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JUVENILE CULPABILITY AND THE FELONY MURDER RULE: APPLYING THE *ENMUND* STANDARD TO JUVENILES FACING FELONY MURDER CHARGES

by

STERLING ROOT

A thesis submitted in partial fulfillment of the requirements for the Degree of Bachelor of Arts

with Honors in Public Policy and Law

TRINITY COLLEGE

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***Abstract*:** Over the past decade, the Supreme Court has issued decisions in numerous cases (*Roper v. Simmons*, *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana*) involving juvenile sentencing that have radically transformed our juvenile criminal justice system. While some of these cases did involve juveniles convicted of felony murder, the Supreme Court never directly addressed how to handle juvenile sentencing in felony murder cases. This leaves a gap in society's understanding of juvenile felony murder sentencing that must be addressed. Otherwise, many juveniles that never intended, attempted, or wished that a life be taken might spend the rest of their lives in prison, without ever being given the possibility of a second chance. This paper proposes using the *Enmund* standard for determining which juveniles exhibit the requisite culpability to be sentenced to life without the possibility of parole in prison.

Acknowledgements
(In Order of Life Appearance)

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Introduction

On October 3, 2012, Blake Layman (age 16), Jose Quiroz (age 16), Levi Sparks (age 17), Anthony Sharp (age 18), and Danzele Johnson (age 21) acted on an ill-conceived, spur of the moment idea, which would dramatically change the rest of their lives. The five boys, strapped for cash, searched their neighborhood looking for a house to burglarize. Unarmed and expecting nobody to be home, four of the young boys entered the back door of a house while Levi Sparks observed from across the street. Upon their entrance, the homeowner woke up, grabbed his gun, and shot at the boys, killing Danzele Johnson and injuring Blake Layman. When the criminal trial for the juvenile burglars reached the Courts, the four surviving teenage boys, now known as the "Elkhart Four," were tried as adults and convicted of first-degree murder under Indiana's felony murder statute for the death of Danzele Johnson. These juveniles were unarmed, did not pull the trigger of the gun that killed their friend, did not foresee or contemplate the risk of the homeowner being present at the time of the crime, and watched their friend die in front of their eyes. Even so, the four survivors of the crime, Quiroz, Layman (who himself suffered a gunshot wound inflicted by the homeowner), Sparks, and Sharp were now destined to spend 45 to 55 years in prison on charges of a murder they never intended, desired, or even imagined might have occurred.[1]

Readers may be shocked to learn that it is possible for a person to be charged with first-degree murder and even be sentenced to death, without ever personally killing someone. The law responsible for this tough sentencing is called the, "Felony Murder Rule." In its most general formulation, the felony murder rule broadens the category of first-degree murder and states that, "any death which occurs during the commission of a felony is first degree murder, and all

[1] "Who Are The Elkhart 4." FreeTheElkhart4com. 2013. Accessed April 20, 2016. http://freetheelkhart4.com/who-are-the-elkhart-4/.

participants in that felony or attempted felony can be charged with and found guilty of murder."[2] After reading cases like that of the Elkhart Four, it is easy to see why the felony murder rule has become one of the most widely criticized principles of criminal law.[3] Despite overwhelming criticism, the rule continues to exist in 47 states and drafters of the Model Penal Code decided to maintain a version of the felony murder rule in their most recent formulation of the code.[4]

For at least the past century, scholars have debated the origins, rationale, sentencing structure, and merits of the felony murder rule. On two critical occasions, the Supreme Court of the United States has stepped in to issue rulings on the scope and application of the felony murder rule. The first of these significant cases was *Enmund v. Florida* (1982), in which the Court held that it is unconstitutional to impose the death penalty upon a person who does not personally kill or attempt to kill, intend to kill, or facilitate the killing of a person.[5] Just five years later, the Court revisited its ruling in *Enmund*, when it heard the case of *Tison v. Arizona* (1987), and held that imposition of the death penalty is a constitutionally acceptable punishment for an individual who was a major participant in the underlying felony during which a murder was committed and who behaved with a "reckless indifference to human life."[6] This holding weakened the impact of the original decision in *Enmund*, and provided that a co-felon that does not directly perform the act that causes the death of an individual can be found just as culpable as their accomplice who performed the act.

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[2] "Felony Murder Doctrine." Law.com: Legal Dictionary. Accessed April 20, 2016. http://dictionary.law.com/Default.aspx?selected=741.

[3] Binder, Guyora. "The Origins of American Felony Murder Rules." *Stanford Law Review* 57, no. 1 (2004): 60. Accessed October 31, 2015. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1925048.

[4] Francis, Traci R. "Availability of the Felony-Murder Rule Today: Equitable and Just or Unfair and Excessive?" Master's thesis, University of Florida, 2005. Accessed April 20, 2016. http://etd.fcla.edu/CF/CFE0000648/Francis_Traci_R_200508_MS.pdf.

[5] *Enmund v. Florida*, 458 U.S. 782 (1982).

[6] *Tison v. Arizona*, 481 U.S. 137 (1987).

After decades of scholarly debate and analysis of these Supreme Court cases, several leading authorities have reached the conclusion that the merits of the felony murder rule strongly depend on the particular statute at issue.[7] Almost every person reading the Elkhart case above will agree that the severity of the punishment imposed upon the juveniles was excessive because the murder was not only unintended and arguably unforeseeable, but also because the direct act that caused the death of Danzele Johnson was performed by a non-participant in the underlying felony. It could be argued that the defendants' sentences were entirely based on the extremely low probability circumstance that the homeowner was present at the time of the crime and owned a gun. Luckily for the juveniles, the appeals Courts in Indiana agreed that the sentence was disproportionate to the nature of the crime, and the original sentences for the Elkhart Four have since been reversed. In addition, Levi Sparks (who only observed the burglary being committed by his friends from across the street, and who received the lightest sentence initially) has been freed from prison.[8] This case does however illustrate the damage that a poorly written felony-murder statute might have on individuals who commit crimes.

