Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham & J.D.B.

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I. INTRODUCTION

Since 2005, the United States Supreme Court has issued a trilogy of opinions affirming the proposition that children and adolescents are different than adults in fundamental—and constitutionally relevant—ways. In *Roper v. Simmons*, the Supreme Court held that imposing the death penalty on individuals who committed murders as juveniles violated the Eighth Amendment's prohibition against cruel and unusual punishment. [1] Five years later, the Court held in *Graham v. Florida* that it is similarly unconstitutional to impose life without parole sentences on juveniles convicted of non-homicide offenses. [2] Both *Roper* and *Graham* relied heavily on adolescent development and brain science research showing that adolescents are fundamentally different from adults in ways that render them categorically less culpable and less deserving of society's harshest forms of punishments.

Just one year after the *Graham* decision, the Court in *J.D.B. v. North Carolina*,[3] held that a child's age must be taken into account for the purposes of the *Miranda* custody test, treating the proposition that children are different for constitutional analysis as unquestionable and a commonsense conclusion.[4] The Court reduced to a footnote the social science and cognitive science research cited at length in both *Roper* and *Graham*, stating that scientific authorities are "unnecessary to establish these commonsense propositions [that children are different than adults]."[5]

In the 2011–2012 term, the U.S. Supreme Court will consider two cases that test the limits of the Court's commitment to these "commonsense" notions.[6] *Miller v. Alabama* addresses the

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[1] Roper v. Simmons, 543 U.S. 551, 578 (2005).

[2] Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).

[3] J.D.B. v. North Carolina, 131 S. Ct. 2394, 2394 (2011).

[4] *Id.* at 2403.

[5] *Id.* at 2403 n. 5.

[6] During the publication of this Article, the Supreme Court issued its decision in these cases, *Miller v. Alabama* and *Jackson v. Hobbs*. Part VII of this Article is a Postscript that includes a brief

constitutionality of imposing a sentence of life without the possibility of parole on an individual found guilty of a capital murder that he committed at the age of fourteen.[7] Miller's crime involved beating a man and then setting fire to his trailer. In *Jackson v. Hobbs*, the Court will consider the constitutionality of a life without parole sentence imposed upon an individual for a felony murder offense that he committed when he was fourteen.[8] The juvenile in *Jackson* was convicted of felony murder based on his involvement in a robbery in which another participant in the robbery shot and killed a store clerk.[9]

Although Petitioners in *Jackson* and *Miller* argue that *Roper* and *Graham*, in particular, dictate a holding that life without parole sentences are unconstitutional for a juvenile convicted of *any* homicide offense,[10] this Article focuses specifically on juveniles convicted of felony murder offenses, examining the intersection between felony murder's dubious history and questionable rationale and contemporary adolescent development research. This Article argues that juvenile life without parole sentences are unconstitutional for felony murder offenses in light of recent Supreme Court precedent. Additionally, this Article argues that any mandatory sentence for a juvenile convicted of felony murder is inconsistent with precedent.

Part II of this Article illustrates the realities of life without parole sentences for juveniles convicted of felony murder with three case studies of individuals serving this type of sentence, including the individual whose case is before the U.S. Supreme Court in the 2011–2012 term. Part III briefly explains the history of the felony murder doctrine and its modern day rationales. Part IV discusses the recent U.S. Supreme Court cases highlighting the differences between youth and adults. Part V analyzes the constitutionality of imposing juvenile life without parole sentences on juveniles convicted of felony murder, including an analysis of Supreme Court precedent, the rationales underlying felony murder as applied to juveniles, and the penological purposes of a life without parole sentence for a juvenile convicted of felony murder. Part VI separately assesses the constitutionality of mandatory sentences—both life without parole sentences and mandatory term-of-years sentences—when imposed on

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summary of the Court's decision and analysis of how the decision impacts the arguments set forth in this Article.

[7] Miller v. Alabama, 63 So. 3d 676 (Ala. Crim. App. 2010), *cert. granted*, (U.S. Nov. 7, 2011) (No. 10-9646), *available at* http://www.supremecourt.gov/qp/10-09646qp.pdf.

[8] Jackson v. Hobbs, 2011 Ark. 49 (Ark. 2011), *cert. granted,* (U.S. Nov. 7, 2011) (No. 10-9647), *available at* http://www.supremecourt.gov/qp/10-09647qp.pdf

[9] Jackson v. Arkansas, 2011 Ark. 49 (Ark. 2011), *petition for cert. filed,* 2012 WL 309538, (U.S. Mar. 21, 2011) (No. 10-9647).

[10] *See* Brief of Petitioner-Appellant, Jackson v. Hobbs, 2010 U.S. Briefs 9647 (No. 10-9647) (U.S. Jan. 9, 2010); Brief of Petitioner-Appellant, Miller v. Alabama, 2010 U.S. Briefs 9646 (No. 10-9646) (U.S. Jan. 9, 2010).

juveniles convicted of felony murder.

II. JUVENILE LIFE WITHOUT PAROLE SENTENCES FOR FELONY MURDER: CASE STUDIES

Approximately 2,500 individuals are serving life without parole sentences for crimes they had committed as juveniles.[11] According to a 2005 report from Human Rights Watch and Amnesty International, an estimated 26 percent of individuals serving juvenile life without parole sentences were convicted of felony murder "in which the teen participated in a robbery or burglary during which a co-participant committed murder, without the knowledge or intent of the teen."[12] Although the situations vary from juvenile-to-juvenile, the characteristics of the juveniles and the offenses are often quite similar.

A. Kuntrell Jackson

On November 18, 1999, shortly after he turned fourteen years old, Kuntrell Jackson was involved in a robbery.[13] Jackson and two older boys were walking together through a housing project and began discussing the idea of robbing a local video store.[14] As they were walking, Jackson learned that one of the other boys had a shotgun.[15] When they arrived at the video store, Jackson initially waited outside while the older boys went inside.[16] The boy with the shotgun pointed the gun in the clerk's face and demanded money.[17] Jackson then went inside the store as the older boy continued to demand money.[18] When the clerk mentioned calling the police, the boy shot the clerk in her face.[19] All the boys ran away.[20] Jackson himself never held the gun and did not shoot the victim.

On July 19, 2003, Jackson was convicted of capital murder (based on felony murder liability) and aggravated robbery.[21] In Arkansas, a sentence of life without parole is mandatory for anyone—including a juvenile—

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[11] *Against All Odds: Prison Conditions for Youth Offenders Serving Life without Parole Sentences in the United States,* HUMAN RIGHTS WATCH 1 (Jan. 2012), http://www.hrw.org/sites/default/files/reports/us0112ForUpload_1.pdf.

[12] *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States,* AMNESTY INT'L & HUMAN RIGHTS WATCH 1–2 (2005), www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf.

[13] Jackson v. Arkansas, 2011 Ark. 49 (Ark. 2011), *petition for cert. filed,* 2012 WL 309538, (U.S. Mar. 21, 2011) (No. 10-9647).

[14] Jackson v. Arkansas, 194 S.W.3d 757, 758 (Ark. 2004).

[15] *Id.*

[16] *Id.*

[17] *Id.* at 758–59.

[18] *Id.* at 759.

[19] *Id.*

[20] *Jackson*, 194 S.W.3d at 759.

[21] Jackson v. Norris, 2011 Ark. 49, at 49, 2011 WL 478600, at *1.

convicted of capital murder.[22] Jackson had no opportunity to argue that his sentence should be reduced because of his young age, because he was not the actual shooter, or because he never foresaw or intended that anyone would die. The U.S. Supreme Court will consider the constitutionality of Jackson's life without parole sentence in the 2011–2012 term.[23]

B. David Young

In 1997, when David Young was seventeen years old, he was involved in a drug deal, which turned violent.[24] Young and his friends Christopher and Tommy Davis were approached by a man who offered to "rent" them a car.[25] Christopher Davis agreed to exchange drugs for the car.[26] When an occupant of the car, Charles Welch, claimed that the drugs were no good and refused to pay the boys, Christopher Davis pulled a gun out of his pocket.[27] In an effort to get the money, Young reached into the car and tried to pull $100 out of Mr. Welch's hands.[28] Mr. Welch became angry, got out of the car and walked toward Christopher Davis, at which point Christopher fired three or four shots, one of which struck Mr. Welch in the head and killed him.[29] There was no finding that Young shot the victim or knew that the victim would be shot.

After Young was arrested, he was offered several plea deals, including an offer that would have carried a sentence of thirty-eight months.[30] He rejected these plea deals based on the advice of his uncle.[31] At trial, Young's lawyers did not present any witnesses or evidence on his behalf, despite the fact that Young faced the possibility of execution.[32] A North Carolina jury found Young guilty of first-degree murder under the felony murder rule. The conviction carried a mandatory sentence of either death or life without the possibility of parole.[33] After a sentencing hearing, the jury recommended imposing life without parole, the least harsh sentencing option available, and the judge imposed that sentence.[34]

After serving fifteen years in prison, thirty-two year old Young stated,

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[22] ARK. CODE ANN. §5-10-101(c)(1) (2011).

