (2005).

28. Keller, *supra* note 4, at 312 ("The intent to kill element of [felony murder] is inferred from an individual's intent to commit the underlying felony since a 'reasonable person' would know that death is a possible result of felonious activities.").

29. *Id.*

30. *See* 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?ref=topics [https://perma.cc/RY4G-8LMH] (noting that, in the opinion of both the Criminal Justice Legal Foundation's legal director and the local

These rationales presuppose that an offender has the capacity to foresee the potentially severe consequences of committing a felony, namely that someone may be killed in its commission.[31] Justice Breyer, recognizing that the rationale of the felony-murder doctrine is based on that assumption, stressed that "the ability to consider the full conseq–uences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively."[32] Another retributive rationale is that the rule brings justice to the victims' families and creates a mechanism by which those who knowingly engage in violent and dangerous felonies are punished accor–dingly.[33] These purposes cannot be served by a rule that assumes reasoned decision-making because juveniles are generally incapable of precisely that type of decision-making. And so, attaching blame to inherently less culpable juveniles frustrates the rule's retributive purpose.[34]

II. JUVENILES AS FUNDAMENTALLY DIFFERENT FROM ADULTS

The felony murder rule allows the intent to kill to be inferred from the intent to commit an underlying felony.[35] The rule presumes that the offender can foresee the consequences of perpetuating a felony, even if they did not actually foresee a death or intend to kill anyone.[36] This presumption is fundamentally inconsistent with juveniles' behavior and lack of capacity for such reasoned decision-making.[37] As the Supreme

prosecutor of a felony murder case, the rule "serves important inter–ests . . . because it holds all persons responsible for the actions of each other if they are all participating in the same crime"); *see also* David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 363 (1985) (asserting that "the felony murder doctrine reflects the conclusion that a robbery that causes death is more closely akin to murder than to robbery").

31. Keller, *supra* note 4, at 312.

32. Miller v. Alabama, 567 U.S. 460, 492 (2012) (Breyer, J., concurring).

33. *See* John Diaz, *Rewrite of Felony Murder Rule Exchanges One Injustice for Another*, S.F. CHRON. (Sept. 22, 2018, 2:18 PM), https://www.sfchronicle.com/opinion/diaz/article/Rewrite-of-felony-murder-rule-exchanges-one-13249023.php [https://perma.cc/2G39-KTUD] (discussing a victim's family's fear that eliminating the felony murder doctrine would prevent the offender from being adequately punished).

34. *See* Keller, *supra* note 4, at 305–06.

35. *See supra* notes 22–23, 28–29 and accompanying text.

36. *See supra* notes 31–32 and accompanying text.

37. *See* Keller, *supra* note 4, at 312 (noting that it is illogical to presume a juvenile is capable of understanding that death may be a consequence of a felony).

Court has repeatedly observed, "juveniles cannot with reliability be classified among the worst offenders";[38] they are less culpable than adults due to "[a] lack of maturity and an underdeveloped sense of responsibility . . . often result[ing] in impetuous and ill-considered actions and decisions."[39] Additionally, "juveniles are more vulnerable or susceptible to negative influences . . . including peer pressure . . . [and] the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[40] Social and behavioral science research shows that juveniles are not completely developed, rendering them less capable than adults of either effectively evaluating their actions' consequences or allowing those evaluations to curb their impulsive tendencies.[41] The felony murder rule's penological purposes are not achieved through its imposition on juveniles because juveniles are continually developing, a reality evident in the Supreme Court's decisions recognizing that juveniles have lessened culpability as compared to adults.[42] Consequently, applying the felony murder rule to juveniles is fundamentally at odds with Supreme Court precedent, as well as various punishment theories, and the doctrine's overall purpose.

A. Social Sciences' Recognition of Juveniles' Immaturity and Limited Capacity for Reasoned Decision-Making

Adolescents undergo a period of transitional and formative development as they move from childhood into young adulthood.[43] This period includes biological, cognitive, and psychosocial growth, in addition to shifting social relationships in school, among peers, and with family members.[44] This developmental period has major implications for the

38. Roper v. Simmons, 543 U.S. 551, 569 (2005).

39. *Id.* (first alteration in original) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

40. *Id.* at 569–70 (citations omitted); *see also* Graham v. Florida, 560 U.S. 48, 72 (2010) (noting that "the same characteristics that render juveniles less culpable than adults suggest . . that juveniles will be less susceptible to deterrence. Because juveniles' 'lack of maturity and an underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions'") (alterations in original) (quoting *Roper*, 543 U.S. at 571; *Johnson*, 509 U.S. at 367); Miller v. Alabama, 567 U.S. 460, 471 (2012); Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016) (identifying the differences that result from children's "diminished culpability and greater prospects for reform") (quoting *Miller*, 567 U.S. at 471).

41. *See infra* Part II.A.

42. *See Roper*, 543 U.S. at 569–71; *see also Graham*, 560 U.S. at 68–69.

43. ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 32 (2008).

44. *Id.*

adolescent's future and success as an adult as it forms an adolescent's perception of society and shapes their identity.[45] Society and the law recognize that juveniles are both less mature and less responsible than adults, "often lack[ing] the experience, perspective, and judgment exp–ected of adults."[46] Cognitive development involves the ability to understand information, engage in analysis, and reason one's way to an informed decision.[47] Psychosocial growth extends beyond cognitive development, encompassing an adolescent's decision-making process in light of social and emotional determinants.[48]

Anatomically, the prefrontal cortex, which is associated with rational decision-making and behavior regulation, is immature and underdeveloped in juveniles' brains.[49] The prefrontal cortex is not fully formed until one's mid-twenties.[50] This part of the brain affects a person's ability to control their behavior, including their impulsivity and consequence assessment.[51] Therefore, the underdevelopment and immaturity of the prefrontal cortex, consistent in all adolescents, limits their "ability to judge and evaluate future consequences" and strongly

45. *Id.*; *see also* Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 741–42 (2000) (noting that the juvenile criminal justice system is separate from the adult system due to beliefs that adolescents are "less capable of mature judgment than adults and are therefore less culpable for any offenses that they commit; and . . . that they are more amenable to treatment than adults, and therefore are more likely to profit from rehabilitation").

46. Thompson v. Oklahoma, 487 U.S. 815, 834 (1988) (plurality opinion) (quoting Eddings v. Oklahoma, 455 U.S. 104, 116 (1982)).

47. Michael Barbee, Comment, *Juveniles Are Different: Juvenile Life Without Parole after* Graham v. Florida, 81 MISS. L.J. 299, 314 (2011).

48. *Id.*; Cauffman & Steinberg, *supra* note 45 at 742–43 (addressing juveniles' cognitive and psychosocial development and describing psychosocial immaturity in juveniles as "deficiencies in adolescents' social and emotional capability").

49. Barbee, *supra* note 47, at 317–18; B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 245 (2000) (discussing the prefrontal cortex and stating that "behavioral regulation [is] used to describe inhibitory processes in cognitive and social development"); Julie Vidal et al., *Response Inhibition in Adults and Teenagers: Spatiotemporal Differences in the Prefrontal Cortex*, 79 BRAIN & COGNITION 49, 49–50 (2012).

50. Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 152 & n.252 (listing several social science sources that address prefrontal cortex development).

51. *See* Cheryl B. Preston & Brandon T. Crowther, *Legal Osmosis: The Role of Brain Science in Protecting Adolescents*, 43 HOFSTRA L. REV. 447, 458–59 (2014).

correlates with their exhibited behaviors.[52] Even when juveniles exhibit the same cognitive ability as adults to understand information relevant to making a decision, and if they are able to identify the associated risks and rewards, juveniles' judgment is still limited by their incomplete psychosocial development.[53] Although cognitively able to understand information and reason, juveniles lack the same capacity as adults to thoughtfully evaluate risks and foreseeable consequences when trying to make an informed decision.[54] This diminished decision-making capacity is marked by juveniles' immaturity in complex processes such as susceptibility to influence, underdeveloped risk-assessment skills and perspective, and lack of restraint and impulse control.[55]

As juveniles undergo psychosocial maturation and formative development, they are easily influenced by their social environments and their fellow adolescents, leading them to engage in risky behavior.[56] In assessing the constitutionality of imposing the death penalty on juveniles under the age of sixteen, the Supreme Court reasoned that "[i]nexperience, less education, and less intelligence make [a] teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion

52. *Id.* at 459–60 (quoting Brief for the Am. Med. Ass'n & the Am. Acad. of Child & Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 17, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621)).

53. SCOTT & STEINBERG, *supra* note 43, at 36–37; Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003).

54. Steinberg & Scott, *supra* note 53.

55. *Id.* (identifying the processes "most relevant to understanding differences in judgment and decision making"); Barbee, *supra* note 47, at 314 (noting the psychosocial factors that influence decision-making and judgment include peer influence, risk assessment, future orientation, and impulse control). Elizabeth Cauffman and her colleagues reasoned that the processes that constitute psychosocial maturity and influence adolescents' decision-making include responsibility, which involves susceptibility to peer pressure; perspective, which involves considering individual actions within a broader context; and temperance, which involves suppressing impulsive behavior. Elizabeth Cauffman et al., *How Developmental Science Influences Juvenile Justice Reform*, 8 U.C. IRVINE L. REV. 21, 23 (2018). Cauffman identifies a psychosocial immaturity gap between juveniles and adults resulting from developmental differences in "how much [juveniles] consider the consequences of their actions, how sensitive they are to rewards, how susceptible they are to peer influence, and how much they are able to regulate impulsive behavior." *Id.*

56. *See* Cauffman et al., *supra* note 55, at 24; *see also* Keller, *supra* note 4, at 313–14.

or peer pressure than is an adult."[57] Before maturing and developing an independent sense of self, juveniles seek peer approval and are less capable of resisting peer influence, often for fear of social rejection or in the pursuit of heightened social status.[58] Juveniles do not have a fully formed character, instead possessing "transitory" personality traits[59] that render them susceptible to immature and irresponsible behavior as a result of their "vulnerability" to negative outside influences.[60] Eng–aging in criminal or otherwise risky activities may earn juveniles the immediate rewards of an elevated social standing and approval among friends.[61] Accordingly, juveniles' susceptibility to peer influence greatly enhances the likelihood that they will partake in dangerous felonies that are potentially subject to the felony murder rule.[62]

Juveniles are not likely to resist the pressure to engage in a crime with a group because they are easily influenced by groups and they do not want to be rejected as the odd one out.[63] Timothy Kane, for example, was fourteen years old when he accompanied his friends to rob a neighbor's home and two of his accomplices killed the home's residents.[64] Kane sought his peers' approval when he participated in the felony, stating that he did not want to remain behind and be deemed a "fraidy-cat."[65]

Juveniles are also subject to pressures and negative influences from parental and authority figures.[66] Sixteen-year-old Kevin Buford attem–

57. Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion).

58. Keller, *supra* note 4, at 314; *see also* Scott & Steinberg, *supra* note 11, at 20.

59. Scott & Steinberg, *supra* note 11, at 19, 24.

60. Roper v. Simmons, 543 U.S. 551, 570 (2005).

61. Keller, *supra* note 4, at 314; *see also Roper*, 543 U.S. at 570 (quoting Steinberg & Scott, *supra* note 53, at 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled.")).

62. Scott & Steinberg, *supra* note 11, at 20–21 ("[A]dolescents might make choices in response to direct peer pressure, as when they are coerced to take risks that they might otherwise avoid. . . . Teens appear to seek peer approval especially in group situations. Thus, perhaps it is not surprising that young offenders are far more likely than adults to commit crimes in groups.").

63. *Id.* at 21.