Professors Guyora Binder and David Crump have emerged as the leading contemporary scholars on the felony murder rule. Together they have made strong arguments concerning the history, rationale, and merits of the rule. Guyora Binder has proposed that those facing charges that might be subject to the rule be assessed based on "(1) the actor's expectation of causing

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[7] Crump, David. "Reconsidering the Felony Murder Rule in Light of Modern Criticisms: Doesn't the Conclusion Depend upon the Particular Rule at Issue." Harvard Journal of Law and Public Policy 32, no. 3, 1158-183. Accessed April 20, 2016. http://www.harvard-jlpp.com/wp-content/uploads/2009/05/CrumpFinal.pdf.

[8] Brown, Jasmine, Lauren Effron, and Sally Hawkins. "Indiana Man, 21, Who Was Sentenced to 50 Years in Prison in 'Elkhart 4' Controversial Felony Murder Case, Enjoys Freedom." ABC News. February 17, 2016. Accessed April 20, 2016. http://abcnews.go.com/US/indiana-man-21-sentenced-50-years-prison-elkhart/story?id=33919381.

harm and (2) the moral worth of the ends for which the actor imposes this risk."[9] Similarly, Professor David Crump has proposed that in its best form, a proper felony murder statute should be written to include a person who, "Commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual."[10] Reflected in this ideal statute is an underlying notion of a reasonable expectation of causing harm. Together, Crump and Binder's formulations of the felony murder rule, combined with previous Supreme Court rulings, offer the most defensible versions of felony murder rule sentencing that exist.

In the past several decades, the Supreme Court has also begun making drastic changes in the way juvenile criminal justice sentencing is handled. In the cases of *Thompson v. Oklahoma* (1988),[11] *Roper v. Simmons* (2005),[12] *Graham v. Florida* (2010),[13] *Miller v. Alabama* (2012),[14] and *Montgomery v. Louisiana* (2016),[15] the Court has issued holdings to limit the application of the death penalty,[16] life without parole,[17] and mandatory sentencing in the context of juveniles.[18] In each of these holdings, the Court has relied heavily on recent neuroscience studies that demonstrate the diminished culpability of juvenile offenders, their inability to fully foresee risk, their transient nature, and their increased likelihood of falling to outside pressures, including peer

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[9] Binder, Guyora. "Making the Best of Felony Murder." *Boston University Law Review* 91, no. 403 (2012): 409. (Accessed April 20, 2016) http://ssrn.com/abstract=1898772.
[10] Crump, "Reconsidering," 1166.
[11] *Thompson v. Oklahoma*, 487 U.S. 815 (1988).
[12] *Roper v. Simmons*, 543 U.S. 551 (2005).
[13] *Graham v. Florida*, 560 U.S. 48 (2010).
[14] *Miller v. Alabama*, 567 U.S. ___ (2012).
[15] *Montgomery v. Louisiana*, 577 U.S. ___ (2016).
[16] See *Thompson v. Oklahoma,* (1988) and *Roper v. Simmons* (2005).
[17] See *Graham v. Florida* (2010), *Miller v. Alabama* (2012), and *Montgomery v. Louisiana* (2016)
[18] See *Miller v. Alabama* (2012), and *Montgomery v. Louisiana* (2016)

pressure.[19] While the case of *Miller v. Alabama* did involve a juvenile convicted of felony murder, the Court's holding in the case did not touch on the application of the felony murder rule for juveniles.

In light of these recent Court cases and recent findings in neurological science, the scholarly discussion questioning the underlying rationale of the felony murder rule and the manner in which felony murder statutes are constructed for juveniles must be completely rethought. According to a 2012 study performed by Human Rights Watch, roughly 2,500 people are serving life without parole for crimes they committed as juveniles.[20] A study conducted in 2005 by the Human Rights Watch and Amnesty International found that "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.' "[21] These statistics imply that as of 2005, as many as 650 people could be spending their entire lives in prison, starting before the time they even finish high school, for a murder that was either (1) committed by a co-participant during the commission of a felony, (2) never intended to happen, or (3) was not foreseen as a potential consequence of their crime. The imposition of life without parole sentencing for

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[19] See *Roper v. Simmons* (2005), *Graham v. Florida* (2010), *Miller v. Alabama* (2012), and *Montgomery v. Louisiana* (2016)

[20] Human Rights Watch. "Against All Odds: Prison Conditions for Youth Offenders Serving Life without Parole Sentences in the United States," by Elizabeth Calvin, 1-56432-850-3. (United States of America). *Human Rights Watch*, 2012. 1-47. https://www.hrw.org/sites/default/files/reports/us0112ForUpload_1.pdf.

[21] Keller, Emily C. "Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham & J.D.B.," JLC 11, no. 2 (2012): 297-326, http://www.jlc.org/sites/default/files/article_images/Keller%20-%20CPILJ%20Final%20PDF.pdf (Accessed April 20, 2016). Citing, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States, (Hum. Rights Watch/Amnesty Int'l, New York, N.Y.), 2005, www.hrw.org/sites/default/files/reports/ TheRestofTheirLives.pdf.

juveniles who never foresaw or intended that a murder take place is a problem that society must address.