[23] Petition for Writ of Certiorari, *Jackson v. Arkansas* (No. 10-9647).

[24] '*This is Where I'm Going To Be When I Die:' Children Facing Life Imprisonment Without the Possibility of Release in the USA*, AMNESTY INT'L 13 (Nov. 2011), http://www.amnesty.org/en/library/asset/AMR51/081/2011/en/cdde342e-5a70-40ca-bc93-39d298d07039/amr510812011en.pdf.

[25] State v. Young, No. COA01-361, 2002 N.C. App. LEXIS 2196, at *2 (Jul. 16, 2002).

[26] *Id.* at *2.

[27] *Id.* at *2–3.

[28] *Id.* at *3.

[29] *Id.* at *3.

[30] AMNESTY INT'L, *supra* note 23, at 14.

[31] *Id.*

[32] *Id.* at 15. David went to trial before the U.S. Supreme Court ruled in *Roper v. Simmons* that the death penalty could not be imposed for crimes committed when an offender was less than eighteen years old.

[33] N.C. GEN. STAT. § 14-17 (2011).

[34] AMNESTY INT'L, *supra* note 23, at 15.

"I'm nothing like I was before I came in."[35] After all his efforts to obtain post-conviction relief failed, he realized the finality of his sentenced, referring to prison as the place "where I'm going to be when I die."[36]

C. *Aaron Phillips*

In 1986, seventeen-year-old Aaron Phillips and twenty-two year old Andrew Gibbs were involved in an unarmed robbery.[37] Phillips and Gibbs entered the home of an elderly gentleman in order to get money. In the course of the robbery, the victim, eighty-seven year-old Edward McEvoy, "was grabbed, his wallet was removed from his pocket, and he was knocked down to the floor."[38] At trial, there was conflicting testimony as to whether Phillips or Gibbs grabbed the victim and took the wallet.[39]

When Phillips and Gibbs left the home, Mr. McEvoy was injured, but alive. Mr. McEvoy had some blood on his face and was holding his side, but had no other noticeable injuries.[40] Although he went to the hospital, he returned home that evening.[41] The next day, he returned to the hospital because his hip was fractured and required surgery.[42] The surgery was successful, but Mr. McEvoy developed a secondary problem with his intestines.[43] Mr. McEvoy required another surgery relating to these intestinal problems, and after that second surgery Mr. McEvoy developed an irregular heartbeat and died—eighteen days after the robbery.[44] According to the record, the stress of the hip fracture and two subsequent surgeries resulted in too much stress on Mr. McEvoy's heart.[45] When Phillips was informed by police that Mr. McEvoy had died, tears welled up in his eyes.[46]

In early 1988, Aaron Phillips was found guilty of second degree murder (pursuant to Pennsylvania's felony murder statute) and other related offenses.[47] He was sentenced to life without parole under Pennsylvania's mandatory sentencing scheme.[48] In Pennsylvania, like Arkansas and North Carolina, anyone convicted of felony murder must be sentenced to at least life without parole despite the age of the offender, the

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[35] *Id.* at 16.
[36] *Id.*
[37] Brief for Appellant at 6, Commonwealth v. Phillips, 32 A.3d 835 (Table) (Pa. Super. Ct. 2011) (No. CP-46-CR-0025720-1986).
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] Brief for Appellant, *supra* note 36, at 6.
[44] *Id.* at 7.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 9.
[48] *Id.*

nature of the crime, or the offender's level of involvement.[49]

While Phillips received a mandatory life without parole sentence, Gibbs, the older participant in the robbery, made a plea deal in return for a shorter sentence. Gibbs was released from state prison in 1994, after serving approximately eight years.[50]

Phillips describes his entry into the adult penal system as traumatic: "[A]t seventeen years of age I witnessed what no adult – much less a child – should experience . . . . There was a level of violence; a degree of brutality . . . that defies description."[51] He also describes the bleakness of a life without parole sentence, saying, "There's a profound sense of hopelessness and despair as you watch your life slowly withering away year after year, decade after decade with no end to the suffering in sight."[52] When asked how he has changed since the incident, Phillips says, "I've simply matured."[53]

D. Different Crimes, Common Patterns

Though the facts and circumstances surrounding the crimes committed by Kuntrell Jackson, Aaron Phillips, and David Young vary, there are also certain commonalities. In none of these cases did the boys foresee that someone would be killed during their felony. None of the boys were armed, and there was no finding that any of the boys inflicted the fatal wound. The crimes themselves were relatively spur-of-the-moment and involved other, often older, participants who initiated the violence. The youths were less savvy plea bargainers—going to trial rather than accepting plea deals for lesser sentences. However, because of the mandatory sentencing statutes, none of these boys ever had the opportunity to argue that they were entitled to a lesser sentence because of their age, immaturity, or level of involvement.

III. HISTORY AND RATIONALE OF THE FELONY MURDER DOCTRINE

Broadly defined, if a person is killed during the commission of a felony, the killing is felony murder.[54] The crime of felony murder does not require an intent to kill.[55] Therefore, a person can be convicted of felony murder even if the killing was accidental, unforeseeable, or committed by

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[49] 18 PA STAT. ANN. §1102(b); 18 PA STAT. ANN. §2502(b); ARK. CODE ANN. §5-10-101(c)(1) (2011); N.C. GEN. STAT. § 14–17. (2011).

[50] Brief for Appellant, *supra* note 36, at 7 n.1.

[51] Letter from Aaron Phillips to Emily C. Keller, Juvenile Law Center (Apr. 22, 2011) (on file with author).

[52] *Id.*

[53] *Id.*

[54] Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 763 (1999).

[55] *Id.*

another participant in the felony.[56] In its broadest application, any participant in a felony can be convicted of murder whether or not the participant committed a dangerous act or was even present when the act occurred.[57] For the purposes of this Article, felony murder includes any murder in which there is no specific finding that the participant in the felony intended to kill, with a particular focus on cases in which felony murder liability is imposed on accomplices, not the actual shooter or killer.

A. History at English Common Law

The origins of the felony murder doctrine are obscure.[58] Although felony murder was discussed by commentators and courts in eighteenth-century England, the rule was rarely, if ever, applied at that time.[59] By the nineteenth-century, however, a felony murder doctrine had developed in England, perhaps based on a misunderstanding or misreading of these authorities.[60] There is no evidence that the emergence of the doctrine reflected a conscious and careful reflection on the penological purposes such a doctrine would further.[61]

The doctrine that developed in England was much more limited than the modern U.S. felony murder rule; it merely provided for liability when, in the course of a felony, the death was caused "through an act of violence or an act manifestly dangerous to human life."[62] The participant himself—not his co-participants—had to engage in this dangerous or violent act that caused a death, even if the death was unintentional. Simply participating in a felony in which someone was killed was not sufficient to be found guilty of felony murder.[63] However, even under this narrow formulation, the felony murder rule in England was relatively short-lived; in 1957, England abolished the felony murder rule altogether.[64]

B. Felony Murder at America's Founding

The felony murder doctrine does not have long-standing roots in the United States. Felony murder was not part of colonial American law or

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[56] *Id.* at 770.

[57] *Id.* at 776.

[58] James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1429, 1442 (1994); Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 63 (2004).

[59] *See* Binder, *supra* note 57, at 63, 98; Leonard Birdsong, *Felony Murder: A Historical Perspective by Which to Understand Today's Modern Felony Murder Rule Statutes*, 32 T. MARSHALL L. REV. 1, 13 (2006).

[60] Binder, *supra* note 57, at 64; Tomkovicz, *supra* note 57, at 1444.

[61] Tomkovicz, *supra* note 57, at 1443–44.

[62] Binder, *supra* note 57, at 64.

[63] *Id.* at 107.