64. *Id.*

65. *Id.*

66. *See* Miller v. Alabama, 567 U.S. 460, 471 (2012) (noting that juveniles "'are more vulnerable to negative influences and outside pressures,' including from their family") (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

pted to reconnect with his estranged criminal father when, at his father's encouragement, he drank alcohol and smoked marijuana for the first time.[67] Kevin's father and his uncle gave Kevin a gun, told him to rob a man walking by, and directed him to shoot the man when the man fought back.[68] Kevin was convicted of felony murder and received a life sentence; his uncle and father each received only twenty years.[69] Juveniles' vulnerability, according to the Supreme Court, "mean[s] juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[70]

Compared to adults, juveniles are less inclined to consider the long-term consequences of their actions when deciding whether to engage in risky and antisocial behavior.[71] Juveniles exhibit a "propensity towards immediate rewards" that leaves them less able to consider either their actions and the implications of those actions within a broader, future-oriented scheme.[72] Juveniles' failures to assess future risks often leads them to focus on immediate rewards rather than engaging in adequate planning.[73] In addition, juveniles lack the experience and accompanying knowledge that adults have gained over time.[74] They often fail to foresee a reasonable outcome and instead view the consequences of a predictable outcome as surprising or "accidental."[75] Juveniles may also

67. Anita Wadhwani & Adam Tamburin, *Special Report: In Tennessee, 185 People are Serving Life for Crimes Committed as Teens*, TENNESSEAN (Mar. 6, 2019, 6:00 PM), https://www.tennessean.com/story/news/2019/03/07/juvenile-sentencing-tennessee-cyntoia-brown-clemency-life/2848278002/?utm_source=oembed&utm_medium=news&utm_campaign=storylines [https://perma.cc/GD2F-HLPL].

68. *Id.*

69. *Id.*

70. *Roper*, 543 U.S. at 570.

71. Scott & Steinberg, *supra* note 11, at 20; Keller, *supra* note 4, at 313.

72. *See* Burton, *supra* note 26, at 185 (noting that adolescents' "lack of future orientation dovetails with the high rate of reward bias in adolescents to create the perfect storm for accidental crimes like felony murder").

73. *Id.* at 184; Keller, *supra* note 4, at 313.

74. *See* Charles Garabedian, *Juvenile Empiricism: Approaches to Juvenile Sentencing in Light of* Graham *and* Miller, 21 U.C. DAVIS J. JUV. L. & POL'Y 195, 204 (2017) (noting the differences in life experiences between juveniles and adults and juveniles' failure to appreciate consequences in the future due to their lack of worldliness).

75. Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26, 28 (2000); *see also* Erin H. Flynn, Comment, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post-*Roper v. Simmons, 156 U. PA. L. REV. 1049, 1055 (2008) (observing that juveniles' immaturity leads them to fail to foresee

overvalue an action's potential reward because they are unable to fully appreciate that action's identifiable risks.[76] Their limited ability to assess their actions' consequences and risks makes juveniles prone to acting impulsively, compounding their already limited capacity for self-regulation.[77] Their failure to adequately assess consequences makes juveniles likely to engage in dangerous felonies when the expected benefits—gaining status,[78] stealing money or goods, or simply feeling a thrill—outweigh a seemingly unlikely or unconsidered death.[79] Consequently, juveniles are not the reasonable persons that the felony murder rule assumes can competently foresee death as a result of their dangerous actions.

Neither the felony murder rule itself nor its rationales account for juveniles' lack of capacity for reasoned decision-making; they do not account for the fact that juveniles are in a state of cognitive and psychosocial development during which their maturity and ability to evaluate risks and make rational, reasoned decisions is limited.[80]

B. Juveniles and the Penological Purposes of the Felony Murder Rule

In the criminal justice system, punishment serves four purposes: retribution, deterrence, incapacitation, and rehabilitation.[81] The system's goal is that an offender's sentence is proportional to the offense they committed; that punishment "be directly related to the personal culpability of the criminal defendant."[82] The felony murder doctrine seeks to punish offenders according to their level of blameworthiness for the underlying felony that led to the murder.[83] In *Graham v. Florida*,

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the consequences of their actions and thus less likely to be deterred by punishment).

76. *See* Scott & Steinberg, *supra* note 11, at 22.

77. *Id.*

78. Keller, *supra* note 4, at 314.

79. *See* Scott & Steinberg, *supra* note 11, at 22 (stating that a juvenile might not decline to participate in a robbery because "the 'adventure' of the holdup and the possibility of getting some money are exciting").

80. Barbee, *supra* note 47, at 314; Beyer, *supra* note 75, at 27 ("[S]cientific evidence now supports the contention that the juvenile brain is often incapable of adult reasoning because of its long maturation process.").

81. Graham v. Florida, 560 U.S. 48, 71 (2010); 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 1, at 2 (15th ed. 1993), Westlaw (database updated Sept. 2019).

82. California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

83. *See* Martin Gardner, *Youthful Offenders and the Eighth Amendment Right to Rehabilitation: Limitations on the Punishment of Juveniles*, 83 TENN. L. REV. 455, 464 (2016); *see also* Richard Wasserstrom, *Some Problems*

the Supreme Court noted that courts may impose severe punishments on juvenile non-homicide offenders in order to condemn the crime and serve justice, but "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[84] That retributive purpose is not served by applying the felony murder rule to juveniles because juvenile non-homicide offenders do not have a culpable mental state regarding any death that results from their felonies.[85] Juveniles only have a culpable mental state regarding the underlying felony because they only have the capacity to evaluate the crime at hand and its immediate rewards, not the violent consequences that may be foreseeable to an adult perpetrating the same crime.

Deterrence seeks to prevent crime by steering the general population away from crime and by specifically dissuading prior criminals from reoffending.[86] The Supreme Court, social scientists, and others have argued that deterrence has less of an effect on juveniles than it does on adults.[87] Recently, scholars have argued that the Supreme Court's reliance on juveniles' immaturity and the Court's "recognition of youth's susceptibility to peer pressure and lack of impulse control, raise[s] serious questions regarding the justification of the use of the felony murder rule as a deterrence mechanism for young people."[88] That is, the possible imposition of the felony murder rule does not effectively deter juveniles from engaging in either dangerous felonies or other activities that create the risk of violence and death.[89] Whether

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with Theories of Punishment, *in* JUSTICE AND PUNISHMENT 173, 179 (J.B. Cederblom & William L. Blizek eds., 1977).

84. *Graham*, 560 U.S. at 71 (alteration in original) (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)).

85. *See R. v. Martineau*, [1990] 2 S.C.R. 633, 645–47 (Can.); *see also* Liptak, *supra* note 30 (stating that the Canadian Supreme Court eliminated accessorial felony murder liability because such punishment counters "the principle that punishment must be proportionate to the moral blameworthiness of the offender").

86. TORCIA, *supra* note 81, § 3, at 16.

87. Shobha L. Mahadev, *Youth Matters:* Roper, Graham, J.D.B., Miller*, and the New Juvenile Jurisprudence,* CHAMPION, Mar. 2014, at 14, 16.

88. *Id.*

89. The Supreme Court stated that the characteristics that make juveniles less culpable than adults prove that deterrence will not work on juveniles. Juveniles' immaturity and irresponsibility leads to impulsive actions, so juveniles are not likely to "take a possible punishment into consideration when making decisions." *Graham*, 560 U.S. at 72. "[I]n light of juvenile nonhomicide offenders' diminished moral responsibility, any limited deterrent effect provided by life without parole is not enough to justify the sentence." *Id.*

they are the principal actors or mere accomplices,[90] juveniles are less likely than adults to engage in a reasoned analysis before committing a felony.[91] In *Thompson v. Oklahoma*,[92] the Court reasoned that juveniles do not engage in an effective cost-benefit analysis through which they might recognize the potential severity of consequences for their actions; without such an analysis, there is no deterrence.[93] Juveniles give little weight to the fact that others their age have been severely punished for the same or similar actions.[94] Instead, juveniles often engage in "thrill-seek[ing]" behavior, viewing themselves as immune from the conseq–uences suffered by others for the same behavior.[95]

Rehabilitation involves reshaping an offender's character and actions so that they are no longer disposed to crime.[96] Juveniles are likely to respond positively to rehabilitation because their characters are in a developmental state and they are susceptible to influence, which creates the capacity for growth and change.[97] When juveniles convicted of felony murder are questioned about their decision to engage in a dangerous felony, they often state that they did not know what they were thinking or that they were completely different people when they committed the crime than they are now.[98] Although juveniles are generally amenable to rehabilitation,[99] conviction under the felony

90. *Id.*

91. Flynn, *supra* note 75, at 1062, 1070.

92. 487 U.S. 815 (1988).

93. *Id.* at 836–38 ("The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.").

94. *See id.* at 838; *see also* CONSTITUTION PROJECT, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY 14 (2001) ("A child or adolescent generally does not possess the level of moral responsibility and culpability that society expects of an adult. Juveniles are particularly unlikely to be deterred by the specter of punishment.").

95. Beyer, *supra* note 75, at 27.

96. TORCIA, *supra* note 81, § 4, at 18.

97. *See* Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (recognizing that juveniles are susceptible to influence and that their character traits are transitory); *see also* Brief of the Constitution Projects as Amicus Curiae in Support of Respondent at 4, *Roper*, 543 U.S. 551 (2005) (No. 03-633) (noting that teenagers' immaturity is balanced by their ability to grow, and that "[t]o the relief of all, most eventually emerge from the trying years of adolescence with the ability to function in society as responsible adults"); Flynn, *supra* note 75, at 1055 ("The implication of . . . the transitory nature of juvenile character traits, is that children and adolescents have a greater propensity for rehabilitation than adults.").

98. *See* Scott & Steinberg, *supra* note 11, at 19–23.

99. *See* Cauffman & Steinberg, *supra* note 45, at 742.

murder rule does not afford them the opportunity to rehabilitate in an appropriate setting, and therefore the rule does not serve this penological goal.[100]

Incapacitation as a penological goal seeks to render a person incapable of reoffending or committing a crime.[101] The most common form of incapacitation is incarceration.[102] Incarceration limits the value a juvenile's life may have to society by isolating the adolescent and inhibiting their growth, thus it does not serve a utilitarian purpose.[103] Proponents of incapacitation suggest that a juvenile offender still has the opportunity to develop and rehabilitate while they are incarcerated or otherwise incapacitated.[104] Given their malleability and receptiveness to influence (positive or negative), juveniles are best reformed in a rehabilitative and educational-treatment setting rather than prison's restrictive environment as juveniles in prison may be exposed to severe violence, sexual assault, and other negative influences.[105]

C. Supreme Court Precedent Recognizing the Fundamental Differentness of Juveniles and Restricting Severe Juvenile Sentencing

The Supreme Court recognizes that juveniles are fundamentally different from adults and understands that neither the felony murder rule's penological purposes nor its rationales are served through its application to juveniles. In *Roper v. Simmons*, the Court recognized that juveniles are fundamentally different from adults—and generally less culpable—leading it to hold that juveniles convicted of capital offenses cannot be sentenced to death.[106] Prior to this decision, the Supreme Court had upheld the capital punishment of sixteen- and seventeen-year olds.[107] But shifts in societal attitudes and advances in the understanding of juveniles' behavior and development led the Court

100. *See* Keller, *supra* note 4, at 316.

101. Alana Barton, *Incapacitation Theory*, *in* ENCYCLOPEDIA OF PRISONS & CORRECTIONAL FACILITIES 463 (Mary Bosworth ed., 2005).

102. *Id.*

103. TORCIA, *supra* note 81, § 4, at 20 ("If the climate in prison is hostile, inordinately repressive, and primarily punishment-oriented, reformative efforts will probably not succeed.").

104. *Id.*

105. *See* Cynthia L. Schirmer, *Punishing Children as Adults: On Meeting International Standards and U.S. Ratification of the U.N Convention on the Rights of the Child*, 16 MICH. ST. J. INT'L L. 715, 737–39 (2008) (discussing the harms caused by housing juveniles in the same prisons as adults, including increased anger and rates of recidivism, sexual assault, and a lack of positive influence).