In the coming chapters, I will argue that in the context of juveniles, the underlying rationale for the felony murder rule no longer meets the standards proposed in *Tison v. Arizona* (1987). Instead, I propose the original sentencing standard created in the case of *Enmund v. Florida* (1982) should be used as the benchmark for sentencing juveniles to life in prison without parole. This requires that for a juvenile to be sentenced to life without the possibility of parole, he or she must personally kill or attempt to kill, intend to kill, or facilitate the killing of a person. Chapter 1 provides an in depth examination of the history of the felony murder rule in the United States, an overview of the scholarly debate, and an analysis of the Supreme Court rulings regarding the rule. Chapter 2 provides an examination of juvenile culpability in light of juvenile Supreme Court cases. Chapter 3 examines the effect these holdings have on juvenile sentencing under the felony murder rule and proposes the use of the *Enmund* standard for determining which juveniles can be sentenced to life without possibility of parole for their crime. And finally, Chapter 4 provides a framework for how states should move forward and the implications recent decisions have on life without parole sentencing.

Chapter 1: Origins and History of the Felony Murder Rule

A proper discussion of juvenile sentencing under the felony murder rule requires a thorough examination of the rule's origins, history, scholarly debates, and the current legislative and judicial standing in the United States, as the felony murder rule is one of the most widely criticized principles of American criminal law.[22] Historically, scholars have taken issue with many aspects of the rule claiming it defies traditional *mens rea* requirements of criminal culpability, is inconsistent with the proof of liability required in wrongful death actions, has no deterrent effects when applied, and does not align with criminal law standards of proportionality.[23] Even "the drafters of the Model Penal Code wrote that it is hard to find 'principled argument' for the doctrine."[24] Despite serious criticisms from the scholarly community and the drafters of the Model Penal Code (the "MPC"), the rule continues to exist in 47 states, the Supreme Court has issued rulings to allow the death penalty to be applied in felony murder cases, and the drafters of the MPC decided to maintain a version of the law in their most recent formulation.[25] Today, scholars have moved away from the belief that the felony murder rule is completely indefensible, and have begun to reach a consensus on its merits. Professors David Crump and Guyora Binder have emerged as the most prominent scholars arguing in favor

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[22] Binder, "The Origins of American Felony Murder Rules," 60.

[23] Gerber, Rudolph J. "The Felony Murder Rule: Conundrum Without Principle."*Arizona State Law Journal* 31, no. 763 (1999): 763-85. Accessed October 31, 2015. https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&srctype=smi&srcid=3B15&doctype=cite&docid=31+Ariz.+St.+L.J.+763&key=d454344b254d1d8bd4cf31be3e14c821.

[24] Crump, David. "Panel Two: Unintentional Killings: Should We Have Different Views of Felony Murder, Depending on the Governing Statute?" *Texas Tech Law Review* 47, no. 113 (2014): 113-19. Accessed October 31, 2015. http://texastechlawreview.org/wp-content/uploads/Crump.PUBLISHED.pdf.

[25] Francis, Traci R. "Availability of the Felony-Murder Rule Today: Equitable and Just or Unfair and Excessive?" Master's thesis, University of Florida, 2005. Accessed April 20, 2016. http://etd.fcla.edu/CF/CFE0000648/Francis_Traci_R_200508_MS.pdf.

of the rule. Both have reached similar conclusions and have outlined the proper and most defensible way for states to craft felony murder statutes. Once a historical foundation has been presented, subsequent chapters will move from abstract and historical discussions, to case studies and state sentencing, with a focus on establishing appropriate juvenile sentencing standards when the felony murder rule is applied.

I. Origins of the Felony Murder Rule

To properly evaluate the felony murder rule, it is essential to first review the origins of the rule since the American legal system is maintained through legal precedent. One of the more interesting aspects of the felony murder rule is the obscurity of and debate over its origins. There are two prevailing theories regarding the origins of the felony murder rule: "The traditional view," and "The contemporary view." The traditional view asserts that the felony murder rule was a standing legal doctrine in common law England, was adopted by America upon independence, and has remained in that form with slight modifications until today. The contemporary view of the rule's origins asserts that the felony murder rule was never a part of the English common law system, although its origins did stem from England, and the law was instead adopted into American law in the 18th and 19th century. The traditional view was widely agreed upon until recently when new arguments from leading scholars including David Crump and Guyora Binder emerged and earned the consensus of the scholarly community. A discussion of both views is necessary to reach an understanding of the rule in today's modern form.

A. The Traditional View

Traditionally, the felony murder doctrine has been thought of as first being enacted in common law England. This interpretation of the law's origins is most commonly referenced in studies written in opposition to the rule, and maintained by scholars including William Clark,

William Marshall, Arnold Loewy, and the Model Penal Code. The general formulation of this argument follows these general lines: Under common law in England, "malice was implied as a matter of law in every case of homicide when engaged in the commission of some other felony, and such a killing was murder whether the death was intended or not."[26] This understanding essentially asserts that "felony + death = first-degree murder," or, as Arnold Loewy states, "at common law, felony murder was a simple proposition: any death resulting from a felony is murder. Thus a totally unforeseeable death resulting from an apparently non-dangerous felony would be murder."[27] This viewpoint further contends that under common law, negligence or recklessness was not an element necessary for murder conviction, and thus when "conceived, the rule operated to impose liability for murder based on [...] strict liability."[28] Scholars who support this understanding of the rule's origins believe that modern American felony murder statutes are based upon these principles of strict liability. They further assert that this common law doctrine has withstood the test of time in America, and is still in force in all states except those that have chosen to eliminate it through statutes, even though the government of England has since abandoned the doctrine altogether.[2930] Many opponents of the felony murder rule often argue that since England has abandoned the doctrine, America should follow their lead. [31]