[64] *Id.;* Birdsong, *supra* note 58, at 16.

common law and was not applied at the country's founding.[65] In the United States, the doctrine was first established by statute in the nineteenth century when states began to codify their murder laws.[66] The earliest American felony murder statutes treated the fact that a murder occurred in perpetration of a felony as an aggravating factor that justified the imposition of the death penalty.[67] These early statutes, however, still required that the defendant have the intent to inflict an injury during the felony, even if they did not have the intent to kill.[68]

By the 1820s, states began enacting broader felony murder legislation that imposed murder liability for all killings, even involuntary killings, in the course of attempting or committing a felony.[69] Still, the doctrine remained limited throughout the nineteenth century; felony murder was imposed only if the participant took part in the fatal assault or the felony involved violence or great danger of death.[70]

C. Modern Felony Murder Liability in the United States

Despite the doctrine's dubious roots and England's abandonment of felony murder in the 1950s, felony murder continued to expand in the United States. In the late twentieth century, states adopted new penal codes, often reducing the level of culpability required for a felony murder conviction,[71] substituting a negligence standard (i.e., that death was foreseeable) for the earlier requirement that a participant actually have an intent to at least wound or injure the victim.[72] States began expanding the underlying predicate felonies in their felony murder statutes to include less serious and less violent felonies.[73] Simultaneously, courts not only expanded the scope of accomplice liability, but also began finding liability for felony murder when the connection between the felony and the killing was attenuated.[74]

Today, states have enacted a variety of felony murder statutes.[75] Some states predicate liability on the commission of a *dangerous* felony; some predicate liability of the commission of *any* felony; and some predicate liability on implied malice in conjunction with the commission of a

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[65] Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 976 (2008).

[66] Binder, *supra* note 57, at 64; Leonard Birdsong, *The Felony Murder Doctrine Revisited: A Proposal for Calibrating Punishment That Reaffirms the Sanctity of Human Life of Co-Felons Who Are Victims*, 33 OHIO N.U. L. REV. 497, 500 (2007).

[67] Binder, *supra* note 57, at 64–65; Birdsong, *supra* note 58, at 17.

[68] Binder, *supra* note 57, at 65–66.

[69] *Id.*; Birdsong, *supra* note 58, at 18–19.

[70] Binder, *supra* note 57, at 65–66.

[71] Binder, *supra* note 64, at 979–80.

[72] *Id.* at 979.

[73] *Id.* at 980.

[74] *Id.*

[75] Tomkovicz, *supra* note 57, at 1433–34.

felony.[76] Additionally, numerous states have adopted accomplice liability statutes by which an accomplice to a crime can be held accountable to the same extent as the principal.[77] Collectively, these statutes and case law allow felony murder convictions even where the participant's involvement was very minor and the death was unintended or unanticipated.

D. Modern Felony Murder Rationales

The modern rationales justifying the felony murder doctrine are particularly relevant in determining the legitimacy of the harsh sentences imposed on juveniles convicted of felony murder. One rationale for the doctrine is that a person who commits a bad act should be punished for the consequence of that act, even if that person did not in fact foresee, expect, or intend it.[78] This rationale reflects a strict liability approach where the actual intent of the defendant is not relevant to the overall analysis. An alternate rationale is that of "transferred intent" where it is presumed that the intent to commit murder can be inferred (or transferred) from the intent to commit the underlying felony.[79] Therefore, to convict a defendant of felony murder, the court need not find that the defendant had actual malice; instead the intent to commit the underlying felony constitutes "implied malice."[80] These theories rely on an assumption that an individual who takes part in a felony should understand and assume the risk that someone may get killed in the course of the felony.[81] As discussed below, these

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[76] Birdsong, *supra* note 58, at 20; 40 AM. JUR. 2D *Homicide* § 65 (2008); Gerber, *supra* note 53, at 766.

[77] *See* Birdsong, *supra* note 58, at 19–21.

[78] Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 458 (1985).

[79] *Id.* at 453.

[80] Birdsong, *supra* note 65, at 498.

[81] State courts frequently invoke and rely upon these various rationales when considering the validity of a felony murder conviction. *See, e.g.*, Lowe v. State, 2 So. 3d 21, 46 (Fla. 2008) ("'[Felony murder is] an exception to the general rule that murder is homicide with the specific intent of malice aforethought. Under the felony murder rule, state of mind is immaterial. Even an accidental killing during a felony is murder.'") (quoting Adams v. State, 341 So. 2d 765, 767–68 (Fla. 1976)); State v. Allen, 875 A.2d 724, 732 (Md. 2005) ("Our current analysis, of course, is that the intended perpetration of the felony is an independent murderous *mens rea*, should death result, and is just as blameworthy and just as worthy of punishment as murder as would be the specific intent to kill. . . . The felony-murder rule has been justified because the defendant is acting maliciously at the time he kills, even if the object of his malice is unrelated to the victim's death."); State v. Cole, 542 N.W.2d 43, 51 (Minn. 1996) (same); State v. Bridges, 133 N.J. 447, 474 (N.J. 1993) (noting that the modern application of the felony murder rule is akin to strict liability); People v. Gutierrez, No. S018634, 2002 Cal. LEXIS 5239, at *1140–41 (Cal. Aug. 15, 2002) ("The mental state required is simply the specific intent to commit the underlying felony; neither intent to kill, deliberation, premeditation, nor malice aforethought is needed. There is no requirement of a strict 'causal' or 'temporal' relationship between the 'felony' and the 'murder.' All that is demanded is that the two 'are parts of one continuous transaction.'") (internal citations omitted); Lisenby v. State, 543 S.W.2d 30, 36, 38 (Ark. 1976) (Fogleman, J., dissenting) ("It is significant, however, that we have embraced the concept that an accomplice may be found guilty of first degree murder where specific intent is a required element, even though he did not intend to take life. This is a clear acceptance of the principle that the intent of the actor who commits an assault while engaged in the execution of a crime according to a common design may be imputed to his accomplices

rationales are highly questionable when applied to adolescents.

IV. UNITED STATES SUPREME COURT PRECEDENT THAT "KIDS ARE DIFFERENT"

The United States Supreme Court has recognized that adolescent development is relevant to constitutional analysis. Between 2005 and 2011, the Court issued a trilogy of opinions that have a direct bearing on the constitutionality of life without parole sentences—or any mandatory sentence—for juveniles convicted of felony murder.

A. Roper v. Simmons

In *Roper v. Simmons*,[82] Christopher Simmons was convicted of murder and sentenced to death for a crime he committed when he was seventeen. The Supreme Court held the death penalty unconstitutional for juveniles, finding three main differences between juveniles and adults which demonstrate that juveniles, categorically, cannot be classified among the worst offenders: their "lack of maturity" and "underdeveloped sense of responsibility;" their vulnerability and susceptibility to "negative influences and outside pressures;" and their transient character and personality traits.[83]

In light of these characteristics, the Court noted, "[I]t is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."[84] The Court found that juveniles, as a class, were less culpable than adults, and the penological justifications for the death penalty were therefore weaker when applied to juveniles.[85]

The Court further found that it was necessary to adopt a categorical prohibition on the death penalty—rather than allowing a case-by-case assessment of a juvenile's level of culpability—because "[a]n unacceptable

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who entered into that design.");People v. Scheer, 518 P.2d 833, 835 (Colo. 1974) ("[U]nder [state] law, in felony murder, which was the case here, specific intent to take a human life with malice is not, in fact, an element of that crime. All that is necessary to sustain the charge is that a life be taken during the course of a felony in which the defendant was engaged."); State v. Heaivilin, No. 1-417, 2002 Iowa App. LEXIS 29, at *13–14 (Iowa Ct. App. Jan. 9, 2002) ("Although sufficient evidence of a defendant's guilt may come from her knowledge during the felony of the principal's murderous intent, such knowledge is not required. It is immaterial whether the killing was in the *contemplation* or intention of the defendant. It is only necessary that the principal had the necessary *mens rea*, and the act was a consequence of carrying out the unlawful common design.") (internal citations omitted). *See also* Guyse v. State, 690 S.E.2d 406, 408 (Ga. 2010) (mens rea to commit the underlying felony supplies the mens rea for the felony murder charge); Commonwealth v. Rolon, 784 N.E.2d 1105 (Mass. 2003) (same); State v. Contreras, 46 P.3d 661, 662–64 (Nev. 2002) (same); State v. Cheatham, 6 P.3d 815, 821 (Idaho 2000) (same); State v. Chambers, 524 S.W.2d 826, 829 (Mo. 1975) (same); Dawkins v. State, 252 P.3d 214, 219 (Okla. Crim. App. 2011) (same).

[82] Roper v. Simmons, 543 U.S. 551, 551 (2005).

[83] *Id.* at 569–70.

[84] *Id.* at 570.