106. Roper v. Simmons, 543 U.S. 551, 568–69.

107. Stanford v. Kentucky, 492 U.S. 361 (1989).

to reject its previous decision.[108] In *Roper*, the defendant, Simmons, was seventeen years old when he and his friends planned to "find someone to burglarize, tie the victim up and ultimately push the victim off a bridge."[109] Simmons and two others broke into the home of their victim, Shirley Crook, whom Simmons recognized.[110] Because he recognized Crook, Simmons led his friends in tying her up, putting her in the back of her car, and driving her to a railroad trestle.[111] After finding that Crook had escaped some of her restraints, Simmons used a towel, a purse strap, and an electrical wire to hog-tie Crook, and then threw her, while she was conscious, off the trestle into a river.[112] Simmons later bragged about the murder, and confessed to it after two hours of questioning.[113] Simmons not only planned to kill his victim, but handled her with cruelty, and subjected her to a tortuous death, and later displayed extreme callousness concerning his actions and Crook's death.[114]

Despite the shocking nature of Simmons's behavior, the Supreme Court held that the Eighth Amendment prohibits the imposition of the death penalty on juveniles,[115] explaining that the "death penalty is reserved for a narrow category of crimes and offenders"[116] and that Simmons did not fall within that narrow category. The Court recognized that juveniles are not those "most deserving of execution"[117] because they lack maturity and responsibility (resulting in impulsive behavior), they are vulnerable to influence, and they have a transient, undeveloped character.[118] These traits render capital murderers who are juveniles: (1) less blameworthy than adults convicted of the same crime, (2) less likely than adults to be deterred by the threat of a death sentence, and (3) unlikely to be deemed "irretrievably depraved," even

108. *See Roper*, 543 U.S. at 574.

109. State v. Simmons, 944 S.W.2d 165, 169 (Mo. 1997).

110. *Id.* at 170.

111. *Id.*

112. *Id.* at 169–70.

113. *Id.* at 170.

114. Roper v. Simmons, 543 U.S. 551, 556–57.

115. *Id.* at 568.

116. *Id.* at 568–69.

117. *Id.* at 568 (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

118. *Id.* at 569–70; *see also id.* at 598 (O'Connor, J., dissenting) (pointing to the Court's recognition that juveniles "lack maturity and responsibility and are more reckless than adults[,] . . . are more vulnerable to outside influences because they have less control over their surroundings[,] . . . and . . . [their] character is not as fully formed as that of an adult").

after committing "the most heinous of crimes."[119] The Court cited previous decisions in which it considered whether the Eighth Amendment mandated that certain offenders should be categorically exempted from the death penalty.[120] The Court then examined thirty states' bans on death-penalty sentences for juveniles and noted that even those states that did not ban such sentences imposed them infrequently.[121] The Supreme Court cited these as "objective indicia"[122] that the nation generally found juveniles undeserving of the death penalty.[123]

The Supreme Court's recognition in *Roper* of juveniles' insufficient culpability and the marked, well-understood differences between juveniles and adults supports the notion that applying the felony murder rule to juveniles does not serve the rule's intended purpose.

In 2010, the Supreme Court in *Graham v. Florida*[124] again limited the imposition of severe sentences on juveniles. Terrence Graham came from a difficult home and engaged in crime at an early age.[125] At sixteen years old, Graham and two friends broke into a home and robbed the inhabitants at gunpoint.[126] Graham had been arrested before, and so, in light of his failure to refrain from committing another crime, he was sentenced to life imprisonment with no possibility of parole for the armed robbery, and another fifteen-year sentence for an additional attempted armed robbery.[127]

The Court held that the Eighth Amendment prohibits life-without-parole sentences for juveniles convicted of non-homicide offenses. *Graham* emphasized the fundamental differentness of juveniles and reflected the Court's willingness to afford juveniles a categorical exclusion from harsh adult sentences like those imposed by the felony murder rule.[128] The Court reasoned that defendants who do not intend

119. *Id.* at 598–99 (O'Connor, J., dissenting); *see also id.* at 573 (majority opinion) (noting the difficulty in distinguishing a juvenile acting in a state of "transient immaturity" from the rare, "irreparabl[y]" corrupt juvenile offender).

120. *See id.* at 561–63 (majority opinion) (citing Thompson v. Oklahoma, 487 U.S. 815, 838 (1988); Stanford v. Kentucky, 492 U.S. 361, 380 (1989); Penry v. Lynaugh, 492 U.S. 302, 340 (1989); *Atkins*, 536 U.S. at 321).

121. *Roper*, 542 U.S. at 552.

122. *Id.* at 564 (considering objective evidence of societal standards in addition to the Court's own understanding of the evolving standards of decency).

123. *Id.*; *see also* Burton, *supra* note 26, at 178.

124. 560 U.S. 48 (2010).

125. *Id.* at 53.

126. *Id.* at 54.

127. *Id.* at 56–57.

128. *See* Keller, *supra* note 4, at 308 ("*Graham* recognized that, in the Eighth Amendment context, while 'death is different,' 'kids are different,' too,

to kill "or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers."[129] The Court noted first that it was rare for states to impose life-without-parole-sentences for non-homicide juvenile offenses. And second that it was not dispositive that many states did not actively prohibit such sentences because those states also did not expressly conclude that those sentences would be appropriate.[130] The Court discussed accessorial felony murder, noting that:

> Although an offense like robbery or rape is "a serious crime deserving serious punishment," those crimes differ from homicide crimes in a moral sense. It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.[131]

In 2012, the Supreme Court once more reinforced its views that juveniles are fundamentally different from adults, categorically less culpable than adults, and deserving of special treatment in sentencing. In *Miller v. Alabama*,[132] the Supreme Court held that the Eighth Amendment prohibits mandatory life-without-parole sentences for juvenile homicide offenders.[133] *Miller* involved two consolidated cases in which fourteen-year-old boys were convicted of murder.[134] In the first case, Kuntrell Jackson was sentenced to life in prison for felony murder when he and his friends robbed a video store and one of his accomplices killed the store clerk.[135] Evan Miller received life in prison when he

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and they are entitled to a separate categorical analysis when severe adult sentences are applied to them.") (quoting *Graham*, 560 U.S. at 103 (Thomas, J., dissenting)).

129. *Graham*, 560 U.S. at 69.

130. *Id.* at 64–66.

131. *Id.* at 69 (citation omitted) (quoting Enmund v. Florida, 458 U.S. 781, 797 (1982)).

132. 567 U.S. 460 (2012).

133. *Id.* at 470. In *Miller*, the Supreme Court considered two lines of cases regarding disproportionate sentencing: one that "adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty"; the other that led the Court to prohibit the "mandatory imposition of capital punishment" and to require that sentencing authorities consider the offender's unique characteristics. *Id.* In combination, these two lines of cases led the *Miller* Court to hold that the Eighth Amendment prohibits mandatory juvenile life-without-parole sentences in part because juveniles are categorically less culpable than adult offenders. *Id.* at 471.

134. *Id.* at 465.

135. *Id.* at 465–66.

caused his neighbor's death by drunkenly beating the man with a baseball bat and subsequently setting the man's trailer on fire.[136] The Court reasoned that *Roper* and *Graham* led to the conclusion that mandatory life-without-parole sentences for juveniles violates the Eighth Amendment.[137] Again, the Court asserted that one's youth diminishes their culpability and must be considered in sentencing.[138]

III. THE APPLICATION OF THE FELONY MURDER RULE TO JUVENILES AND THE EIGHTH AMENDMENT'S PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENTS

The Eighth Amendment, applicable to the states through the Fourteenth Amendment, asserts that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punish–ments inflicted."[139] The Supreme Court has examined many lengthy and severe sentences for whether they violate the Eighth Amendment's prohibition of cruel and unusual punishments.

In *Roper*, the Supreme Court held that the Eighth Amendment forbids courts from sentencing juveniles to death.[140] The Court utilized a proportionality framework to determine whether a punishment is so disproportionate or excessive that it is cruel and unusual.[141] This framework does not necessitate a "static" interpretation of what constitutes cruel and unusual punishment under the Eighth Amend–ment,[142] rather it requires that courts assess the "evolving standards of decency that mark the progress of a maturing society."[143] The Supreme Court recognized that "a principle, to be vital, must be capable of wider

136. *Id.* at 467–69.

137. *Id.* at 470.

138. *Id.* at 471. In 2016, the Supreme Court again examined juvenile sentencing and held that *Miller* created a substantive constitutional rule that applies retroactively in state collateral review. Montgomery v. Louisiana, 136 S. Ct. 718 (2016). In *Montgomery*, the Court held that "[a]llowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." *Id.* at 736.

139. U.S. CONST. amend. XIII.

140. Roper v. Simmons, 543 U.S. 551, 568 (2005).

141. *Id.* at 560; *see also id.* at 587 (O'Connor, J., dissenting); Atkins v. Virginia, 536 U.S. 304, 311 (2002) (discussing the Court's continued use of a "proportionality" precept in determining whether the punishment for a crime is properly tailored to the offense).

142. Gregg v. Georgia, 428 U.S. 153, 172–73 (1976) ("It is clear . . . that the Eighth Amendment has not been regarded as a static concept.").

143. *Roper*, 543 U.S. at 561 (quoting Trop v. Dulles, 356 U.S. 100, 101 (1958)).

application than the mischief which gave it birth".[144] Consequently, the Eighth Amendment's prohibition of cruel and unusual punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[145] The applicable standards of decency are those that "currently prevail," not the standards that were in place at the time a statute or rule was created or, in the Eighth Amendment's case, at the adoption of the Bill of Rights.[146] Determining what the currently prevailing standards are involves assessing objective indicia that reflect national norms, including the states' legislative judgments and sentencing juries' behaviors.[147]

The Court's analysis also evaluates whether a particular punishment contributes to legitimate penological goals.[148] In doing so, the Supreme Court considers whether the punishment is subjectively excessive.[149] In *Gregg v. Georgia*, the Court sustained the imposition of the death sentence for armed robbery and murder.[150] But, it affirmed that the "Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed."[151] The Court described a two-part analysis for determining whether a punishment is excessive. First, "a punishment is 'excessive' and unconstitutional if it . . . makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering."[152] Second, a punishment is excessive if it is "grossly out of proportion to the severity of the crime."[153] The Court highlighted that a small number of sentences

144. *Gregg*, 428 U.S. at 171 (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).

145. *Weems*, 217 U.S. at 378.

146. *Atkins*, 536 U.S. at 311.

147. *See* Coker v. Georgia, 433 U.S. 584, 596 (1977) (plurality opinion); *Gregg*, 428 U.S. at 181.

148. *See* Enmund v. Florida, 458 U.S. 782 (1982) (applying this Eighth Amendment–proportionality analysis to invalidate the death penalty for persons who commit felony murder without actually killing or having intent to kill).

149. *Atkins*, 536 U.S. at 311.

150. 428 U.S. at 186, 206–07.

151. *Coker*, 433 U.S. at 592 (summarizing *Gregg*'s holding).

152. *Id.*

153. *Id.* In *Gregg*, under this prong of the analysis, the Supreme Court specifically considered the death penalty and compared it "to other sentences imposed for similar crimes." 428 U.S. at 203. The Court also noted that the lower court in Georgia considered both the type of crime and the defendant's particular circumstances in analyzing the imposition of the death sentence. *Id.* at 204.

imposing less-severe-than-normal punishments does not necessarily prove that the standard punishment is arbitrary or disproportionate.[154] The requirements that a punishment be not excessive and in proportion to the crime's severity requires that only culpable offenders are punished.[155]

A. Objective Evidence that Evolving Standards of Decency Are Moving Courts Away from Applying the Felony Murder Rule to Juveniles

Current legislation provides objective evidence of contemporary national values.[156] So states' collective legislative action is a clear indicator of an evolving national standard of decency.[157] To date, no state has categorically excluded juveniles from convictions under the felony murder rule.[158] Nevertheless, states have consistently exhibited a trend toward treating juveniles as less developed, less responsible, and less mature than adults, indicating a recognition of juveniles' reduced culpability. As the Supreme Court put it in *Thompson v. Oklahoma*,[159] "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult."[160] Age limitations on voting, marriage, smoking, military service, buying tickets to R-rated movies, acquiring birth control, drinking, driving, gambling, acquiring piercings and tattoos, purchasing firearms, finding employment, and renting a car all demonstrate a general societal

154. The *Gregg* Court noted that a single incident of a jury deciding against the death penalty did "not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." 428 U.S. at 203.