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[26] Binder, Guyora. "The Culpability of Felony Murder." *Notre Dame Law Review* 83, no. 965 (2008): 967-1060. Accessed October 31, 2015. http://scholarship.law.nd.edu/ndlr/vol83/iss3/2.
[27] Loewy, Arnold H. *Criminal Law in a Nutshell*. St. Paul, MN: West, 2009.
[28] Binder, "The Origins of American Felony Murder Rules," 61. Citing, "Model Penal Code" § 210.2 cmt. 6, at 31 nn. 30-31.
[29] Binder, "The Origins of American Felony Murder Rules," 60-80.
[30] Tomkovicz, James J. "The Endurance of the Felony Murder Rule: A Study of the Forces That Shape Our Criminal Law." *Washington and Lee Law Review* 51, no. 1429 (1994): 1429-480. Accessed October 31, 2015. http://scholarlycommons.law.wlu.edu/wlulr/vol51/iss4/8/.
[31] Gerber, Rudolph J. "The Felony Murder Rule: Conundrum Without Principle."*Arizona State Law Journal* 31, no. 763 (1999): 763-85. Accessed October 31, 2015. https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&srctype=smi&srcid

This traditional understanding of the felony murder rule as having a rationale based in substantive strict liability has substantial implications against the merits of the law. Historically, the American Criminal Justice System has been very critical of substantive strict liability doctrines, and in the case of the felony murder rule, it implies that defendants may lack any direct fault, moral blameworthiness, or culpability for the death they are being charged for. In other words, this traditional understanding suggests that a person could be sentenced for first-degree murder, even if someone in the area dies of a heart attack during the commission of the felony, or if the homeowner pulls out a gun and kills an unsuspecting burglar as in the case of the "Elkhart Four."

While today almost every jurisdiction has limited the scope of the felony murder rule to guard against imposing strict liability on felony criminal actors, such as permitting affirmative defenses for non-killing co-felons, or requiring malice to be shown prior to conviction, and have moved away from "felony + death = first-degree murder" frameworks in their statutes, the fact remains that, "[t]his genealogy implies that even if current felony murder rules do not impose strict liability, they owe their existence to strict liability rules. Thus current rules must be regarded as vestiges of injustice, unless the 'original common law felony murder doctrine' can be justified today."[32] It therefore becomes imperative to disprove this understanding of the origins of the felony murder rule in order to defend the merits of this longstanding legal doctrine.

B. The Contemporary View

The traditional view of the strict liability based origins of the felony murder rule is no longer accepted by most of the scholarly legal community. Contemporary legal scholars maintain

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=3B15&doctype=cite&docid=31+Ariz.+St.+L.J.+763&key=d454344b254d1d8bd4cf31be3e14c821.

[32] Binder, "Making the Best of Felony Murder," 423.

that the felony murder doctrine was never actually a law in common law England, but was instead first enacted in America. This interpretation of the law's origins has been asserted on multiple occasions in the past century, however it can most notably be found in Guyora Binder's law review, "*The Origins of American Felony Murder Rules*" written in 2004. Binder debates the truth behind the traditional understanding of the rule's origins, since despite treaties and texts, court opinions, scholarly articles, and law review comments, "none of these accounts manages to identify when this supposed common law rule […] became the law of England. None identifies a single case in which it was applied in England before American Independence. […] None of them documents the application of such a rule in colonial America, or in the early republic."[33] This work goes on to discredit the traditional, strict liability based point of view and makes a case for an alternative theory for the true origins of the rule.

The contemporary view of the felony murder rule's origins generally follows the ensuing line of argument: The original concept of felony murder was first proposed in England in 1700 by Chief Justice Holt in *Rex v. Plummer* and William Hawkins in his 1716 treaties. Holt argued that unforeseeable killings during felonies should be classified as murders and "offered [this proposal] as a narrowing interpretation of an unlawful-act-murder rule he mistakenly attributed to [Sir Edward] Coke, and which had been clearly rejected by the courts."[34] Hawkins further reasoned "that killing during an unlawful act should be murder if the act was dangerous and likely to provoke armed resistance."[35] Later, William Blackstone of England declared that involuntary killings while pursuing a felonious goal are murders, although he most likely did not intend to include unforeseeable deaths. While these are clear historical records from common

[33] Binder, Guyora. "The Origins of American Felony Murder Rules," 413.
[34] Binder. "Making the Best," 414.
[35] Binder. "Making the Best," 414.

law England advocating for a felony murder rule, no law was ever enacted in England or the Colonies before the American Revolution. It is also important to note that in England, the word "killing" as understood at the time, meant causing death by intentionally striking a person.[36] This therefore shows that even during its English common law discussions, the felony murder rule was not intended to cover unforeseeable deaths, but only deaths directly caused by actors in the underlying felony. It is this more precise definition of "killings" that informed the creation of modern felony murder rules.

The concept of felony murder liability first emerged in the United States around 1794, when Pennsylvania enacted a statute that limited first-degree murder to murders that were premeditated, intended, or done in the furtherance of heinous crimes. This statute was created to limit the number of killings, under the old definition of the word, during the furtherance of felonies. Under the contemporary view, the felony murder rule is therefore based on principles of deterrence, and not on principles of strict liability, upon which the traditional view was predicated. Other states then began adopting similar deterrence driven statutes in various forms that have been maintained to the present day.[37] The contemporary understanding of felony murder in the context of its deterrent effect has changed the scholarly discussion in significant ways. This contemporary interpretation of the rule's origins legitimizes the original purpose of felony murder rules, and by premising the rationale for the rule on its purported deterrent effect, divorces felony murder rules from the notion that truly unintentional killings are included in the category of felony murder, which has historically been the strongest case against the doctrine.