[85] *Id.* at 571.

likelihood exists that the brutality and cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."[86] In the context of capital murder, the Court recognized that the majority of youth who commit crimes will not grow up to be lifetime offenders, and that even experts cannot differentiate between the offenders whose crimes are merely a function of their age and immaturity and those rare juvenile offenders whose crimes will persist throughout their life.[87]

B. Graham v. Florida

Five years after the Court's ruling in *Roper*, the Court had another opportunity to consider the constitutionality of severe sentences imposed on juveniles. In *Graham v. Florida*, sixteen-year-old Terrance Graham pleaded guilty to armed robbery and attempted armed robbery in adult criminal court.[88] While on probation for that crime, he was arrested after he and two older co-defendants forcibly entered and robbed a home while holding the occupants of the home at gunpoint.[89] The trial court found that Graham had violated his probation and imposed a life without parole sentence based on his previous conviction for armed robbery.[90]

In *Graham*, the Court held the Eighth Amendment prohibits the imposition of a life without parole on a juvenile offender convicted of a nonhomicide offense.[91] As compared to an adult murderer, children "who did not kill or intend to kill" have a "twice diminished" moral culpability due to both their age and the nature of the crime.[92] The Court again relied on the adolescent development and brain science research discussed in *Roper*.[93] The Court recognized the severity of a life without parole sentence, and determined that no penological goal justified the sentence for juveniles convicted of nonhomicide offenses.[94] The Court ruled that juveniles convicted of nonhomicide crimes must have "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[95] The Eighth Amendment "forbid[s] States from making the judgment at the outset that these offenders never will be fit to reenter

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[86] *Id.* at 573 (recognizing that, in some cases, the fact that the defendant is a youth is considered an aggravating factor.).
[87] *Id.*
[88] Graham v. Florida, 130 S. Ct. 2011, 2018 (2010).
[89] *Id.* at 2018.
[90] *Id.* at 2020.
[91] *Id.* at 2034.
[92] *Id.* at 2027.
[93] *Graham*, 130 S. Ct. at 2026–27.
[94] *Id.* at 2028–30.
[95] *Id.* at 2030.

society."[96]

The ruling in *Graham* vastly expanded the Court's jurisprudence that juveniles, as a category, are different than adults in ways that are directly relevant to the sentences imposed. In *Graham*, the Supreme Court considered, for the first time, a categorical challenge to a term-of-years sentence (rather than the death penalty), and expanded their Eighth Amendment jurisprudence to impose a new categorical rule applying to juveniles in non-death penalty cases. [97] *Graham* recognized that, in the Eighth Amendment context, while "death is different," "kids are different," too, and they are entitled to a separate categorical analysis when severe adult sentences are applied to them.[98]

C. J.D.B. v. North Carolina

Though not an Eighth Amendment case, in *J.D.B. v. North Carolina*, the Court reaffirmed the findings in *Roper* and *Graham* that "kids are different."[99] *J.D.B.* involved the question of "whether the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda v. Arizona*."[100] The Court emphasized in clear terms that children are categorically different from adults in holding that the age of a child properly informs the *Miranda* analysis.

The Court noted, "A child's age is far 'more than a chronological fact.'"[101] "It is a fact that 'generates commonsense conclusions about behavior and perception.' Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself. . . ."[102] The social science and neuroscientific research about adolescent development cited at length in both *Roper* and *Graham* was relegated to a short footnote in *J.D.B.* because the Court found it obvious that adolescents fundamentally differ from adults in ways that are relevant to its constitutional analyses. [103]

V. ASSESSING THE CONSTITUTIONALITY OF LIFE WITHOUT PAROLE SENTENCES FOR JUVENILES CONVICTED OF FELONY MURDER

Sentencing a juvenile convicted of felony murder to life without parole is constitutionally suspect in light of Supreme Court precedent that children are fundamentally different than adults. The argument that these

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[96] *Id.*
[97] *Id.* at 2026.
[98] *Id.* at 2046. (Thomas, J., dissenting).
[99] *J.D.B,* 131 S. Ct. at 2394.
[100] *Id.* at 2398.
[101] *Id.* at 2403 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).
[102] *Id.* at 2403 (quoting Yarborough v. Alvarado, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting) (internal citation omitted).
[103] *Id.* at 2403, n.5.

sentences are now unconstitutional are strengthened by the facts that the rationale underlying felony murder does not apply to juveniles and no penological goal justifies a life-without-parole sentence when applied to juveniles.

A. Supreme Court Precedent and the Constitutionality of Juvenile Life Without Parole Sentences for Felony Murder

The Supreme Court's recent decisions involving adolescents discussed in Part IV above suggest that the Court would also consider juveniles different from adults for the purposes of felony murder sentencing. As described above, *Roper* found that children who commit homicide offenses—even homicides in which they were the actual killers—are categorically less culpable than adults and are unlikely to be irreparably depraved. In *Graham*, the Court found that juveniles who "do not kill or intend to kill" are twice diminished, because of both their young age and the fact that their crimes do not involve murder. In *J.D.B.*, the Court treated as commonsense that children are different and should not be considered simply "miniature adults"—or equivalent to the adult reasonable person.[104] These decisions together indicate that a juvenile convicted of felony murder, who did not kill or intend to kill, should not be subject to life-without-parole sentences.

Graham's discussion of the diminished culpability of juveniles "who did not kill or intend to kill"[105] in nonhomicide cases suggests that juveniles convicted of felony murder "who did not kill or intend to kill" are similarly "twice diminished" and undeserving of life without parole sentences.[106] In *Graham*, the Court favorably cites to *Enmund v. Florida*, a case holding that an adult convicted of felony murder who did not kill or intend to kill could not be subjected to the death penalty.[107]

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[104] *Id.* at 2404 (citing Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982)).

[105] *Graham*, 130 S. Ct. at 2027. "The Court has recognized that defendants *who do not kill, intend to kill, or foresee that life will be taken* are categorically less deserving of the most serious forms of punishment than are murderers. . . 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." (emphasis added) (internal citation omitted). *Id.*

[106] Though, as argued in this section, the Court's independent analysis in *Graham* applies to juveniles convicted of felony murder who did not kill or intend to kill, the Court did not count juveniles convicted of felony murder in its tally of the number of juveniles serving life without parole sentences for nonhomicide offenses. *See id.* at 2023.

[107] *Id.* at 2027 (citing Enmund v. Florida, 458 U.S. 782, 784–785 (1982)).

Although the Court notes that while "[s]erious nonhomicide crimes "may be devastating in their harm . . . but 'in terms of moral depravity and of the injury to the person and the public,'. . . they cannot be compared to murder in their 'severity and irrevocability'," suggesting that a felony murder defendant may be more culpable than a defendant where no one is killed. The Court in the same paragraph cities favorably to *Enmund,* suggesting that the Court differentiates between individuals convicted of murder and individuals convicted of felony murder, finding individuals convicted of felony murder, particularly where they are mere bystanders, are less culpable than actual killers. *Id.*

Enmund stands for the proposition that participants in felony murders who do not kill or intend to kill—in *Enmund,* the driver of a getaway car—are "categorically less deserving of the most serious forms of punishment than are murderers."[108] In *Enmund*, the Court held that the death penalty cannot be imposed upon a person "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."[109] Enmund, like Kuntrell Jackson, took part in a robbery in which the victims were shot and killed by another participant. The Court held:

> For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.[110]

The *Enmund* Court found that the death penalty "is an excessive penalty for the robber who, as such, does not take human life."[111] *Graham* quoted *Enmund*'s holding that although robbery is "a serious crime deserving serious punishment," it is different from "homicide crimes in a moral sense," even if the robber is convicted of felony murder.[112]

The *Graham* Court's reliance on *Enmund* suggests that life without parole sentences are disproportionate for any juvenile who, like Enmund, did not kill or intend to kill, even if the juvenile participated in a felony in the course of which someone was killed. *Enmund* requires that criminal culpability be limited to a defendant's personal participation. Therefore, if a juvenile convicted of felony murder did not himself kill or intend to kill, he has the same liability as a juvenile in a nonhomicide felony who did not kill or intend to kill. Pursuant to *Graham*, he is less culpable than a murderer, and life without parole is unconstitutionally disproportionate.

As illustration, the opinions in *Graham* and *Enmund* make it difficult to distinguish between the moral culpability of Terrance Graham and Kuntrell Jackson, David Young, or Aaron Phillips. Graham, after being placed on probation for armed robbery, participated in an armed home

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[108] *Id.* at 2027 (citing Enmund v. Florida, 458 U.S. 782, 788 (1982)).
[109] *Enmund*, 458 U.S. at 797.
[110] *Id.* at 801.
[111] *Id.* at 797.
[112] *Graham*, 130 S. Ct. at 2027 (citing *Enmund*, 458 U.S. at 797).

invasion with two twenty-year-olds.[113] Graham himself was armed and held a gun to the chest of the occupant of the home. For thirty minutes, Graham and his co-defendants held two occupants of the home at gunpoint and ransacked the home.[114] Graham and the older men also attempted a second robbery the same night during which one of the other men was shot.[115]

Kuntrell Jackson and David Young similarly participated in armed robberies, but, unlike Terrance Graham, they never personally handled the weapon. Aaron Phillips also participated in a robbery, but neither he nor the older participant in the robbery was armed. Jackson, Young, and Phillips—like Graham—had no foreknowledge that someone would get killed, but, unlike Graham, they had participated in crimes in which the victim was tragically killed. There was no finding that Jackson, Young, or Phillips personally inflicted the fatal wound, and in the cases of Jackson and Young it was clear that other defendants were the actual killers. Looking at their individual actions, as *Enmund* instructs—not the actions of their co-defendants—they are no more culpable than a person who engaged in a non-homicide felony, such as Graham.