155. Guyora Binder et al., *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141, 1152–56 (2017).

156. Graham v. Florida, 560 U.S. 48, 62 (2010).

157. Penry v. Lynaugh, 492 U.S. 302, 331 (1989).

158. *See* State v. Harrison, 914 N.W.2d 178, 197 (Iowa 2018). There, the court noted that "there is not a national consensus against sentencing juvenile offenders convicted of felony murder as the principal or accomplice to life imprisonment with immediate parole eligibility." *Id.* Additionally, no state "has categorically held that life with the possibility of parole should be categorically prohibited for juveniles convicted of felony murder." *Id.* And recognizing that although there might be a specific situation in which the application of the felony murder rule to a certain juvenile offender would be unconstitutional, the *Harrison* court declined to hold that "the felony-murder rule is fundamentally unfair or that it violates due process under the Iowa or United States Constitutions when applied to juvenile offenders pursuant to a theory of aiding and abetting." *Id.* at 196.

159. 487 U.S. 815 (1988) (plurality opinion).

160. *Id.* at 835.

recognition of juveniles' limited maturity and lack of capacity for certain rational choices.[161]

There has been a national shift towards limiting the severity of the felony murder rule. Hawaii, Kentucky, Michigan, Massachusetts, and Ohio are among the states that have eliminated the felony murder rule entirely.[162] Although other states have not banned the felony murder rule's application to juveniles,[163] some have begun limiting its appli–cation to them.[164] The Colorado General Assembly implemented a resentencing scheme for juveniles who were unconstitutionally senten–ced prior to *Miller*, including a limit on the sentence those convicted of felony murder could receive.[165] In 2014, Florida passed legislation

161. *See* Preston & Crowther, *supra* note 51, at 451–52 (detailing protection for minors through age-based restrictions); *see also* Roper v. Simmons, 543 U.S. 551, 558 (2005) (noting that the defense counsel reminded the jury that "juveniles of Simmons' [sic] age cannot drink, serve on juries, or even see certain movies, because 'the legislatures have wisely decided that individuals of a certain age aren't responsible enough'"); Nick Straley, Miller*'s Promise: Re-Evaluating Extreme Criminal Sentences for Children*, 89 WASH. L. REV. 963, 989 (2014) (recognizing societal limitations on juvenile activities including smoking, drinking, voting, and increased charges for car renters under twenty-five years old).

162. *See* Jason Tashea, *California Considering End to Felony Murder Rule*, ABA JOURNAL (July 5, 2018, 11:27 AM), http://www.abajournal.com/news/article/california_considering_end_to_felony_murder_rule [https://perma.cc/3VU7-ZWFX].

163. *See Harrison*, 914 N.W.2d at 197–99, 202.

164. *But see* People v. Richardson, No. A134783, 2013 WL 2432510, at *6 (Cal. Ct. App. June 4, 2013). The California court considered excluding juvenile offenders from the felony murder rule on constitutional grounds. *Id.* at *6–8. Richardson participated in an armed robbery when he was sixteen years old during which the robbery victim was killed. *Id.* at *1. He was convicted of felony murder, and sentenced to thirty-five years in prison. *Id.* In his 2012 appeal, the court reasoned that Richardson's sentence was not cruel and unusual because he was not sentenced to the state's most severe penalty of life without parole or its functional equivalent. *Id.* at *6–7. The felony-murder doctrine is set by statute, and many state statutes do not allow for discretionary sentencing but instead require a minimum mandatory sentence based on strict liability. *Id.* at *4. Sentencing under the felony-murder rule, however, is necessarily severe for juveniles. This sentence is particularly extreme in light of the offender's culpability in the death because juvenile offenders cannot adequately appreciate the risk of a death in committing a felony, as adults committing the same crime would be.

165. COLO. REV. STAT. §§ 19-2-906–907 (2017); *see also* Beth McCann, *Resentencing Juveniles Put Behind Bars for Life with Care and Discretion,* DENVER POST (Sept. 20, 2018, 7:41 AM), https://www.denverpost.com/2018/09/20/resentencing-juveniles-put-behind-bars-for-life-with-care-and-discretion/ [https://perma.cc/5VE7-99NW] (describing the Colorado juvenile resentencing options for those convicted of felony murder: "the court may sentence the juvenile to a 30 to 50 year sentence with 10 years

altering its juvenile-sentencing scheme and automatically entitling a juvenile convicted of a capital felony, but who did not actually kill, intend to kill, or attempt to kill the victim, to a review of their sentence if the sentence was a prison term of greater than fifteen years.[166] North Carolina adopted a revised sentencing scheme regarding the felony murder rule's application to juvenile offenders.[167] Its resentencing structure granted offenders resentencing hearings and it then limited the length of time for which an offender who was a juvenile at the time of the offense may serve.[168] California enacted a bill that raised the state's minimum age to sixteen years old for juveniles who may be transferred to adult court, even if they were charged with murder or other serious offenses.[169] Previously, the district attorney could move to transfer fourteen- and fifteen-year-old juveniles to adult court for certain serious offenses.[170] The new law reflects California's recognition of juveniles' differentness.

Objective evidence of a "social and professional consensus"[171] that a form of punishment is cruel and unusual may include trends and views from outside the United States.[172] Justice Kennedy wrote, "the opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own concl–

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of mandatory parole if the court finds extraordinary mitigating circumstances"); People v. Brooks, 426 P.3d 353 (Colo. 2018).

166. FLA. STAT. § 775.082(b)(2) (2014).

167. N.C. GEN. STAT. § 15A-1340.19B (2012); *see also* State v. Jefferson, 798 S.E.2d 121, 122–23 (N.C. Ct. App. 2017) (upholding the constitutionality of a mandatory life sentence with the possibility for parole after twenty-five years for a juvenile convicted of felony murder).

168. N.C. GEN. STAT. § 15A-1340.19B (2012).

169. 2018 Cal. Stat. 95.

170. *See id.*

171. Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002).

172. *See id.* at 316–17 n.21 (discussing the support of the national consensus against the execution of the mentally disabled by a broader social and professional consensus including within the world community where "the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"); *see also* Thompson v. Oklahoma, 487 U.S. 815, 830 (1988) (finding that executing a sixteen-year-old would offend civilized standards of decency is "consistent with the views that have been expressed by respected professional organizat–ions, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community"); Brief of Amicus Curiae Missouri Ban Youth Executions (BYE) Coalition in Support of Respondent at 10, Roper v. Simmons, 543 U.S. 551 (2004) (No. 03-633) (arguing that the assessment of common evolving standards of decency should receive broad consideration).

usions."[173] We need not look far. The Canadian Supreme Court eliminated accessorial felony murder liability because such punishment runs counter to "the principle that punishment must be proportionate to the moral blameworthiness of the offender."[174] The United Kingdom does not employ the felony murder rule; its "joint enterprise" law covers accomplices in murder, but applies only when the offender has "foresight" and "intention."[175] The United Nations Convention on the Rights of the Child articulates that juveniles should receive special protective treatment in criminal sentencing.[176]

In assessing the nation's evolving standards of decency, the Supreme Court has asserted that legislative enactments are the "clearest and most reliable evidence" of a social consensus.[177] Thus, the number of states that exclude juveniles from the felony murder rule may be most relevant in establishing an evolving national standard.[178] Even though many states only limit the rule's application to juveniles, not prohibit it, further evidence of societal practices recognizing juveniles' differentness and diminished culpability supports the proposition that the felony murder rule, as applied to juveniles,

173. *Roper*, 543 U.S. at 578; *see also* Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 891 (2005) (noting that the Supreme Court often "consult[s] foreign sources of law to evaluate the reasonableness of American legal practices . . . in determining whether American criminal law punishments violate the Eighth Amendment's ban on 'cruel and unusual punishments'").

174. *See* R. v. Martineau, [1990] 2 S.C.R. 633 (Can.); *see also* Liptak, *supra* note 30; Dennis Baker & Troy Riddell, *Elimination of Felony-Murder May Help Rafferty*, NAT'L POST (May 11, 2012, 9:00 AM), https://nationalpost.com/opinion/dennis-baker-troy-riddell-elimination-of-felony-murder-may-help-rafferty [https://perma.cc/RY4G-8LMH] (stating that the Canadian Supreme Court found that a person must have "subjective foresight of death" to be found guilty of murder).

175. Lussenhop, *supra* note 1.

176. G.A. Res. 44/25, annex, Convention on the Rights of the Child, U.N. Doc. A/Res/44/25, art. 37(a)–(b) (Dec. 15, 1989) ("No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age. . . . The arrest, detention or imprisonment of a child . . . shall be used only as a measure of last resort and for the shortest appropriate period of time.").

177. Graham v. Florida, 560 U.S. 48, 62 (2010) (quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002)); *see also* Guyora Binder et al., *Unusual: The Death Penalty for Inadvertent Killing*, 93 IND. L.J. 549, 558 (2018).

178. *See* Binder et al., *supra* note 177.

constitutes excessive and disproportionate sentencing and thus cruel and unusual punishment.

B. Categorical Exclusions from Specific Crimes for Certain Classes of Defendants

Opponents of exempting juveniles from the felony murder rule express concern that treating juveniles differently under the doctrine will create an unconstitutional special class.[179] The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[180] The Supreme Court's treatment of juveniles as inherently different when determining the applicability of severe sentences, such as the death penalty and life without parole, does not implicate equal-protection concerns. The Supreme Court in *Roper v. Simmons* recognized, through an analysis of the Eighth Amendment's protection against cruel and unusual punishments, that juveniles, as a class, are inherently less culpable than adults.[181] True, this protection is "inflected with equality concerns,"[182] but it still "seems to lie far beyond the traditional domain of equal protection."[183] Juveniles are not a group of the general population who are receiving special treatment; rather they are fundamentally different from others (adults) in their reduced culpability. Consequently, they deserve treatment in prop–ortion to that reduced culpability.[184] Additionally, the Supreme Court has consistently upheld distinct treatment for specific classes of people.

The United States has experienced a shift in the public's perception of the death penalty that has led to a greater hesitancy to impose it, particularly on those deemed categorically less culpable or whose actions are not severe enough to justify such a punishment.[185] Developments in societal perceptions, the law, and the social sciences

179. McCann, *supra* note 165 (stating that some Colorado district attorneys argued that a Colorado statute creating sentencing options for juveniles who had received unconstitutional sentences treated juveniles as a "'special class' of individuals on whom a certain benefit was bestowed," contrary to Colorado's constitutional principles).

180. U.S. CONST. amend. XIV, § 1.

181. 543 U.S. 551, 570–71 (2005).

182. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 791 (2011).

183. *Id.* at 792.

184. *See Roper*, 543 U.S. at 571; *id.* at 599 (O'Connor, J., dissenting).