Determining the correct historical understanding of the felony murder rule is essential because, as Ronald Dworkin argues, any constructive interpretation of a law must (a) have a

[36] Binder. "Making the Best," 414-15.
[37] Binder, "Making the Best," 415-17.

purpose that justifies and explains the history of the practice, and (b) use the same purpose to resolve dilemmas within the practice.[38] The contemporary view of the rule's deterrent-based origins manages to justify and explain the principles upon which this rule is based, and thus allows scholars to make sound constructive interpretations that defend this longstanding law. It is this more recent understanding of the rule that has given scholars the ability to defend the practice and has changed the entire tone of the legal discussion.[39]

II. Supreme Court and The Felony Murder Rule

For decades, legal scholars, historians, and even court opinions almost unanimously criticized the felony murder rule until the 1980's. Perhaps the biggest reason for this overwhelming criticism was that felony murder statutes are constructed differently in every state. One state may broadly define the felony murder rule to include any death that occurs during any single felony, or as "felony + death= first-degree murder." Under this strict liability type of statute, an individual may be convicted of murder, even if an observing elderly woman were to die from a heart attack during the commission of a felony. Other states may define it narrowly to only include crimes where all participants went into the crime ready and willing to kill. This wide range of felony murder statutes cluttered scholarly discussions about the felony murder rule, since some statutes were infinitely more defensible than others.

The 1980's marked a serious turning point for criminal sentencing under the felony murder rule when the Supreme Court heard the cases of *Enmund v. Florida*, 458 U.S. 782 (1982)

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[38] Dworkin, Ronald. *Law's Empire*. Cambridge, MA: Belknap, 1986.

[39] Birdsong, Leonard. "Felony Murder: A Historical Perspective by Which to Understand Today's Modern Felony Murder Rule Statutes." *Thurgood Marshall Law Review* 32, no. 1 (2006): 1-26. Accessed October 31, 2015. http://www.lexisnexis.com.ezproxy.trincoll.edu/lnacui2api/api/version1/getDocCui?oc=00240&hnsd=f&hgn=t&lni=4N9F-YYG0-00CW-602N&hns=t&perma=true&hv=t&hl=t&csi=270944%2C270077%2C11059%2C8411&secondRedirectIndicator=true.

and *Tison v. Arizona*, 481 U.S. 137 (1987). Together, these landmark decisions substantially shifted the manner in which scholars came to criticize the felony murder rule.

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

The case of *Enmund v. Florida* was the first time the Supreme Court addressed the application of the death penalty in a felony-murder case. According to the facts of the lower Court case, on April 1, 1975, Earl Enmund sat in a parked yellow Buick with a vinyl top while Sampson and Jeanette Armstrong attempted to rob the house of Thomas and Eunice Kersey in Florida. Sampson and Jeanette went to the back door of the Kersey's home and asked for water for an overheated car. When Mr. Kersey stepped out of the house, Sampson grabbed him, pointed a gun at him, and instructed Jeanette to take his money. Mr. Kersey yelled for help, so his wife came out with a gun and shot and wounded Jeanette. "Sampson Armstrong, and perhaps Jeanette Armstrong, then shot and killed both of the Kerseys, dragged them into the kitchen, and took their money and fled."[40] Based on eyewitness testimony, it can be assumed Enmund drove the fleeing vehicle.

When Enmund's trial reached Florida courts, the judge instructed the jury that under Florida law, "the killing of a human being while engaged in the perpetration of or in the attempt to perpetrate the offense of robbery is murder in the first degree even though there is no premeditated design or intent to kill,"[41] and elaborated that in order to sustain a first degree murder conviction, "the evidence must establish beyond a reasonable doubt that the defendant was actually present and was actively aiding and abetting the robbery or attempted robbery, and that the unlawful killing occurred in the perpetration of or in the attempt of perpetration of the

[40] 785. *Enmund v. Florida*, 458 U.S. 782 (1982).
[41] 785-6. *Enmund v. Florida*, 458 U.S. 782 (1982).

robbery."[42] The jury found both Earl Enmund and Sampson Armstrong guilty of two-counts of first-degree murder and one count of robbery.[43] A separate sentencing hearing sentenced Enmund to death on the two charges of first-degree murder. The Supreme Court "granted Enmund's petition for certiorari, […] presenting the question whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took the life, attempted to take life, nor intended to take life."[44]

Upon hearing the case, the Supreme Court held that the imposition of the death penalty upon Enmund is inconsistent with the Eighth and Fourteenth Amendments. In issuing their holding, the Court relied on three principal findings. First, the Court looked to societal norms of the United States to conclude that since only eight states allow the death penalty to be used in similar situations, and courts almost universally reject its application, it must be considered an unusual punishment.[45] [46] Second, the Court stated that when issuing an accomplice sentence, the sentence must analyze the individual's culpability, and not those who committed the robbery and killings. The Court expounded, "It is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'"[47] Finally, the Court reasoned that, "neither deterrence of capital crimes nor retribution is a sufficient justification for executing [the] petitioner."[48] Together, these three findings led the Court to create the "*Enmund*

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[42] 786. *Enmund v. Florida*, 458 U.S. 782 (1982).
[43] 786. *Enmund v. Florida*, 458 U.S. 782 (1982).
[44] 787. *Enmund v. Florida*, 458 U.S. 782 (1982).
[45] *Enmund v. Florida*, 458 U.S. 782 (1982).
[46] This practice of analyzing society's evolving standards of decency for interpreting the constitutionality of various sentences under the Eighth Amendment has become a cornerstone of judicial review. This practice will be further discussed when examining the Court's holdings in the cases of *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*.
[47] 799. *Enmund v. Florida*, 458 U.S. 782 (1982).
[48] 799. *Enmund v. Florida*, 458 U.S. 782 (1982).

Standard," which states that the death penalty is not a valid sentence for an individual who does not personally kill or attempt to kill, intend to kill, or facilitate the killing of a person.