Cases upholding the death penalty for adults convicted of felony murder do not undermine this conclusion. *Tison v. Arizona* upheld the death penalty in a felony murder case in which the defendant's "participation [was] major and whose mental state [was] one of reckless indifference."[116] *Graham* quoted *Tison* for the proposition that "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[117] This proposition supports a conclusion that juveniles convicted of felony murder are less culpable than their adult counterparts because of their age and development, as held in *Roper* and *Graham*.

Tison—because of its acceptance of a death penalty sentence for certain felony murder offenses—raises a question of whether, under certain circumstances, a juvenile's level of participation in a felony murder offense may render him sufficiently culpable as to warrant the imposition of a life without parole sentence. However, neither developmental research nor the Court's own precedent would justify such a conclusion. As *Roper* noted, there is "[a]n unacceptable likelihood . . . that the brutality or cold-blooded nature of any particular crime would overpower mitigating

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[113] *Id.* at 2018.

[114] *Id.*

[115] *Id.* at 2019.

[116] Tison v. Arizona, 481 U.S. 137, 152 (1987). The defendants in *Tison* gathered a large arsenal of weapons to help their father escape from prison, took the weapons into a prison to break their father out, helped their father escape, stole a car from a family, and watched as their father repeatedly fired a shotgun at the family, including two young children. *Id.* at 139–41. *Tison* is discussed at greater length below.

[117] *Graham,* 130 S. Ct. at 2028 (quoting *Tison*, 481 U.S. at 149).

arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."[118] Similarly, any seemingly cold-blooded or calculated circumstances of a felony murder offense should not overpower the recognition that juveniles who do not kill or intend to kill are fundamentally less culpable than adults.

B. Rationales for Felony Murder in Light of Research on Adolescent Development

The felony murder doctrine requires simply that an offender participated in a felony and that someone was killed in the course of the felony; there is no requirement that the offender actually committed the killing or intended that anyone would die. As discussed above, felony murder shares some of the attributes of a strict liability offense in that a person who commits a specified act is punished for the consequences of that act, even if the person did not foresee, expect, or intend these consequences. The intent to kill element of the offense 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.[119]

The theories underlying felony murder are inconsistent with behavioral and neuroscientific research on adolescent development. Research confirms that adolescents do not assess risks and make decisions in the same manner as a "reasonable adult," and it is therefore illogical to presume that an adolescent who takes part in a felony—even a dangerous felony—would anticipate or comprehend that someone may be killed as a consequence of the felony.[120]

1. Adolescents' Decision-Making And Risk-Assessment Capacities

Juveniles' decision making processes are very different than those of adults. Research shows that adolescents are "less capable decision makers."[121] Adolescents "lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[122] Moreover, "children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world

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[118] Roper v. Simmons, 543 U.S. 551, 573 (2005).

[119] *See, e.g.*, Commonwealth v. Legg, 417 A.2d 1152, 1154 (Pa. 1980) (finding it proper to impute intent to commit a felony to intent to kill because "the actor engaged in a felony of such a dangerous nature to human life . . . as held to a standard of a *reasonable man*, knew or should have known that death might result from the felony") (emphasis added).

[120] *See J.D.B.*, 131 S. Ct. at 2404 (noting that the common law has long recognized that the "reasonable person" standard does not apply to children).

[121] Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 THE FUTURE OF CHILD. 15, 20 (2008).

[122] *J.D.B.*, 131 S. Ct. at 2403 (quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979) (plurality opinion).

around them."[123] Although, compared to younger children, adolescents have the capacity to reason logically, "adolescents are likely less capable than adults are in *using* these capacities in making real-world choices partly because of lack of experience and partly because teens are less efficient than adults at processing information."[124]

Adolescents are also "less likely to perceive risks and less risk-averse."[125] They attach different values to rewards than do adults. Relatedly, adolescents exhibit sensation-seeking characteristics in which they have a need for "seeking of varied, novel, and complex experiences and the willingness to take physical, social, legal, and financial risks for the sake of such experience."[126] Their need for this sort of sensation may lead them to become involved in risky behaviors.[127] Adolescents also have difficulty exercising self-control.[128] As a result, it is not surprising that "adolescents are overrepresented statistically in virtually every category of reckless behavior."[129]

Finally, adolescents also lack future orientation—they are less likely to think about long-term consequences and are likely to assign less weight to long-term consequences, especially when faced with the prospect of short-term rewards.[130] They have difficulty thinking realistically about what may occur in the future.[131]

Because of these differences, juvenile offenders are not making the same calculations as adults when they participate in felonies. They are not as likely to be weighing the risks of their involvement, including the risk that someone might get hurt or killed. When confronted with the prospect of short-term rewards—from approval of their peers to any tangible rewards from the felony itself—juveniles are more likely to prioritize those rewards over any long-term consequences.

As a result, the rationale for holding a person liable for murder based on their participation in a felony makes little sense when applied to adolescents. Adolescents' risk-taking behavior in engaging in a felony should not be equated with malicious intent, nor should their recklessness

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[123] *Id.*

[124] Scott & Steinberg, *supra* note 120, at 20.

[125] *Id.* at 21.

[126] *See* MARVIN ZUCKERMAN, BEHAVIORAL EXPRESSIONS AND BIOSOCIAL BASES OF SENSATION SEEKING 27 (1994) (defining sensation seeking); *see also* AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., *Kids are Different: How Knowledge of Adolescent Development Theory Can Aid Decision-Making in Court*, JUV. L. CENTER 8 (2000) (applying Zuckerman's definition of sensation seeking to adolescents).

[127] AM. BAR ASS'N JUVENILE JUSTICE CTR. ET AL., *supra* note 125, at 8.

[128] Scott & Steinberg, *supra* note 120, at 22.

[129] Roper v. Simmons, 543 U.S. 551, 569 (2005) (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEV'L REV. 339, 339 (1992)).

[130] Scott & Steinberg, *supra* note 120, at 20; *Graham,* 130 S. Ct. at 2032.

[131] Brief for the American Psychological Association et al. as Amici Curiae Supporting Petitioners at 3–13, Graham v. Florida, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621).

indicate that they are indifferent to human life.[132] Instead, their behavior is a reflection of their impulsiveness and inability to accurately assess risks and exercise good judgment in the face of those risks—characteristics they will outgrow as they mature.

2. Susceptibility to Negative Outside Influence

The Supreme Court has recognized that adolescents are also more "susceptible to negative influences and outside pressures" than adults.[133] Adolescents "have less control, or less experience with control, over their own environment."[134] Research supports the common perception that adolescents are more susceptible to peer pressure than are adults.[135] Because antisocial or criminal activity is sometimes rewarded with higher status among their peers, youth may face pressure to engage in criminal activities that they would otherwise avoid.[136]

Statistics on youth crime are consistent with this developmental research. Youth are much "more likely than adults to commit crimes in groups."[137] A survey of individuals serving juvenile life without parole sentences in California, for example, found that over 75 percent of these individuals committed their crimes in groups of two to eight people.[138]

The element of peer pressure may be especially significant in the context of felony murder where the juvenile participated in a felony with other teens or adults, as demonstrated in the cases of Kuntrell Jackson, David Young, and Aaron Phillips. In such situations, the juvenile may make a spur-of-the-moment decision to participate in the crime—perhaps out of fear that his friends will reject him or he will lose status if he refuses to join.[139] In considering why a hypothetical youth may "choose" to go along with friends who suggest that they hold up a convenience store, researchers Elizabeth S. Scott and Laurence Steinberg look to adolescent development to explain this choice:

> [The youth] may assume that his friends will reject him if he declines to participate – a negative consequence to

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[132] *Cf.* Tison v. Arizona, 481 U.S. 137, 152 (1987) (finding that the actions of the *adult* felony murder defendants "clearly support a finding that they both subjectively appreciated that their acts were likely to result in the taking of innocent life.").

[133] *Roper*, 543 U.S. at 569.

[134] *Id.*

[135] Scott & Steinberg, *supra* note 120, at 20; *see* Brief for American Psychological Association, *supra* note 130, at 3.

[136] Scott & Steinberg, *supra* note 120, at 20–21; Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives From Brain and Behavioral Science*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCI. 55, 56 (2007).

[137] Scott & Steinberg, *supra* note 120, at 21.

[138] HUMAN RIGHTS WATCH, *When I Die, They'll Send Me Home: Youth Sentenced to Life without Parole in California*, 31–32 (Jan. 2008), http://fairsentencingforyouth.org/pdf/When_I_Die.pdf.