185. Binder et al., *supra* note 155, at 1551 ("[B]ecause execution is now very rare, application of the death penalty to any class of offenders may seem 'cruel and unusual' in the sense of violating 'evolving standards of decency.'").

have guided the evolution of our standards of decency, leading the Supreme Court to overrule some of its previous decisions and compelling new conclusions concerning what constitutes cruel and unusual punishment.[186]

In *Atkins v. Virginia*,[187] the Supreme Court, after considering our "evolving standards of decency," held that the Eighth Amendment prohibits the execution of offenders with intellectual disabilities.[188] Daryl Atkins is a mentally disabled man who abducted, robbed, and shot his victim to death.[189] The Supreme Court recognized that the mentally disabled have a fundamentally diminished personal culpability, even though they may be capable of distinguishing right from wrong.[190] This argument parallels juveniles' diminished culpability in that juveniles have the cognitive capacity to understand the realities of a situation, yet lack the full capacity to use responsibility, perspective, and reasoned risk-assessment in their decision-making.[191]

In *Enmund v. Florida*,[192] the Supreme Court held that the Eighth Amendment prohibits the imposition of the death penalty on a defendant who participates in a felony resulting in a death but does not murder, attempt to murder, or intend to murder.[193] Earl Enmund and two others, Sampson and Jeanette Armstrong, were indicted for the robbery and first-degree murder of the Kerseys at the Kerseys' farmhouse.[194] Enmund drove his co-defendants to the Kerseys' residence to rob the elderly couple.[195] Enmund remained in the getaway car while his co-defendants robbed and murdered them victims when they resisted the burglary.[196] The Court recognized that offenders such as Enmund are "categorically less deserving of the most serious forms of

186. *See id.*

187. 536 U.S. 304 (2002).

188. *Id.* at 321. *Contra* Penry v. Lynaugh, 492 U.S. 302, 335 (1989) (holding that the Eighth Amendment did not categorically prohibit the execution of the mentally handicapped).

189. *Atkins*, 536 U.S. at 307.

190. *See* Roper v. Simmons, 543 U.S. 551, 563 (2004) (citing *Atkins*, 536 U.S. at 318–20).

191. *Id.* at 569.

192. 458 U.S. 782 (1982).

193. *Id.* at 788.

194. *Id.* at 784.

195. *Id.* at 784, 786, 788.

196. *Id.* at 786, 788.

punishment than are murderers"[197] and thus prohibited the death penalty for felony murder offenders with minimal involvement in a murder other than participating in the underlying felony.[198] The Court did not believe that the penological goal of deterrence would be served by the imposition of such a harsh sentence on someone "who does not kill and has no intention or purpose that life will be taken."[199] Continuing, the Court held that a defendant's culpability is limited to his participation and "his punishment must be tailored to his personal responsibility and moral guilt."[200]

In *Coker v. Georgia*,[201] the Supreme Court held that the Eighth Amendment prohibited the death penalty for a defendant who raped an adult woman because death is a "grossly disproportionate and excessive punishment for the crime."[202] Coker broke into the Carvers' house after he escaped from a correctional institution raped Mrs. Carver, and stole the Carvers' car before he was apprehended.[203] The Court assessed the contemporary social view of sentencing rapist to death by reviewing recent cases, history, and objective evidence. In *Kennedy v. Louisiana*,[204] the Court ruled that both the Eighth and Fourteenth Amendments proscribe as excessive the death penalty's imposition for the rape of a child.[205] Patrick Kennedy was sentenced to death for the rape of his eight-year-old stepdaughter, whose resulting injuries were so severe that she required emergency surgeries.[206] The state court recognized that death would serve the deterrent and retributive purposes of punishment and that the defendant did not possess any mitigating characteristics limiting his culpability, such as

197. Graham v Florida, 560 U.S. 48, 69 (2015) (explaining that robbery is not as severe to the victim as murder and thus does not warrant the death penalty for the offender).

198. The Supreme Court looked to sentencing practices to determine whether the imposition of the death penalty would constitute cruel and unusual punishment and recognized that "only a small minority of jurisdictions . . . allow[ed] the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed." *Enmund*, 458 U.S. at 792.

199. *Id.* at 798–99.

200. *Id.* at 801.

201. 433 U.S. 584 (1977).

202. *Id.* at 592.

203. *Id.* at 587.

204. 554 U.S. 407 (2008).

205. *Id.* at 421.

206. *Id.* at 414–17.

mental disability or youthfulness.[207] Despite this, objective indicia of evolving standards of decency and the Supreme Court's understanding of the Eighth Amendment led the Court to conclude that the Amendment prohibits the death penalty for the rape of a child.[208]

C. Excluding Juveniles from Punishment for Acts that Would Be Crimes if Committed by Adults

Juveniles' poor decision-making skills and impulsive behavior renders them susceptible to engaging in risky behavior. Many states account for these characteristics and seek to protect juveniles from suffering unduly harsh consequences by excluding them from the severe punishments that would be imposed on adults who commit the same crimes.[209] Age-gap laws and "Romeo and Juliet clauses"[210] provide exceptions for juveniles from statutory rape laws, or mitigate sentencing thereunder, for juveniles engaged in consensual sexual acts.[211] Statutory rape laws seek to protect minors by establishing a minimum age of consent for an adult to engage in sexual activity with a juvenile on the premise that juveniles cannot give legal consent to engage in sexual activity "even if they are a willing participant."[212] A key basis upon which legislatures rest this reasoning is that juveniles' unfinished development renders them unable to "make mature, informed decisions" or to fully deliberate the potential consequences of sexual activity.[213] These

207. *Id.* at 418.

208. The Court held that "a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments." *Id.* at 421.

209. Scott & Steinberg, *supra* note 11, at 28–29.

210. For teenagers in "close-in-age" relationships, age-gap laws establish reductions in or exceptions from sentencing that would apply if adults committed the same acts. BRITTANY LOGINO SMITH & GLEN A. KERCHER, CRIME VICTIMS' INSTITUTE, ADOLESCENT SEXUAL BEHAVIOR 10–11 (2011), *available at* http://www.crimevictimsinstitute.org/documents/Adolescent_Behavior_3.1.11.pdf) [https://perma.cc/WAZ2-MUED]. "[O]ffender[s] . . . will not be subject to the same punishments as those who commit the crime outside of the age gap provision. In other words, . . . close-in-age teenage relationships need not have the same consequences as those of older adults seeking to sexually exploit minors." *Id.* at 10. Romeo-and-Juliet clauses are provisions that can, but do not necessarily, reduce sentencing or exclude juveniles from sentencing. These clauses can provide juveniles with an affirmative defense under certain circumstances, including engaging in consensual sexual acts with another close-in-age juvenile. *Id.* at 11.

211. *See* Kern, *supra* note 20, at 1613.

212. LOGINO SMITH & KERCHER, *supra* note 210, at 6–7.

213. *Id.* at 7.

qualities that render juveniles susceptible to harm, and that lawmakers argue warrant legislative protection, are the same qualities that should grant juveniles sentencing exemptions and special treatment because they frustrate the purposes of punishment and lead to disproportionate sentences.[214]

Consenting juveniles of the same age, or a consenting juvenile and a somewhat older partner, who engage in sexual activity can fall under statutory rape laws.[215] Convicting these juveniles under statutory rape laws does not serve the purpose of the law—to protect juveniles. Age-gap laws and Romeo-and-Juliet clauses function to address the same fundamental differentness between juveniles and adults that the Supreme Court addressed in *Roper*, a differentness which the felony murder rule should also recognize. Adolescents do not engage in a reasoned analysis of predictable consequences and instead engage in impulsive thrill-seeking behavior.[216] This often leads developing teen–agers to engage in consensual sexual acts despite being several years apart in age.[217] The law has limited the potentially severe consequences of violating statutory rape laws, which could include a felony convic–tion, up to ten years in prison, and required registration on the sex offender registry for ten years or more.[218] Some statutory rape laws reduce juveniles' punishments by lowering the crime's classification from a felony to a misdemeanor, limiting the required time they would have to register on the sex-offender list (or eliminating this requirement altogether), or limiting any prison sentence to a few months instead of a few years.[219] Additionally, instead of reducing punishment, these exceptions may allow courts to totally exclude juveniles from *any* punishment, treating the juveniles as if they committed no crime although the same acts would be crimes if committed by adults.[220]

214. *See* People in Interest of T.B., No. 16CA1289, 2019 WL 2528764, *6–8 (Colo. Ct. App. June 20, 2019) (holding that, in light of juveniles' differentness and the lasting consequences of sex-offender registration, it was excessive to require a juvenile to register as a sex offender for the rest of his life).

215. *See* LOGINO SMITH & KERCHER, *supra* note 210, at 6.

216. *See generally* Kelsey Dumond, Note, *"Cast Me Not Away!": The Plight of Modern Day Romeo and Juliet*, 36 QUINNIPIAC L. REV. 455 (2018) (discussing teenagers' impulsive tendencies regarding their sexual behavior).

217. *Id.* at 460–61.

218. *Id.* at 464.

219. *Id.*

220. *See id.* at 467–68 (identifying various state legislatures' approaches to Romeo-and-Juliet laws and exemptions from those laws).

States have enacted similar Romeo-and-Juliet-type provisions for teens and young adults under "sexting" and child pornography laws.[221] Sexting involves sending text messages that contain sexual content and nude or explicit photos.[222] A minor who engages in sexting by sending explicit images of their self, or receiving explicit images of another minor, partakes in the creation and possession of child pornography.[223] The purpose of child pornography laws is to protect children and prevent child sexual abuse by punishing and precluding the distribution, creation, and possession of sexually suggestive and explicit images of children that can be a record or means of child sexual abuse.[224] This purpose, and punishment's general deterrent, retributive, and rehabilitative purposes, are not served when minors are convicted under anti-child-pornography laws for sexting.[225] Juveniles cannot appreciate the potentially serious consequences of sending "sext" messages.[226]

221. Erik Eckholm, *Prosecutors Weigh Teenage Sexting: Folly or Felony?*, N.Y. TIMES (Nov. 13, 2015), https://www.nytimes.com/2015/11/14/us/prosecutors-in-teenage-sexting-cases-ask-foolishness-or-a-felony.html [https://perma.cc/T2KQ-T5KZ].

222. Teresa Nelson, *Minnesota Prosecutor Charges Sexting Teenage Girl with Child Pornography*, ACLU (Jan. 5, 2018, 11:45 PM), https://www.aclu.org/blog/juvenile-justice/minnesota-prosecutor-charges-sexting-teenage-girl-child-pornography [https://perma.cc/YP9Y-CEQ5].

223. *See* Natasha Marie Landon, Note, *Sexting: The 21st Century's Digital Lovers' Lane*, 79 OHIO ST. L.J. 591, 594 (2018) ("Due to the nature of the beast, teen sexting is by definition the creation of child pornography."). The federal child-pornography law provides: "Any person who . . . knowingly produces, distributes, receives, or possesses with intent to distribute, a visual depiction of any kind . . . that depicts a minor engaging in sexually explicit conduct; and is obscene . . . or attempts or conspires to do so, shall be subject to . . . penalties." 18 U.S.C. § 1466A(a) (2012). Child pornography includes "any photography, film, video, picture, digital image or picture, computer image or picture, computer generated image or picture, whether made or produced by electronic, mechanical, or other means." *Id.* § 1466A(f); *see also* Eckholm, *supra* note 221 ("[W]hen a 16-year-old girl emails a raunchy picture of herself to a boy, she has in theory created and distributed child pornography. If the boy sends the picture to 20 others, he has distributed, and they all have possessed, child pornography.").

224. *See* New York v. Ferber, 458 U.S. 747, 757–60 (1982); *see also* Nelson, *supra* note 222.

225. *See* Nelson, *supra* note 222.

226. *See, e.g.*, Brooke Glover & Aine Kervick, *Youth Justice Part Two: Mini Sex Offenders or Just Kids?*, KINGSLEY NAPLEY (Apr. 12, 2018), https://www.kingsleynapley.co.uk/insights/blogs/criminal-law-blog/youth-justice-part-two-mini-sex-offenders-or-just-kids#page=1 [https://perma.cc/6V2B-72DL] (quoting the English government's response to a report on juvenile crime in England and Wales, which noted that "cases of 'sexting' can be damaging to both the victim and the perpetrator. It can be difficult

Additionally, state statutes are specifically designed to criminalize the activities of adults taking advantage of juveniles, not necessarily juveniles who are in sexual relationships with each other.[227]

Even if juveniles are charged with felonies under anti-child-pornography laws, prosecutors and judges often exhibit great leniency in those cases.[228] In Minnesota, a fourteen-year-old girl sent an explicit photo of herself through Snapchat, a smartphone application that allows users to send images that automatically delete after a certain amount of time.[229] The Minnesota teen's photo was saved and distrib–uted to other teens, and she was consequently charged with felony child pornography distribution, a charge that could result in her mandatory registration as a sex offender for ten years.[230] The trial court dismissed the felony charges against her, asserting that the law's purpose was not served by punishing the teen.[231] The Minnesota law's purpose is to protect children from harms resulting from their involvement in pornographic work.[232] But the teen girl facing conviction was not the type of "victim" the statute sought to address; she was only "exhibiting

for young people to understand the implications of these activities, or to consider that once an image has been shared they have no control over its distribution.").