B. *Tison v. Arizona*, 481 U.S. 137 (1987)

The Court's holding in Enmund stood unchallenged until five years later, when the Court qualified its previous holding in the case of *Tison v. Arizona*, 481 U.S. 137 (1987). Gary Tison was sentenced to life in prison on murder charges. After spending a few years in prison, Gary Tison's wife, their three sons (Donald, Ricky, and Raymond), Gary's brother Joseph, and other family members made plans to help Gary Tison escape.[49] On July 30, 1978, the Tison boys entered a prison with guns in an ice chest, armed their father and his cellmate Randy Greenawalt (also a convicted murderer), locked the guards and visitors in a closet, and all fled from the prison. No shots were fired at the prison.[50] While escaping through the desert, the tire in their Lincoln blew out.[51] Raymond Tison stood in the street and flagged down a car while the other four watched from behind the broken down Lincoln. When a family got out of the car to help, they were forced into the back seat of the Lincoln. Then Raymond and Donald drove the Lincoln far down a dirt road while Gary Tison, Ricky Tison, and Randy Greenawalt followed in the family's Mazda. Gary Tison then stopped the car, transferred their possessions from the Lincoln to the Mazda, and instructed Raymond to drive the Lincoln far into the desert.[52] The family was escorted to the car and told to stand in front of the headlights. The father of the family begged the captors to leave them water and abandon them. Gary told his sons to go back and get some water.[53] "The petitioners' statements diverge to some extent, but it appears that [Raymond and

[49] 139. *Tison v. Arizona*, 481 U.S. 137 (1987).
[50] 139. *Tison v. Arizona*, 481 U.S. 137 (1987).
[51] 140. *Tison v. Arizona*, 481 U.S. 137 (1987).
[52] 140. *Tison v. Arizona*, 481 U.S. 137 (1987).
[53] 140. *Tison v. Arizona*, 481 U.S. 137 (1987).

Ricky] went back towards the Mazda, along with Donald, while Randy Greenawalt and Gary Tison stayed at the Lincoln guarding the victims."[54] Raymond claims to have heard shots fired, and "the petitioners agree they saw Greenawalt and their father brutally murder their four captives with repeated blasts from their shotguns."[55] Neither tried to help the victims, but they do claim to have been surprised by the killings. Later, during a police shooting, the police captured Raymond and Ricky Tison, and Randy Greenawalt. Donald Tison was killed, and Gary Tison escaped to the desert and died of exposure.[56]

When the trial reached the courts, Raymond and Ricky Tison, and Randy Greenawalt were tried jointly for the same crimes, namely "capital murder of the four victims as well as for the associated crimes of armed robbery, kidnaping, and car theft."[57] Ricky and Raymond Tison were sentenced to death under "Arizona's felony-murder law providing that a killing during the perpetration of robbery or kidnapping is capital murder […] and that each participant in the kidnapping or robbery is legally responsible for the acts of his accomplices."[58] The Arizona Supreme Court affirmed the lower court's ruling.[59]

The United States Supreme Court granted certiorari and confirmed the lower court's decision, holding that, "the Eighth Amendment does not prohibit the death penalty as disproportionate in the case of a defendant whose participation in a felony that results in murder is major and whose mental state is one of reckless indifference."[60] In issuing this decision, the Supreme Court first found Arizona's ruling as an attempt "to reformulate 'intent to kill' as a

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[54] 141. *Tison v. Arizona*, 481 U.S. 137 (1987).
[55] 141. *Tison v. Arizona*, 481 U.S. 137 (1987).
[56] 141. *Tison v. Arizona*, 481 U.S. 137 (1987).
[57] 141. *Tison v. Arizona*, 481 U.S. 137 (1987).
[58] 141. *Tison v. Arizona*, 481 U.S. 137 (1987).
[59] 143. *Tison v. Arizona*, 481 U.S. 137 (1987).
[60] "United States Supreme Court, Tison v. Arizona, (1987)." Thomson Reuters. 2016. http://caselaw.findlaw.com/us-supreme-court/481/137.html. Accessed, April 25, 2016.

species of foreseeability. The Arizona Supreme Court wrote, 'Intend [sic] to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might have been used or that life would or might have been taken in accomplishing the underlying felony.'"[61] The Supreme Court rejected the lower court's redefinition of intent, but they agreed with Arizona that the petitioners fell outside the "intent to kill" standard of the *Enmund* decision. The Court instead found that, "their degree of participation in the crimes was major rather than minor, and the record would support a finding of the culpable mental state of reckless indifference for human life."[62] The Court noted that by arming prisoners already convicted of murder, "[the petitioner] could have foreseen that lethal force might be used, particularly since [the petitioner] knew that his father's previous escape attempt had resulted in murder."[63] After examining the commonality of felony murder statutes in the United States that would allow the application of the death penalty for the Tisons,[64] and then analyzing the proportionality of sentencing as applied to the Tison boys,[65] the Court expanded its previous ruling, and held "that major participation for the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement."[66]

III. Scholarly Criticisms of The Felony Murder Rule

Together, the decisions in *Enmund v. Florida* and *Tison v. Arizon* substantially shifted scholarly discourse in the United States regarding the felony murder rule. For decades, the strongest criticisms against the felony murder rule had always been made against the most extreme cases, but now the Court had issued two decisive rulings that restricted the application

[61] 150. *Tison v. Arizona*, 481 U.S. 137 (1987).
[62] 151. *Tison v. Arizona*, 481 U.S. 137 (1987).
[63] 152. *Tison v. Arizona*, 481 U.S. 137 (1987).
[64] 153-6. *Tison v. Arizona*, 481 U.S. 137 (1987).
[65] 157. *Tison v. Arizona*, 481 U.S. 137 (1987).
[66] 158. *Tison v. Arizona*, 481 U.S. 137 (1987).

of the death penalty to prevent its application in cases of totally unforeseeable deaths. Despite these narrowing decisions, scholars continued to argue against the merits of the law, claiming it defies traditional *mens rea* requirements of culpability, has no deterrent effects when applied, and does not align with criminal law principles of proportionality.[67] A discussion of each argument is needed to assess the merits of the felony murder rule.