[139] Scott & Steinberg, *supra* note 120, at 22.

> which he attaches considerable weight in considering alternatives. He does not think of ways to extricate himself, as a more mature person might do. He may fail to consider possible options because he lacks experience, because the choice is made so quickly, or because he has difficulty projecting the course of events into the future. Also, the "adventure" of the holdup and the possibility of getting some money are exciting. These immediate rewards, together with peer approval, weigh more heavily in his decision than the (remote) possibility of apprehension by the police.[140]

The youth who engages in a robbery is not making a thoughtful, calculated decision. He is responding to pressures, impulses, and emotion, not examining or weighing the risks to himself or to others. As the Supreme Court noted in *Roper*, this "vulnerability" and "lack of control over their immediate surroundings" means that adolescents have "a greater claim than adults to be forgiven for failing to escape the negative influences in their whole environment."[141]

3. Transient Nature

Finally, adolescents who engage in reckless and criminal activity are different from adults in that their personality traits are "more transitory, less fixed."[142] Most juveniles who engage in criminal activity are not destined to become life-long criminals.[143] Although there is a small group of youth whose antisocial and criminal behaviors will continue into adulthood, [144] "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[145] Most youth who commit crimes—even serious crimes—are likely to outgrow these behaviors.[146] Therefore, adolescents convicted of felony murder, even where the crime was violent or brutal, are likely to naturally outgrow the impulses that led to their involvement in the felony. The justifications for the felony murder doctrine and the harsh sentences imposed on juveniles convicted of felony murder are therefore inconsistent with the key characteristics that distinguish adolescents from

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[140] *Id.*

[141] Roper v. Simmons, 543 U.S. 551, 570 (2005).

[142] *Id.*

[143] *Id.*; *see also* Brief for American Psychological Association, *supra* note 130, at 8 (finding that involvement in violent crimes peak at age seventeen and then drops precipitously).

[144] Scott & Steinberg, *supra* note 120, at 24.

[145] *Roper*, 543 U.S. at 573; *see also* Scott & Steinberg, *supra* note 120, at 24 ("it is simply not yet possible to distinguish incipient psychopaths from youths whose crimes reflect transient immaturity.").

[146] Scott & Steinberg, *supra* note 120, at 25.

adults.

C. *Penological Justifications for Juvenile Life Without Parole Sentences for Felony Murder*

The United States Supreme Court has held that "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."[147] Legitimate penological goals recognized by the Supreme Court are retribution, deterrence, incapacitation, and rehabilitation.[148] Supreme Court precedent, combined with both the history and rationale of felony murder and research on adolescent development, establish that sentencing a juvenile convicted of felony murder to life without the possibility of parole serves no penological purpose.

1. Retribution

Retribution cannot justify a life without parole sentence imposed on a juvenile convicted of felony murder because the juvenile's culpability is twice diminished. First, juveniles are categorically less culpable than adults. Even in the context of capital murder, "the case for retribution is not as strong with a minor as with an adult."[149]

Second, the Court has found adults convicted of felony murder who do not kill or intend to kill are less culpable than the actual killers. "It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'"[150] In the felony murder context, the culpability of a person who "did not kill or intend to kill . . . is plainly different from that of the robbers who killed."[151] In examining the constitutionality of imposing the death penalty on a person convicted of felony murder, the Court found that "[t]he question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for [the defendant's] own conduct. The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims."[152] To determine culpability, the Court focuses not on the harm caused, but the individual's role in creating that harm.

In *Tison*, the Court held that the death penalty can be imposed on individuals convicted of felony murder where the individual was a major participant in the crime and was recklessly indifferent to human life.[153]

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[147] Graham v. Florida, 130 S. Ct. 2011, 2028 (2010).

[148] *Id.*

[149] *Roper*, 543 U.S. at 571.

[150] Enmund v. Florida, 458 U.S. 782, 798 (1982) (quoting H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 162 (1968)).

[151] *Id.*

[152] *Id.*

[153] Tison v. Arizona, 481 U.S. 137, 158 (1987).

The Court found that "reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent to kill.'"[154] *Tison* was a case involving adults, not juveniles. Youths are, as a class, more reckless than adults, which can result in "impetuous and ill-considered actions and decisions."[155] As discussed above, the recklessness of a youth is not a manifestation of the youth's indifference to the value of human life so much as a reflection of the youth's immaturity and impulsiveness. Adolescents are not considering the risks and consequences of their actions in the same way as an adult. Therefore, absent a finding that the youth killed or intended to kill, malice should not be presumed by a youth's reckless actions.

Therefore, where a youth did not kill or intend to kill, the culpability of a juvenile convicted of felony murder is twice diminished as compared to an adult murderer. *Graham* established that where culpability is twice diminished, life without parole is unconstitutional.[156]

2. Deterrence

The Supreme Court has questioned whether deterrence is a legitimate rationale both when applied to adults convicted of felony murder and when applied to juveniles convicted of any offense. Using deterrence to justify a sentence imposed on a juvenile convicted of felony murder thus amounts to a "twice diminished" reasoning.

In *Enmund*, an adult felony murder case in which the offender challenged his sentence of death, the Court found that deterrence did not justify the imposition of the death penalty. The Court was "quite unconvinced . . . that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken."[157] The Court found that "competent observers have concluded that there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself."[158]

If deterrence is a questionable rationale for felony murder even as applied to adults, it is even more suspect for juveniles. The Supreme Court has questioned whether the death penalty would have "significant or even measurable deterrent effect on juveniles."[159] "[T]he absence of evidence of deterrent effect is of special concern because the same characteristics that

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[154] *Id.* at 157.

[155] Graham v. Florida, 130 S. Ct. 2011, 2028 (2010) (quoting Johnson v Texas, 509 U.S. 350, 367 (1993)).

[156] *Id.* at 2027.

[157] *Enmund*, 458 U.S. at 798–99.

[158] *Id.* at 799.

[159] Roper v. Simmons, 543 U.S. 551, 571 (2005).

render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."[160] The Court noted, "[i]n particular . . . '[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.'"[161] The Court in *Graham* similarly held that "juveniles . . . are less likely to take a possible punishment into consideration when making decisions."[162]

As deterrence is a questionable justification for felony murder in general, when applied to juveniles in particular, it cannot justify the imposition of life without parole for juveniles convicted of felony murder.

3. Incapacitation

Graham found that incapacitation did not justify imposing life without parole on juveniles. "To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable."[163] As discussed above, "it is difficult even for experts to distinguish [between] transient immaturity, and the rare juvenile offender whose crimes reflect irreparable corruption." [164] As that statement is applied in *Roper* to a juvenile convicted of capital murder, it is no less true for juveniles convicted of felony murder. "Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity."[165]

4. Rehabilitation

A final penological goal identified by the Court is rehabilitation.[166] A life without parole sentence does not further this goal because the juvenile has no opportunity to return to society. Quite simply, "[t]he penalty foreswears altogether the rehabilitative ideal."[167] Accordingly, the goal of rehabilitation can never justify a life without parole sentence, including for juveniles convicted of felony murder.

VI. MANDATORY SENTENCES FOR JUVENILES CONVICTED OF FELONY MURDER

Kuntrell Jackson, Aaron Phillips, and David Young, once convicted of

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[160] *Id.*
[161] *Id.* at 571–72 (quoting Thompson v. Oklahoma, 487 U.S. 815, 837 (1988)).
[162] Graham v. Florida, 130 S. Ct. 2011, 2028–29 (2010).
[163] *Id.* at 2029.
[164] *Roper*, 543 U.S. at 573.
[165] *Graham*, 130 S. Ct. at 2029.
[166] *Id.*
[167] *Id.* at 2030.

felony murder offenses, all faced *mandatory* sentences of life without parole. At no point could the sentencing judge consider their age, level of involvement, or individual culpability. Any mandatory minimum sentence for juveniles convicted of felony murder—even if not as severe as life without the possibility of parole—runs counter to the theories underlying felony murder and research about adolescent development.[168] While some have argued that there should be a presumptive ban on application of the felony murder doctrine to juveniles,[169] at the very least there should be discretion in sentencing when juveniles are tried and convicted of felony murder offenses.