227. *See, e.g.*, Order Granting Motion to Dismiss, In the Matter of the Welfare of Juvenile 17, at 11–12 (Minn. Dist. Ct., Juv. Div. Feb. 20, 2018), *available at* https://www.aclu-mn.org/sites/default/files/redacted_order_granting_motion.pdf [https://perma.cc/R5EX-JYC3] [hereinafter Juvenile 17 Order].

228. Eckholm, *supra* note 221 (noting that many states have adopted laws to "address juvenile sexting by providing a less severe range of legal responses to personal photo-sharing, including misdemeanor charges that may be expunged, and required community service or counseling"); *see also* Juvenile 17 Order, *supra* note 227, at 19 (demonstrating leniency in dismissing sexting charges brought against a fourteen-year-old girl).

229. Jana Kooren, *Victory! Judge Dismisses Charges in Minneosta Teen Sexting Case*, ACLU OF MINN. (Mar. 14, 2018), https://www.aclu-mn.org/en/press-releases/victory-judge-dismisses-charges-minnesota-teen-sexting-case [https://perma.cc/S5FN-AW5U]; *see also* Christina Newberry, *How to Use Snapchat: A Guide for Beginners*, HOOTSUITE: BLOG (Jan. 9, 2018), https://blog.hootsuite.com/how-to-use-snapchat-beginners-guide/ [https://perma.cc/2UXZ-PV62].

230. Nelson, *supra* note 222.

231. The judge stated that punishing the teen would "produce[] an absurd, unreasonable, and unjust result that utterly confounds the statute's stated purpose." Kooren, *supra* note 229. He continued, "[t]his Court cannot see how subjecting [the juvenile] to registering as a sexual offender would protect her or teach her anything but that the justice system is cruel and unjust." *Id.*

232. Nelson, *supra* note 222.

normal adolescent behavior in the digital age."[233] Legislatures do not seek to punish "youths who in all likelihood haven't the vaguest idea that what they are doing is felonious because so many of them do it, apparently without a thought."[234] Punishing this teen, or the many other teens exploring sexual behavior through sexting, would subject her to great harm while failing to serve the intended purposes of anti-child-pornography laws.

Similarly, punishing juveniles under the felony murder rule with lengthy prison sentences subjects them to great harm and greatly reduces their chances of rehabilitating, despite their strong propensity to do so. Juveniles charged under the felony murder rule generally understand that they are engaging in a felonious activity, but they do so "without a thought"[235] for the serious consequences of engaging in such activities; just as juveniles who sext do not consider the serious consequences of violating an anti-child-pornography law.[236] Sentencing juveniles to lengthy prison terms or other harsh punishments does not serve the felony murder rule's purposes, just as applying child-porn–ography laws to consensually sexting teens does not serve to protect children.[237] The applications of Romeo-and-Juliet-type laws discussed above account for both juveniles' behavior and their development, reflecting a systemic acceptance of juveniles' "differentness," showing a willingness to exhibit greater tolerance for juveniles' actions (compared to adults' actions), and, accordingly, exempting juveniles from punish–ments for activities that would be crimes if adults did them.[238]

D. Limiting and Reevaluating Sentencing Based on Age

Courts have often considered age and its accompanying characteristics—which offenders cannot control—as mitigating factors in sentencing. Specifically, courts account for age in determining whether a punishment is excessive or disproportionate to the crime committed. In sentencing juveniles, courts have considered whether the sentence will result in de facto life imprisonment and whether it will serve punishment's overarching penological goals.

233. *Id.*

234. Juvenile 17 Order, *supra* note 227, at 17.

235. *Id.*

236. *See id.* at 17.

237. *See* Burton, *supra* note 26, at 189; *see also* Nelson, *supra* note 222.

238. *See generally* LOGINO SMITH & KERCHER, *supra* note 210, at 8, 10–11; Scott & Steinberg, *supra* note 11, at 19–20, 28–29.

1. Accounting for Youth in Juvenile Sentencing

Recently, in *People v. Rodriguez*,[239] the Appellate Court of Illinois held that it was unconstitutional to sentence a fifteen-year-old defendant to a mandatory minimum sentence of forty-five years because it constituted a de facto life sentence.[240] In that case, Rodriguez fired a gun in a gang-related drive-by shooting that killed eighteen-year-old Ricardo Vasquez.[241] A divided panel vacated Rodriguez's sentence, requiring that Rodriguez's youth, and its attendant circumstances, be considered in resentencing.[242] The concurring judge emphasized that proposed changes in Illinois' statutes illustrate the legislature's recog–nition that juveniles should not be treated the same way as adult offenders.[243] This example aside, courts struggle when considering what role a juvenile's age should play when determining whether their sentence is constitutional.[244]

In *State v. Null*,[245] the defendant was sixteen years old when he shot and killed Kevin Bell during a robbery of Bell's apartment.[246] Null received a seventy-five-year aggregate sentence, of which he was required to serve at least 52.5 years before he would be eligible for parole—that is, he would be in prison at least until he was sixty-nine years old.[247] Null argued that the 52.5-year prison term effectively amounted to a life sentence because his life expectancy as an African-American male was only 51.7 years.[248] The Supreme Court of Iowa

239. 118 N.E.3d 557 (Ill. App. Ct. 2018).

240. *Id.* at 569, 574. Rodriguez's mandatory forty-five-year sentence ran consecutively to a different twenty-year sentence for first-degree murder. Consequently, Rodriguez was required to serve a sixty-five-year sentence and would not be released from prison until he was eighty-three years old. *Id.* at 559–60.

241. *Id.* at 559.

242. *Id.* at 574.

243. *Id.* at 576 (McBride, J., concurring).

244. *Id.* ("Although *Miller* does not specifically speak to *de facto* life sentences, . . . the letter and spirit of *Miller* requires us to . . . allow relief to those who are serving lengthy mandatory minimum sentences that amount to *de facto* life sentences in prison without parole. Courts however have struggled with how to apply *Miller* in such cases, and how to determine what kind of sentence amounts to a *de facto* life sentence.").

245. 836 N.W.2d 41 (Iowa 2013).

246. *Id.* at 45.

247. *Id.*

248. *Id.* at 50–51 ("[T]he life expectancy of a twenty-year-old black male [Null's age at the time of this appeal] is 51.7 years."). Null argued that he would be released in poor health "to die on the streets after spending all his adult years in prison." *Id.* at 51.

recognized that the 52.5-year sentence was not *formally* a life sentence, but the court applied the rationales for limiting severe juvenile sentencing[249] and emphasized that geriatric release "does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabil–itation' required to obtain release and reenter society as required by *Graham*."[250] Likewise, in *State v. Williams*,[251] the Court of Appeals of North Carolina held that a life sentence without the possibility of parole for a seventeen-year-old defendant convicted of two counts of first-degree murder was unconstitutional[252] because the defendant was not irreparably corrupt and thus he deserved an opportunity to demon–strate rehabilitation.[253] In *State v. Bassett*,[254] the sixteen-year-old defendant received three life sentences without the possibility of parole when he and a friend shot his parents and drowned his brother.[255] Despite the cruel nature of the crime, the Supreme Court of Washington found that its state constitution barred the imposition of a life sentence without the possibility of parole on juvenile offenders because lifelong incapacitation "is at odds with . . . children's capacity for change," and so such a punishment would not serve any penological purpose.[256] Even

249. *Id.* at 71 ("Even if lesser sentences than life without parole might be less problematic, we do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*.").

250. *Id.*; *see also* People v. Buffer (*Buffer I*), 75 N.E.3d 470 (Ill. App. Ct. 2017), *aff'd*, No. 122327, 2019 WL 1721435 (Ill. Apr. 18, 2019). In *Buffer*, the court held that a fifty-year sentence imposed on a sixteen-year-old for shooting and killing a woman constituted an unconstitutional de facto life sentence. *Id.* at 471. Buffer would have been sixty-six on his projected parole date and sixty-nine on his parole discharge date. The court found that "as a practical matter, [Buffer], whose average life expectancy is at best 64 years, will not have a meaningful opportunity for release." *Id.* at 482. The concurring judge emphasized that courts should focus on a juvenile's capacity for rehabilitation in sentencing because juveniles "have a larg[e] and potentially unlimited ability to change as they mature, and those changes can be for the better, or unfortunately, for the worse, depending in large part on their own history when dropped into the surroundings and experiences of prison." *Id.* at 486 (Pucinski, J., concurring).

251. 820 S.E.2d 521 (N.C. Ct. App. 2018).

252. *Id.* at 522 ("[C]ourts in all jurisdictions are still discerning the appropriate criteria and methodology for imposing the harshest of sentences on young people whose entire lives lie before them and whose potential for change is generally unknowable.").

253. *Id.* at 526.

254. 428 P.3d 343 (Wash. 2018).

255. *Id.* at 346.

256. *Id.* at 353.

if a sentence imposed on a juvenile is "survivable,"[257] it should still be proportionate to the underlying offense and allow the convicted juvenile a meaningful opportunity for release. Especially given a juvenile's susceptibility to influence, a convicted juvenile should be given the opportunity to demonstrate her rehabilitation via a useful life outside prison in which they positively contribute to society.[258] A severely lengthy prison sentence that denies a juvenile that opportunity cannot be proportionate to the crime of felony murder, particularly when the juvenile did not "pull the trigger."

Cyntoia Brown's case illustrates states' recent willingness to account for juvenile differentness by readdressing harsh sentencing.[259] Cyntoia Brown was convicted of premeditated first-degree murder, first-degree felony murder, and "especially aggravated robbery" when she shot and killed Johnny Mitchell Allen in his home in 2004.[260] Brown was sixteen years old when Allen picked her up in his truck at a Sonic

257. *See* People v. Buffer (*Buffer II*), No. 122327, 2019 WL 1721435, at *8 (Ill. Apr. 18, 2019) (assessing the length of a juvenile's prison term as "survivable").

258. *See supra* notes 56–70 and accompanying text; *infra* notes 290–291 and accompanying text.

259. Additionally, for the purpose of determining the constitutionality of a lengthy sentence, courts have sometimes treated offenders over eighteen years old as though they were juveniles with diminished culpability. In *People v. House*, 72 N.E.3d 357 (Ill. App. Ct. 2015), the Appellate Court of Illinois held that a mandatory life sentence was unconstitutional for a defendant who was nineteen years old at the time of the crime. *Id.* at 389. Although the Supreme Court of Illinois vacated the judgment in *People v. House*, 111 N.E.3d 940 (Ill. 2018), the Appellate Court's reasoning illustrates increased state willingness to recognize juvenile differentness. House, under the orders of a higher-ranking gang member, acted as a lookout while his fellow gang members murdered two opposing gang members; House was consequently convicted under the theory of accountability. *Id.* at 389. The sentencing court did not consider mitigating factors such as House's youthfulness, his lack of a prior violent criminal history, or his minimal participation in the murders. *Id.* at 389. House was not the actual shooter but he received the same sentence as the "person who pulled the trigger." *Id.* at 385. Just like Lakeith Smith, Timothy Kane, and Curtis Brooks—who all were given severe sentences for felony murder when they merely participated in felonies that caused deaths—House did not pull the trigger. *See supra* notes 1–14 and accompanying text. The Illinois Appellate Court nonetheless concluded that House did not have the requisite culpability for a lengthy, severe prison sentence due in part to his age and juvenile differentness.