A. Lack of Culpability

The historical scholarly view of the felony murder rule has condemned the doctrine in almost every measure and stems from the traditional understanding of the rule's origins, which was derived from principles of strict liability. The most widespread and strongest historical scholarly criticism is the contention that the felony murder rule goes directly against criminal law principles of culpability and defies traditional *mens rea* requirements. According to these critics, American criminal law sentencing requires both *actus reus* (a guilty act) and *mens rea* (a guilty mind).[68] The critics argue that the felony murder rule is unjust because sentencing does not consider a defendant's intention (*mens rea*) to commit murder, but only the murderous result (*actus reus*). These scholars then make either one or both of two arguments. Some scholars argue the underlying logic for felony murder is one of transferred intent, whereby the intent to commit a dangerous felony is transferred onto the *actus reus*, or end result of murder. Therefore, since "the only relevant mental state is the intent to do the underlying felony,"[69] and not the intent to commit murder, the rule disregards traditional *mens rea* requirements since defendants may be

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[67] Gerber, Rudolph J. "The Felony Murder Rule: Conundrum Without Principle."
[68] Hillard, James W. "Felony Murder in Illinois: The "Agency Theory" vs. the "Proximate Cause Theory": The Debate Continues." *Southern Illinois Law Review*25, no. 331 (2001): 331-51. Accessed October 31, 2015. https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&srctype=smi&srcid=3B15&doctype=cite&docid=25+S.+Ill.+U.+L.+J.+331&key=267059af45566716949d1304f8ae005e.
[69] Gerber, Rudolph J. "The Felony Murder Rule: Conundrum Without Principle," 772.

charged for an act they never intended. Other scholars contend the rule lacks traditional *mens rea* requirements because it is based on the principles of substantive strict liability that were previously discussed.[70] Regardless of the ground on which they base their objections, these scholars agree that because murderous criminal intent is not required, the felony murder rule is in violation of traditional criminal law culpability requirements.

B. Lack of Deterrent Effect

The next commonly argued objection to the felony murder rule states that it lacks deterrent effect. Those arguing against the deterrent value of the felony murder rule contend that it is highly improbable that defendants will even be aware of the law. Others claim that the nature of felony murder deterrence applies a very grave punishment to a very small risk of someone dying during the commission of the felony. "Critics also argue that the felony murder rule distorts marginal deterrence incentives – once a felon has accidentally caused one death, there is less to deter him from intentionally killing other witnesses to the crime."[71] Finally, and perhaps most convincingly, scholars argue that there is no empirical evidence to suggest that the felony murder rule operates as a deterrent. These scholars hold their objections confidently, as even Guyora Binder, one of the law's strongest supporters concedes that, "Indeed, empirical studies have generally confirmed that raising the severity of penalties has little or no deterrent effect. Moreover, the only empirical study directly addressing the deterrent effect of felony murder rules found no deterrent benefit."[72] Despite these criticisms, scholars have taken steps to strike down this argument and the Supreme Court has upheld the application of the death penalty

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[70] Gerber, Rudolph J. "The Felony Murder Rule: Conundrum Without Principle."
[71] Malani, Anup. "Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data." *Virginia Law Review*, 2002. Page 1. Accessed October 31, 2015. http://www.law.virginia.edu/pdf/malani/felonymurder021111rand.pdf.
[72] Binder, Guyora. "Making the Best of Felony Murder," 422. Citing, Malani, "Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data."

in felony murder cases without empirical proof of deterrent effect. Nevertheless, a strong case against the rule's deterrent value can still be made.

IV. Scholarly Defense of the Felony Murder Rule

Despite these major criticisms against the felony murder rule, the rule continues to stand strong in 47 states across the US and many scholars continue to defend the practice. The most notable publication supporting the merits of the felony murder rule came in 1985, between the Court's rulings in *Enmund* and *Tison*, when David and Susan Waite Crump wrote an article in the *Harvard Journal of Law and Public Policy* titled, "In Defense of the Felony Murder Doctrine." This publication marked a sharp turning point in the scholarly conversation because it both went to great lengths to disprove classic historical scholarly arguments against culpability claims and deterrent value, and also provided arguments for the retention of the rule including principles of proportionality and merger doctrines.

A. Examining Criminal Law Proportionality and Culpability

The strongest criticism against the felony murder rule has always been the claim that the felony murder rule divorces the individual actor from their moral blameworthiness and fails to consider the actor's *mens rea* (guilty mind) to commit the crime. David Crump argues that (1) *actus reus* (guilty act) has always been regarded as more important than the *mens rea* requirement, and (2) that lack of *mens rea* does not always mean a lack of individual culpability or blameworthiness.[73] Crump's first contention is an argument for the proportional and retributive grading of criminal offenses. His second is an argument regarding individual culpability for felonies that result in death.

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[73] Crump, David, and Susan Waite Crump. " In Defense of the Felony Murder Doctrine." *Harvard Journal of Law and Public Policy* 8, no. 2 (1985): 359-98. Accessed October 31, 2015. http://heinonline.org/HOL/LandingPage?handle=hein.journals/hjlpp8&div=40&id=&page .