A. Mandatory Life-Without-Parole Sentences for Juveniles Convicted of Felony Murder

If, as argued in Part V, discretionary life without parole sentences are constitutionally questionable based on U.S. Supreme Court precedent and adolescent development, *mandatory* sentences of life without parole for juveniles convicted of felony murder are particularly problematic. Under such schemes, a judge has no choice but to impose a juvenile life without parole sentence without any opportunity to consider the youth's age, level of involvement, degree of culpability, intent or state of mind. Several state courts, including the Illinois Supreme Court, have found such a practice unconstitutional.[170]

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[168] Some states with felony murder mandate minimum term of years sentences for juveniles convicted of felony murder. In Connecticut, for example, a conviction for felony murder mandates a minimum sentence of ten years to life. *See* CONN. GEN. STAT. ANN. §§ 53a-54c; 53a-35 (West 2007). A juvenile convicted of felony murder in Oklahoma must be punished by life without the possibility of parole or life with the possibility of parole. There are no lesser sentencing options. *See* OKLA. STAT. ANN. tit. 21, §§ 701.7 (B); 701.9 (A) (West 2002). Other states also have mandatory sentences for felony murder, though sometimes those mandatory sentences are significantly shorter. Missouri, for example, mandates a minimum ten-year sentence. *See* MO. ANN. STAT. §§ 565.021(1); 558.011(1) (West 1999).

[169] *See* Steven A. Drizin & Allison McGowan Keegan, *Abolishing the Use of the Felony-Murder Rule When the Defendant is a Teenager*, 28 NOVA L. REV. 507, 535–36 (2004). Drizin and Keegan argue that there should be an outright ban on applying the felony murder rule to juvenile defendants under the age of fourteen and a presumptive ban for juveniles ages fourteen to seventeen. *Id.* Drizin and Keegan propose imposing a "heavy burden" on prosecutors who wish to try juveniles ages fourteen to seventeen for felony murder, requiring the prosecutor to show that "the defendant was capable of forming the criminal intent of the underlying felony; that the alleged offense was committed in an aggressive or violent manner; that death or great bodily harm is a natural and probable consequence of the defendant's actions; and that the defendant's actions are the proximate and legal cause of the victim's death." *Id.* at 537.

[170] *See also* Arrington v. State, No. 2008-2700, 2012 Fla. App. LEXIS 536, at *19–20 (Fla. Dist. Ct. App. Jan. 18, 2012) (holding that "Florida's statutorily mandated life-without-parole sentence for juveniles convicted of felony murder when they were not the actual killer raises a sufficient risk of a cruel and unusual sentence that trial courts must consider whether such a sentence is proportionate given the circumstances of the juvenile's crime."); People v. Jones, Circuit Court No. 1979-11040-FC (9th Cir. Ct., Kalamazoo Co., Dec. 21, 2011) (finding that a mandatory life without parole sentence for a juvenile convicted of felony murder who did not kill or intend to kill was unconstitutional pursuant to *Graham*).

In *People v. Miller*,[171] fifteen-year-old Leon Miller was convicted of first-degree murder, based on accomplice liability, and subject to a mandatory sentence of life without parole.[172] Leon Miller served as a lookout while two other individuals approached people they believed to be rival gang members.[173] While he was serving as lookout, the other individuals shot and killed the rival gang members.[174] When the shooting began, Miller ran away.[175]

After Miller was convicted, the trial court refused to impose the mandatory life without parole sentence on the grounds that it violated both the proportionate penalties clause of the Illinois Constitution and the Eighth Amendment of the United States Constitution.[176] The trial judge stated:

> I believe [Miller] was proved guilty beyond a reasonable doubt, and I believe he should suffer harsh criminal consequences for acting as a look-out in this case, but to suggest that he ought to receive a sentence of life without the possibility of parole, I find to be very, very hard to swallow to the point where I can describe it as unconscionable. . . . I have a 15-year-old child who was passively acting as a look-out for other people, never picked up a gun, never had much more than – perhaps less than a minute – to contemplate what this entire incident is about, and he is in the same situation as a serial killer for sentencing purposes.[177]

The Illinois Supreme Court affirmed this holding. After examining three separate statutes—the Juvenile Court Act mandating certain juveniles be tried in adult criminal court, the accountability statute holding all individuals who participate in a criminal design equally responsible for the conduct and consequences, and the multiple-murder sentencing statute mandating a sentence of life without parole—the court found that there was no opportunity to "consider[ ] the actual facts of the crime, including the defendant's age at the time or the crime or his or her individual level of culpability."[178] The Court held that the mandatory life without the possibility of parole sentence "grossly distorts the factual realities of the case and does not accurately represent defendant's personal culpability

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[171] People v. Miller, 781 N.E.2d 300 (Ill. 2002).
[172] *Id.* at 302–03.
[173] *Id.* at 303.
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Miller*, 781 N.E.2d at 303.
[178] *Id.* at 308.

such that it shocks the moral sense of the community."[179] The court grounded its holding in the longstanding recognition that juveniles and adult offenders are fundamentally different.[180]

United States Supreme Court precedent similarly supports a holding that mandatory life without parole sentences for juveniles convicted of felony murder are unconstitutional. *Graham* noted that, while some juvenile offenders may turn out to be irredeemable and therefore would never be released on parole, "[the Eighth Amendment] forbid[s] States from making the determination at the outset that those offenders never will be fit to reenter society."[181] Graham mandated "some meaningful opportunity to gain release based on demonstrated maturity and rehabilitation."[182] Mandatory life without parole sentences imposed upon juveniles are particularly problematic under the Eighth Amendment; not only do the juveniles have no opportunity to demonstrate their maturity, the determination that they are incorrigible is based on the actions of other participants in the felony, not their own individual characteristics.

B. Mandatory (Non-Life Without Parole) Sentences for Juveniles Convicted of Felony Murder

Any mandatory adult sentence for a juvenile convicted of felony murder, even if not life without parole, is constitutionally suspect. A sentencer must be able to fashion an appropriate sentence for a juvenile convicted of felony murder, and should not be required to impose a mandatory sentence designed for adults convicted of the offense.

In light of the Court's rulings in *Roper*, *Graham*, and *J.D.B.*, the appropriateness of ever imposing mandatory adult sentences on juveniles is questionable.[183] These cases all held that juveniles are different from adults in fundamental ways, and *Roper* and *Graham* both held that juveniles are categorically less culpable than adults. Therefore, a mandatory adult sentence that does not account for the youth's reduced

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[179] *Id.*

[180] *Id.* at 309. This case, decided before the U.S. Supreme Court's rulings in *Graham* and *J.D.B.* maintained that a life without parole sentence for a juvenile convicted of felony murder may in some cases be appropriate. *Id.* at 341.

[181] Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

[182] *Id.*

[183] Washington State has prohibited imposing mandatory sentences on juveniles convicted in adult court. WASH. REV. CODE ANN. § 9.94A.540 (West 2010). The findings accompanying the statute state: "(1) The legislature finds that emerging research on brain development indicates that adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults. It is appropriate to take these differences into consideration when sentencing juveniles tried as adults. The legislature further finds that applying mandatory minimum sentences for juveniles tried as adults prevents trial court judges from taking these differences into consideration in appropriate circumstances. (2) The legislature intends to eliminate the application of mandatory minimum sentences under RCW 9.94A.540 to juveniles tried as adults, and to continue to apply all other adult sentencing provisions to juveniles tried as adults." *Id.*

culpability and individual characteristics is constitutionally infirm.

In death penalty cases involving *adults* convicted of felony murder, the United States Supreme Court has recognized the importance of individualized determinations. The dissent in *Enmund,* for instance, argued against a categorical prohibition on imposing the death penalty in felony murder cases:

> [T]he intent-to-kill requirement is crudely crafted; it fails to take into account the complex picture of the defendant's knowledge of his accomplice's intent and whether he was armed, the defendant's contribution to the planning and success of the crime, and the defendant's actual participation during the commission of the crime. Under the circumstances, the determination of the degree of blameworthiness is best left to the sentencer.[184]

According to the dissent, a sentence in a capital felony murder case "must consider any relevant evidence or arguments that the death penalty is inappropriate for a particular defendant because of his relative lack of *mens rea* and his peripheral participation in the murder."[185] The defendants in both *Tison* and *Enmund* were both convicted of felony murder, but, based on the defendant's personal conduct and culpability, the Supreme Court found the death penalty constitutional in *Tison* and unconstitutional in *Enmund*. Mandatory sentencing schemes, however, do not allow the sentencer to adjust the sentence to the defendant's personal level of culpability.