260. State v. Brown, No. M2007-00427-CCA-R3-CD, 2009 WL 1038275, at *1 (Tenn. Crim. App. Apr. 20, 2009); *see also* Mallory Gafas & Tina Burnside, *Cyntoia Brown Is Granted Clemency After Serving 15 Years in Prison for Killing Man Who Bought Her for Sex*, CNN (Jan. 8, 2019, 5:31 AM), https://www.cnn.com/2019/01/07/us/tennessee-cyntoia-brown-granted-clemency/index.html [https://perma.cc/F5NP-KMP8].

Drive-In in Nashville and took her back to his home to engage in sexual activity.[261] Brown was a runaway and a sex-trafficking victim,[262] stating that her boyfriend had often abused her and "made her leave with other men."[263] With Allen, Brown feared that she would be harmed and used a gun she kept in her purse to shoot Allen in the middle of the night. Brown then stole a rifle, a shotgun, and $172 from Allen before driving away in his truck.[264] The Tennessee trial court imposed a mandatory life sentence of sixty years requiring Brown to serve at least fifty-one years of the sentence before she would be eligible for release.[265] In 2018, the Supreme Court of Tennessee accepted a certified question from the United States Court of Appeals for the Sixth Circuit arising from Brown's case and determined that requiring a defendant convicted of first-degree murder to serve fifty-one years before becoming eligible for release was consistent with Tennessee law.[266] Less than a year later, however, the state recognized that Brown's sentence was excessive and severe: in January 2019, Tennessee's governor granted clemency to Cyntoia Brown after she served fifteen years of her sentence.[267]

Brown's case garnered attention from lawmakers, attorneys, and several notable celebrities, all who advocated for greater leniency in the justice system's treatment of Brown, and juvenile victims in general because of juveniles' propensity for rehabilitation.[268] While in prison, Brown worked to earn both her high-school-equivalency diploma and an associate degree, and she began working towards a bachelor's degree.[269] Governor Bill Haslam emphasized that Brown's sentence was too harsh in light of her "extraordinary" character transformation.[270] The founder of an organization to end sex trafficking in Tennessee

261. *Brown*, 2009 WL 1038275, at *3; *see also* Gafas & Burnside, *supra* note 260.

262. Gafas & Burnside, *supra* note 260.

263. *Brown*, 2009 WL 1038275, at *9.

264. *Id.* at *3.

265. Gafas & Burnside, *supra* note 260; Christine Hauser, *Cyntoia Brown is Granted Clemency After 15 Years in Prison*, N.Y. TIMES (Jan. 7, 2019), https://www.nytimes.com/2019/01/07/us/cyntoia-brown-clemency-granted.html [https://perma.cc/2NVF-MAPW].

266. Brown v. Jordan, 563 S.W.3d 196, 198 (Tenn. 2018) ("Will a defendant convicted of first-degree murder . . . and sentenced to life in prison under [Tennessee law] become eligible for release and, if so, after how many years?").

267. Gafas & Burnside, *supra* note 260.

268. *Id.*

269. Hauser, *supra* note 265.

270. *Id.* The Governor added: "Transformation should be accompanied by hope." *Id.*

remarked that "[Brown] is light years today, as a woman, different from the traumatized 16-year-old that she was."[271] Brown's case evidences that juveniles' characters are malleable and that many of their characteristics are transient. As a teenager, Brown was controlled and victimized, leading her to make dangerous and violent decisions after she ran away from home.[272] But when she was exposed to positive influences, albeit in prison, Brown became a model prisoner and reached a high degree of academic achievement.

Similarly, Timothy Kane's[273] early release from prison in light of his juvenile differentness and exemplary behavior while in prison further supports that juveniles' characteristics are not fixed. In 2017, after his parole hearing, thirty-nine-year-old Timothy Kane was released from prison after serving twenty-five years of his life sentence for particip–ating in a robbery that resulted in a death.[274] Kane received no disciplinary citations while in prison, and he educated visiting teens about the consequences of engaging in crime.[275] His isolated and impulsive decision as a fourteen-year-old boy in no way reflected an irreparable character as he grew older. Although juveniles are suscep–tible to engaging in crimes, particularly crimes that have a high risk of resulting in death, they are simultaneously receptive to positive influences and rehabilitative efforts.[276]

271. Gafas & Burnside, *supra* note 260.

272. *See id.*; *see also* Hauser, *supra* note 265.

273. In addition to the discussion below, see *supra* notes 11–12, 64–65, 265 and their accompanying text for more on Kane's case.

274. *See supra* notes 11–12 and accompanying text; Lois Swoboda, *Kane Released After 24 Years in Prison*, THE APALACHICOLA & CARRABELLE TIMES (Mar. 9, 2017, 10:37 AM), https://www.apalachtimes.com/news/20170309/kane-released-after-24-years-in-prison [https://perma.cc/887H-R7GR] ("Kane received no disciplinary reports in his 24 years of incarceration for murder. He completed his GED, worked for the prison chaplain and spoke to teens who visit the prison as part of a 'scared straight' program.").

275. Swoboda, *supra* note 274; John Romano, *The Kid Who Went to Prison Has Come Home a Man*, TAMPA BAY TIMES (Mar. 5, 2017), https://www.tampabay.com/news/humaninterest/romano-the-kid-who-went-to-prison-has-come-home-as-a-man/2315361/ [https://perma.cc/4KBJ-2NXJ].

276. *See* Sharon Cohen & Adam Geller, *After 2016 Supreme Court Ruling, Battles over Juvenile Lifer Cases Persist,* DENVER POST (Jan. 25, 2019, 3:47 PM), https://www.denverpost.com/2019/01/20/juvenile-life-in-prison-2016-supreme-court-case/ [https://perma.cc/56AM-ESTX] (noting that the Supreme Court's decision in *Montgomery* "hinged partly on research showing the brains of adolescents are slow to develop, making teen offenders likelier to act recklessly but capable of rehabilitation").

2. Accounting for Old Age in Sentencing

Courts' sentencing practices regarding senior citizens offer a different view of how courts consider age when determining whether a punishment is excessive or proportionate to the crime committed. The sentencing of individuals over sixty-five years old may provide further objective evidence of courts' willingness to account for age. Senior offenders cannot control characteristics that accompany old age, just as juvenile offenders cannot control those accompanying youthfulness.[277] Courts account for age in determining a sentence's length as well as its constitutionality precisely because offenders cannot control it.[278] Elderly defendants are subject to what could be potentially lengthy and harsh sentences considering their relatively poor physical condition and significantly shorter lifespan.[279] The Federal Sentencing Guidelines, for instance, allow a court to consider an elderly and infirm defendant's age and accompanying health problems for the purpose of reducing the defendant's sentence.[280]

Courts can consider those same age-related characteristics when deciding to sentence an elderly defendant to some alternative form of incarceration or punishment, so long as the alternatives are as effective as imprisonment.[281] When Bill Cosby was sentenced for aggravated indecent assault in April 2018, his attorney asked for house arrest because eighty-one-year-old "blind men who are not self-sufficient are not a danger, unless perhaps to themselves."[282] Cosby's defense lawyers stressed his feeble physical condition in the hope of limiting his sentence. Cosby was ruled a "sexually violent predator," deemed likely to engage in sexually violent offenses and was subsequently sentenced to three to ten years in state prison.[283] His sentence may effectively be a "life sentence"[284] because, considering Cosby's age and legal blindness,

277. *See* Scott & Steinberg, *supra* note 11, at 757–59.

278. *See* Cohen & Geller, *supra* note 276.

279. *See* John Elgion & Benjamin Weiser, *Weighing Prison When the Convict Is Over 80*, N.Y. TIMES (Oct. 9, 2009), https://www.nytimes.com/2009/10/10/nyregion/10astor.html [https://perma.cc/TE65-ATYX].

280. U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1, 5H1.4 (U.S. SENTENCING COMM'N 2018).

281. *Id.*

282. Eric Levenson & Aaron Cooper, *Bill Cosby Sentenced to 3 to 10 years in Prison for Sexual Assault*, CNN (Sept. 26, 2018, 10:03 AM), https://www.cnn.com/2018/09/25/us/bill-cosby-sentence-assault/index.html [https://perma.cc/56AM-ESTX].

283. *Id.*

284. *See* Elgion & Weiser, *supra* note 279 (discussing the varying degrees in which age factors in to sentencing "octogenarians," and noting that "for

he may not live through it. Cosby, however, could have received a thirty-year sentence as he was convicted of three counts of aggravated indecent assault, each carrying a maximum sentence of ten years.[285] Although Cosby effectively received a "severe" sentence, it was still significantly less harsh than what younger offenders who committed the same crime would have received, due in part to the court's accounting of his advanced age in sentencing.[286] Similarly, in 2017, Pennsylvania's Crawford County Court of Common Pleas sentenced David Fucci, a sixty-six-year-old man, to a "lengthy" sentence of six-and-one-half to thirteen years in state prison for multiple counts of illegal drug possession and activity.[287] Fucci could have received a total sentence of over one hundred years in prison.[288]

When sentencing senior citizens, courts consider that a prison sentence will constitute a significant percentage of the remainder of the defendant's life. Conversely, juvenile sentences will constitute a smaller percentage of the juvenile's remaining life as compared to adults sentenced to the same term of years. But just as an elderly offender cannot control her advanced age or its accompanying characteristics, juvenile offenders cannot control their youthfulness or any other age-related characteristic. Juveniles, unlike senior citizens, are still cognitively developing; consequently, they have a greater capacity for rehabilitation and change. Courts may still issue harsh sentences to culpable juveniles so long as courts take into account both the juveniles' youthfulness and their fundamental differentness, and the sentence is proportionate to the crime.

IV. A JUVENILE EXCEPTION FROM ADULT SENTENCING UNDER THE FELONY MURDER RULE

Society appreciates that juveniles are inherently less culpable than adults and that they should not be punished under the felony murder rule. This conclusion is supported by objective evidence of our evolving

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the oldest defendants even a short prison term 'may very well be a life sentence'").

285. Dominic Patten, *Bill Cosby to Get Less than Three Years Behind Bars for 2004 Rape, Says Judge*, DEADLINE HOLLYWOOD (Sept. 24, 2018, 10:48 PM), https://deadline.com/2018/09/bill-cosby-sentence-three-years-likely-judge-says-1202470189/[https://perma.cc/D2PE-MXCA].

286. *See id.*; *see also* Levenson & Cooper, *supra* note 282.

287. Keith Gushard, *Full Story: Admitted Pill Dealer Gets Lengthy State Prison Sentence*, MEADVILLE TRIB. (Jan. 5, 2017), https://www.meadvilletribune.com/news/local_news/full-story-admitted-pill-dealer-gets-lengthy-state-prison-sentence/article_5d7e361a-d2d7-11e6-91f2-0ba3061cfaee.html [https://perma.cc/LM7P-L7T6].

288. *Id.*

standards of decency, including: (1) courts' accounting for juvenile differentness; (2) the Supreme Court's categorical exclusion of specific classes of offenders from certain punishments; (3) the exclusion of juveniles from punishments that would be imposed if adults commit the same crime; and (4) courts' considerations of age as a limiting factor in sentencing. Although states have taken steps in revising their senten–cing schemes to account for juveniles' youthfulness, no state has categ–orically excluded juveniles from the felony murder rule.[289] Accordingly, the Supreme Court is not likely to hold that the states' practices evince an evolving national standard. The Court also seems unlikely to hold that the felony murder rule as applied to juveniles implicates the Eighth Amendment's prohibition on cruel and unusual punishment.[290] But even if the Supreme Court does not recognize a sufficient evolving national standard to categorically exclude juveniles from the felony murder rule, states are still free to do so. States are also free to limit the rule's application to juveniles. Eventually, state legislative actions limiting the application of the felony murder rule to juveniles, or excluding them from adult-type sentencing under the rule, will be enough to show the Supreme Court that there is a new, clear national standard by which it can conclude that the Eighth Amendment prohibits the application of the felony murder rule to juveniles.

States should curb the imposition of excessive and harsh punishments on juveniles through revised sentencing standards that exclude juveniles from adult sentencing under the felony murder rule. A standard under which juveniles receive specialized sentencing for felonies that result in death will result in effective punishment that accounts for juveniles' differentness. In order to avoid imposing excessive and disproportionate punishments, juveniles' felony-murder sentences should not be for such an extensive length that the juveniles are effectively denied a meaningful opportunity to demonstrate their rehabilitation and maturity.[291] In *Graham v. Florida*, the Supreme Court did not require that juveniles be released from prison simply with

289. *See supra* notes 156–158 and accompanying text.

290. *See supra* notes 153–154, 177 and accompanying text.

291. *See* Straley, *supra* note 161, at 987; *see also* Graham v. Florida, 560 U.S. 48, 74 (2010) (emphasizing the importance of providing juvenile offenders an opportunity to demonstrate maturity and rehabilitation and stressing that the denial of a juvenile's right to reenter the community "is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability"); People v. Buffer (*Buffer I*), 75 N.E.3d 470, 488 (Ill. Ct. App. 2017) (Pucinski, J., concurring) (citing *Roper*'s underlying principle that juveniles have a great capacity for change and states must allow juveniles the meaningful opportunity to demonstrate their rehabilitation), *aff'd*, No. 122327, 2019 WL 1721435 (Ill. Apr. 18, 2019).

enough time to *outlast* their confinement for a trivial amount of time.[292] Instead, the Supreme Court recognized that juvenile offenders are entitled to *live* upon release from prison for "some appreciable period."[293]

Juveniles have great capacities for change; specialized juvenile sentences should provide them with sufficient time outside prison for them to demonstrate their rehabilitation. Cyntoia Brown's development from a sixteen-year-old girl at sentencing into a markedly different, educated, and motivated woman clearly evinces the transitory nature of juveniles' characteristics, their maturation, and their receptiveness to rehabilitation.[294] Several years after committing a felony that results in death, a juvenile will not be the same person she was when she committed the crime.[295] Lengthy sentences like Brown's do not provide juveniles a meaningful opportunity to demonstrate rehabilitation.[296]

To allow for such an opportunity, courts should calculate a juvenile's sentence for felony murder based on her average life expectancy. This approach will also serve penological goals by preventing juveniles from serving de facto life sentences or other excessive sentences that are disproportionate to the crime committed.[297] Courts

292. *Graham*, 560 U.S. at 75; Straley, *supra* note 161, at 987 ("The Supreme Court in *Graham* viewed the concept of 'life' as broader than simply biological survival. It implicitly endorsed the notion that release from prison should be available at a time at which a defendant might actually 'live' outside the prison walls for some appreciable period.").

293. Straley, *supra* note 161, at 987; *Graham*, 560 U.S. at 69–70.

294. *See supra* notes 260–272 and accompanying text.

295. Wadhwani & Tamburin, *supra* note 67. In response to Brown's case, a Tennessee senator recognized that there are many juveniles in similar situations as Brown and that "[a]s horrific as it sounds that a child committed murder, the person they are now is not the person they will be in 20 years." *Id.* An attorney who represents another juvenile imprisoned for murder stressed that the criminal justice system should understand and work to account for "[t]he fact that we [all] grow and change and mature." *Id.*

296. Other attorneys who represent juveniles convicted under a felony-murder statute have used Brown's case as an example: "The whole premise of [*Miller*] is that juvenile brains have not developed into adulthood. . . . Sentencing a juvenile to prison for 51 years does not give that juvenile an opportunity to demonstrate meaningful rehabilitation. . . . This is the most cruel type of punishment that we can impose, except for possibly the death penalty." *Id.*

297. In *Buffer II*, the concurring judge asserted that courts can calculate what constitutes de facto life sentences by determining whether "the defendant's age at the earliest projected time of release exceeds an incarcerated minor's average life expectancy." People v. Buffer (*Buffer II*), No. 122327, 2019 WL 1721435, at *11 (Ill. Apr. 18, 2019)

will be able to ensure that juveniles' sentences do not take up such a significant portion of their lives that they are punished in excess of their level of culpability. Under this model, Courts only need to account for a juvenile's *average* life expectancy; 'early' or 'late' deaths should not change the sentence. According to a National Vital Statistics Report summarizing life expectancy based on how old a person is now, a fifteen-year-old has a further life expectancy of 64.4 years.[298] Incarceration in the general prison population, however, reduces an individual's life expectancy.[299] Studies demonstrate that an incarcerated person loses two years off their life expectancy for every year they are in prison.[300] And prisoners between fifty and sixty years old have health issues that individuals outside of prison do not experience until significantly later in life.[301] Additionally, living in the general prison population has a more significant effect on a juvenile's life expectancy.[302] In *People v.*

(Burke, J., concurring). Judge Burke also argued that "it is possible to arrive at a number that reasonably reflects the average life expectancy of a minor who is incarcerated for a lengthy period of time." *Id.*

298. ELIZABETH ARIAS & JIAQUAN XU, U.S. DEP'T OF HEALTH & HUMAN SERVS., UNITED STATES LIFE TABLES, 2015, at 3 (2018), *available at* https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_07-508.pdf [https://perma.cc/89WV-Z97V].

299. Deborah LaBelle, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*, at 1, *available at* LIBRARY OF THE U.S. COURTS OF THE SEVENTH CIRCUIT, http://www.lb7.uscourts.gov/documents/17-12441.pdf [https://perma.cc/AJB3-TMPT] (last visited Oct. 22, 2019) ("It is not disputed that life expectancy for incarcerated individuals lag behind the general population."); People v. Buffer (*Buffer I*), 75 N.E.3d 470, 481–82 (Ill. App. Ct. 2017) (summarizing several reports noting the correlation between a person's time spent in prison and a decrease in her life expectancy), *aff'd*, No. 122327, 2019 WL 1721435 (Ill. Apr. 18, 2019); Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989-2003*, 103 AM. J. PUB. HEALTH 523, 526 (2013) ("[F]or each year served in prison, a person could expect to lose approximately [two] years of life."); Emily Widra, *Incarceration Shortens Life Expectancy*, PRISON POL'Y INITIATIVE (June 26, 2017), https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/ [https://perma.cc/ZG6R-P4RH] (noting that mass incarceration has decreased average American's life expectancy by five years).

300. Patterson, *supra* note 299; *see also* Widra, *supra* note 299.

301. Maurice Chammah, *Do You Age Faster in Prison?*, THE MARSHALL PROJECT: JUSTICE LAB (Aug. 24, 2015), https://www.themarshallproject.org/2015/08/24/do-you-age-faster-in-prison [https://perma.cc/7CAX-ZDJC].

302. LaBelle, *supra* note 299, at 2 (asserting that the average life expectancy for incarcerated individuals "drop[s] even lower for those who begin their natural life sentences as children, therefore, serving longer years in prison then [sic] adults with the same sentence").

Buffer,[303] the court noted that the estimated sixty-four-year life expectancy assigned to adult offenders "probably overstates the average life expectancy for minors committed to prison for lengthy terms."[304] Juveniles in prison are often exposed to stress and violence that have a negative impact on their life expectancy.[305] Therefore, for juveniles, term-of-year sentences "of no more than a few decades may actually result in life in prison."[306] Upon release from prison, a juvenile may have health issues relating to their age and resulting from years in the general prison population, issues that may eliminate any opportunity for a meaningful life outside prison.[307] Consequently, a standard for calcul–ating juveniles' sentences for felony murder must account for juveniles' prison-related diminished life expectancies, limiting the maximum sentence that a juvenile can receive to an amount of time that still allows for enough time after she is released to demonstrate her rehabilitated character.[308]

That standard should distinguish between sentences for juveniles who had a direct hand in the felony's resulting death and sentences for juveniles who were mere accomplices. This will ensure that sentences are not disproportionate to the crime by sentencing juveniles in accordance with their individual culpability. A sentencing standard that ensures juveniles will be released and afforded an opportunity to demonstrate their rehabilitation might require that a fifteen-year maximum sentence for a juvenile who was only an accomplice. This

303. (*Buffer I*), 75 N.E.3d 470 (Ill. App. Ct. Dist. 2017), *aff'd*, No. 122327, 2019 WL 1721435 (Ill. Apr. 18, 2019).

304. *Id.* at 481; People v. Buffer (*Buffer II*), No. 122327, 2019 WL 1721435, at *11 (Ill. Apr. 18, 2019) (Burke, J., concurring) ("The accuracy of the 64-year life expectancy figure with regard to minors is suspect, particularly when one takes into account that it is generally recognized that the life expectancy of a minor sentenced to a lengthy prison term is further diminished.").

305. *See supra* notes 98–99 and accompanying text; *see also* Straley, *supra* note 161, at 986 ("The unpleasant realities of prison life reduce the life expectancies of many prisoners incarcerated as children."); LaBelle, *supra* note 299 ("It is generally accepted that life in prison, with its stressors, violence and disease in and of itself significantly shortens one's life expectancy.").

306. Straley, *supra* note 161, at 986–87.

307. *Id.* at 987 ("[E]ven if a prisoner survives long enough to see release after a long determinate sentence, parole may be effectively meaningless because of the prisoner's age and related disabilities and limitations.").

308. An attorney who advocates for juvenile offenders sentenced to lengthy prison terms argues that "[e]ven if juvenile offenders survive to see freedom in their 60s . . ., they will almost certainly be hobbled by old age and health problems, not to mention a criminal record that would make getting housing and jobs a struggle." Wadhwani & Tamburin, *supra* note 67.

would guarantee that a juvenile would be released from prison before age thirty-five, giving them a significant amount of time left to live outside of prison. On the other hand, juveniles who "pulled the trigger" should receive a greater sentence, perhaps twenty to twenty-five years. This would prevent the offender from remaining in prison beyond age forty-five. Even if the juvenile's life expectancy is reduced to sixty-four (based on the average prisoner's life expectancy), she will still have an appreciable period of time to live outside prison. Because the proposed sentencing structure would both limit the sentence a juvenile may receive under the felony murder rule and adequately account for the juvenile's fundamental differentness and youthfulness, dividing juve–niles into the above culpability categories will result in proportionate sentencing.

Courts should consider other mitigating factors in addition to age and youthfulness, such as past criminal history and the level of involvement in the underlying felony, to limit punishment below these maximum sentences to ensure that sentences are proportionate and appropriate. In addition to applying to juvenile offenders who commit and are charged with felony murder-type offenses, this standard would also apply to *re*sentencing juveniles who committed felony murder-type crimes and to individuals who committed a crime as a juvenile but were not charged or convicted until after they reached the age of majority. This will ensure that an offender's sentence will account for their reduced culpability for a felony resulting in a death that they committed as a juvenile.

CONCLUSION

Juveniles are fundamentally different from adults. The application of the felony murder rule to juveniles is necessarily at odds at with both the rule's purpose and the goal of effective punishment. Juveniles are not capable of meaningfully accounting for the possibility that someone might die during their commission of a felony. Therefore, the transferred intent on which the felony murder doctrine relies does not work for juveniles who could not engage in the reasoned decision-making that the doctrine presumes. Even if state legislation does not yet support a Supreme Court decision that the national standards of decency have sufficiently evolved to satisfy the Eighth Amendment's requirement, the Court's past reasoning and states' current practices still support the conclusion that applying the felony murder rule to juveniles, without accounting for their diminished culpability, const–itutes cruel and unusual punishment. Because juveniles are incapable of realizing that death is a foreseeable consequence–of committing a felony, juveniles should receive specialized treatment under the felony murder rule that prevents them from serving a significant portion of their lives in prison for an act for which they have limited culpability. Accordingly, a specialized sentencing standard excluding juveniles from

adult sentencing under the felony murder rule, and limiting sentencing based on life expectancy, is necessary to prevent excessive and disproportionate sentencing.

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