Mandatory adult sentences for felony murder also do not account for juveniles' diminished capacity and their individual development as compared with adults. A judge sentencing a juvenile convicted of felony murder must have the opportunity to assess the juvenile's individual level of culpability, considering not only the juvenile's level of involvement in the crime, but also how the juvenile's age and development may have impacted his actions or involvement. As previously discussed, the recklessness and impulsiveness of juveniles, their inability to perceive and weigh risks, their vulnerability to outside pressure, and the transient nature of these characteristics makes the rationale for imposing mandatory adult sentences for felony murder questionable when applied to a juvenile. The assumptions and presumptions that a juvenile knew and considered, or should have known or foreseen, the potentially deadly consequences of participating in a felony—even a dangerous felony—are inconsistent with the realities of adolescent development. As a result, a court should have

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[184] Enmund v. Florida, 458 U.S. 782, 825 (1982) (O'Connor, J., dissenting).
[185] *Id.* at 828 (O'Connor, J., dissenting).

the discretion in sentencing a juvenile convicted of felony murder such that the court can consider the age of the juvenile, the level of involvement in the offense, the circumstances of the offense, and the juvenile's individual level of culpability in light of his or her development. Chief Justice Roberts' concurrence in *Graham* noted that "[o]ur system depends upon sentencing judges applying their reasoned judgment to each case that becomes before them."[186]

A mandatory sentence that does not allow the sentencer to account for the juvenile's individual level of culpability—including his actions, intent and expectations—is counter to the Court's reasoning in *Enmund* and *Tison*, as well as *Roper*, *Graham,* and *J.D.B.*

VII. CONCLUSION

The United States Supreme Court has established that juveniles are different than adults in constitutionally relevant ways, including for the purposes of the Eighth Amendment assessment of cruel and unusual punishment. The question of the constitutionality of life-without-parole sentences for juveniles convicted of felony murder is before the Court in the 2011–12 term. Based on the Court's recent decisions, the rationale underlying felony murder, and adolescent development research, the constitutionality this sentence is highly in doubt. Whether a mandatory sentence for a term of years other than 'life' is ever appropriate for juveniles convicted of felony murder is not before the Supreme Court, and the prospects of the Court examining that issue will depend, in part, on the Court's ruling in *Jackson v. Hobbs*.

Finding that juveniles cannot be sentenced to life without parole for felony murder would not mean that these juveniles would escape without punishment; it would merely mean that they would have an opportunity to demonstrate that they have matured and changed such that they are entitled to release from prison. Similarly, a ban on mandatory (non-life without parole) sentences for felony murder would not mean that a juvenile would never receive the same sentence as an adult; it would merely mean that his youth, immaturity, level of involvement, and potential for change would have to be taken into account at sentencing. Youths make mistakes—sometimes huge mistakes with tragic consequences—but the sentences they receive must account for the fact that they are not yet fully-formed, rational and competent decision-makers; they "cannot be viewed simply as miniature adults."[187]

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[186] Graham v. Florida, 130 S. Ct. 2011, 2042 (2010) (Roberts, C.J., concurring).
[187] J.D.B. v. North Carolina, 131 S. Ct. 2394, 2397 (2011).

VII. POSTSCRIPT

After this Article was written, but prior to publication, the United States Supreme Court issued an opinion in *Jackson v. Hobbs*, a case described at length in this Article. Decided together, *Miller v. Alabama* and *Jackson v. Hobbs*[188] held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"[189] The ban on mandatory life without parole sentences applies to juveniles convicted of *any* homicide offense, not just felony murder offenses.[190]

The decision in *Miller* and *Jackson* continues to advance the Court's Eighth Amendment jurisprudence "that children are constitutionally different from adults for the purposes of sentencing."[191] The Court stated that "none of what *Graham* said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific . . . So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile."[192] The Court found that mandatory juvenile life without parole sentences were flawed since they "preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."[193] The Court therefore held that a sentencer must "take into account how children are different, and how these differences counsel against irrevocably sentencing them to a lifetime in prison."[194]

Because a ban on mandatory life without parole was "sufficient to decide these cases,"[195] the Court did not consider Jackson's and Miller's alternative arguments, including Jackson's argument – and the argument of this Article – that the Eighth Amendment requires a categorical ban on life without parole for juveniles convicted of felony murder. Though not reaching the issue, the Court's opinion, together with Justice Breyer's concurrence, lend strong support to the arguments in this Article that a life

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[188] 567 U.S. ---; --- S.Ct. ---; 2012 WL 2368659 (June 25, 2012).

[189] *Id.* at *4.

[190] Part VI of this Article describes the constitutional infirmities of mandatory life without parole sentences for juveniles convicted of felony murder.

[191] 2012 WL 2368659 at *7.

[192] *Id.* at *8.

[193] *Id.* at *11. A juvenile convicted of homicide offenses is instead entitled to individualized sentencing that, the Court suggests, takes account of his "chronological age," "immaturity, impetuosity, and failure to appreciate risks and consequences," "the family and home environment that surrounds him," "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him," the "incompetencies associated with youth," particularly as they relate to criminal justice proceedings and procedures, and "the possibility of rehabilitation." *Id.*

[194] *Id.* at *12.

[195] *Id.*

without parole sentence for a juvenile convicted of felony murder is *always* unconstitutional.

First, the Court in *Miller* noted that, "given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon*."[196] The Court then suggests the sentencer must consider factors including the "nature of [the juveniles'] crimes,"[197] "the circumstances of the homicide offense, including the extent of [the juvenile's participation] in the conduct,"[198] and whether a juvenile was "the shooter [or] the accomplice"[199] when determining an appropriate sentence.[200] Since, specifically, an accomplice is less culpable than a shooter, and, more generally, a person who did not kill or intend to kill is less culpable than an intentional killer, the Court's reasoning implies that a juvenile convicted of felony murder would never be categorized as one of the "uncommon" most serious, most culpable juvenile offenders for whom a life without parole sentence would be proportionate or appropriate.[201]

In his concurrence, Justice Breyer makes explicit what the majority merely implies, stating – as argued in Part V of this Article[202] – that "the Eighth Amendment as interpreted in *Graham* forbids sentencing Jackson [who was convicted of felony murder] to [life without parole], regardless of whether its application is mandatory or discretionary."[203] Justice Breyer wrote:

> Given Graham's reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim. Quite simply, if the juvenile either kills or intends to kills the victim, he lacks "twice diminished" responsibility. But where the juvenile neither

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[196] *Id.* (emphasis added).

[197] *Id.* at *17.

[198] *Id.* at *11.

[199] *Id.*

[200] Specifically discussing Jackson's case, the Court found that the fact that Jackson did not fire the gun that killed the victim, that the prosecutor did not argue that he intended the victim's death, and his age all "go to Jackson's culpability for the offense," citing *Graham* for the proposition a that a juvenile who does not kill or intend to kill has a twice diminished moral culpability. *Id.*

[201] *See id.* at *18 (Breyer, J., concurring) ("The dissent itself here would permit life without parole for 'juveniles who commit the worst types of murder,' but that phrase does not readily fit the culpability of one who did not himself kill or intend to kill.")

[202] Many of this Article's arguments were also included in the *amicus curiae* brief Juvenile Law Center and other advocates submitted in *Miller* and *Jackson*. *See* Brief for Juvenile Law Center et al. as Amici Curiae Supporting Petitioners, *Miller v. Alabama* & *Jackson v. Hobbs*, --- U.S. --- (2012) (Nos. 10-9646 and 10-9647), at 24-32.

[203] *Miller*, 2012 WL 2368659 at *17 (Breyer, J., concurring).

> kills nor intends to kill, both features emphasized in *Graham* as extenuating apply.[204]

Consistent with arguments made in Part V of this Article, Justice Breyer argues that a juvenile cannot be subjected to life without parole based on the theory of "transferred intent" underlying the felony murder doctrine.[205] Relying on *Enmund*, Breyer notes that if transferred intent is not sufficient to warrant the imposition of the death penalty on an adult, in light of *Graham*, transferred intent similarly cannot be the basis of sentencing a juvenile convicted of felony murder to life without parole, the harshest available sentence.[206] Though acknowledging that the Constitution sometimes allows the imposition of the harshest available sentence (for adults, the death penalty) when adult felony murder defendants are "actively involved" in the crime and display "a reckless disregard for human life," Justice Breyer draws a different line for juveniles. Justice Breyer writes, and this Article discusses in Parts V.A and V.C., that "even juveniles who meet the *Tison* standard of 'reckless disregard' may not be eligible for life without parole."[207] To face a life without parole sentence, a juvenile must have either killed or intended to kill; recklessness is not sufficient.

In his concurrence in *Miller*, Justice Breyer articulated the "clear rule" dictated by *Graham*: "The only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses who 'kill or intend to kill.'"[208] This Article has aimed to explain how *Roper*, *Graham*, and *J.D.B.* together compel this rule. The decision in *Miller* and *Jackson*, though not reaching the issue directly, provides additional support for this rule and opens the door for future challenges to the constitutionality of life without parole sentences imposed upon juveniles convicted of felony murder.

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[204] *Id.*

[205] *Id.* at *18.

[206] *Id.* Justice Breyer also noted that applying the doctrine of transferred intent to a juvenile who did not kill or intend to kill would be "fallacious reasoning," because, as discussed in Part V.B. of this Article, juveniles lack the capacity to understand the full consequences of their actions and adjust their conduct accordingly. *Id.*

[207] *Id.*

[208] *Id.*