The first argument by critics essentially asserts that in the American Criminal justice system, criminals must be proportionally graded so that each person convicted receives their "just deserts." This logic stems directly from Eighth Amendment protections to guard against cruel and unusual punishments. In the context of murder, this proportional grading is illustrated by the levels of severity of sentences imposed as a result of conviction on charges of incidental manslaughter, manslaughter, second-degree murder, and first-degree murder. Individuals who intend to cause the death of a person, or are found to have a guilty mind (*mens rea*), are invariably charged with stronger sentences than those that do not. The problem with this argument is that it fails to consider the proportional grading of the *actus reus* of the crime and "seems to assume that felony murderers are not, as a class, more blameworthy than felonies that do not result in death."[74] If for example, we were to change the name from "felony murder" to "felony resulting in murder" it is easier to see why felony murder sentencing is proportional.[75] Any rational individual will realize that a felony that results in death should be punished more severely than a felony that does not result in death.

This argument is strongly reinforced by the "merger doctrine." The "merger doctrine" is a longstanding principle of law standing for the presupposition that since individuals cannot be tried for separately for different elements of the same crime; for example having one trial for the killing during the felony, and another trial for the felony itself, the punishment for both aspects of the crime must be "merged" together. In the case of the felony murder rule, when sentencing individuals, the death that occurs during the commission of a felony and the underlying felony must be merged together. This combination of a death and a felony retributively fits with other

[74] Crump, "Reconsidering," 1159.
[75] Crump, "In Defense."

homicide categories such as second-degree murder or incidental manslaughter.[76] In changing the perspective of felony-murder to felony resulting in death, and examining merger doctrine, a stronger case can be made for the proportionality of felony murder sentencing.

Beyond examining the proportionality of the *actus reus* in question, the crux of this scholarly criticism "appears to be that the felony murder doctrine results in convictions unrelated to individual blameworthiness."[77] Despite this charge, the Supreme Court in *Tison* held that non-triggerman co-felons could be just as culpable for a felony murder charge as their trigger pulling counterparts.[78] As was also held in the *Tison* decision, an individual can be found culpable or "intent" can be proven, if an individual behaves "with reckless indifference to human life."[79] This criticism therefore, is highly dependent on the particular statute at issue. Should a statute use a very broad definition of felony murder, for example a statute that includes all deaths that occur during the commission of a felony, even totally unforeseeable deaths like an old lady dying of a heart attack in the area, it becomes easy to see why individual blameworthiness might not be properly considered in sentencing. However, if the guidelines of *Tison* are followed, then individual culpability at the level of "reckless indifference to human life" as well as major participation in an underlying felony is all that is needed for conviction.

To combat this criticism, David Crump and Guyora Binder, both strong supporters of the felony murder rule, have proposed different ways of assessing individual culpability to ensure just sentencing of criminals. David Crump's proposal centers around the concept that the justification of the felony murder rule is directly dependent on the particular statute at issue.

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[76] Ferzan, Kimberly K. "Murder after the Merger: A Commentary on Finkelstein." *Buffalo Criminal Law Review* 9, no. 561 (2006): 561-75. Accessed April 20, 2016. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913005.
[77] Crump, "Reconsidering," 1159.
[78] *Tison v. Arizona*, 481 U.S. 137 (1987).
[79] *Tison v. Arizona*, 481 U.S. 137 (1987).

Crump uses Texas' statute to show what a much stronger felony murder statute looks like. "The Texas statute includes, as guilty of murder, a person who:

> Commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual." [80]

Included in this statute is an underlying notion of a reasonable expectation of causing harm. Crump contends this statute is infinitely more defensible than the original interpretation of the doctrine because "it ties the crime of murder to relatively high degrees of individual blameworthiness," [81] "[it] is confined to circumstances that are more readily subject to deterrence,"[82] and it "does not seem likely to require a great deal of interpretation."[83] While this statute is not said to be perfect, and arguments can still be made for its improvement, Crump contends that this statute serves as a strong benchmark the rest of the nation should try meet.

Guyora Binder approaches the issue of individual culpability from a slightly different perspective. In his analysis, Binder instead proposes that liability and blameworthiness for felony murder be understood as a model of dual culpability, whereby an actor's guilt should be assessed in "two dimensions of culpability: (1) the actor's expectation of causing harm and (2) the moral worth of the ends for which the actor imposes this risk."[84] This dual culpability model combines elements of foreseeability and transferred intent to create a stronger benchmark for satisfying the requisite *mens rea* needed to be convicted of felony murder. While these two models might not be perfect, they are currently agreed upon by the scholarly community to be the strongest defenses for the felony murder rule, and the hardest to make constructive criticisms against.

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[80] Crump, "Reconsidering," 1166.
[81] Crump, "Reconsidering," 1166.
[82] Crump, "Reconsidering," 1167.
[83] Crump, "Reconsidering," 1167.
[84] Binder, "Making the Best," 409.

B. Deterrence

Deterrence is the second strongest criticism that can be offered against the felony murder doctrine, since, as stated before, "the only empirical study directly addressing the deterrent effect of felony murder rules found no deterrent benefit."[85] David Crump and Guyora Binder both openly admit that there is a lack of proof that the felony murder rule truly does deter, since few studies have been conducted. Nevertheless, Crump contends that despite a lack of evidence for the rule's deterrent value, any rational individual would assume their punishment should be more severe if a death occurs during the commission of a crime than if it does not. Beyond lack of evidence for the rule's deterrent value, critics assert that rule cannot deter since "felons will not know the law and cannot conform their conduct to the goal of minimizing accidental killings."[86] However, Crump contends this argument is "dubious because the same reasoning could be applied to many rules aimed at avoiding accidents, including those penalizing negligence or creating strict liability. [Yet,] no one advocates recession of those laws because actors may not know the law."[87]

V. Current Standing in the US

As the felony murder rule currently stands in the United States, the historical understanding of "felony + death = first-degree murder" has vanished from the law books almost entirely. States now put limitations on the scope of their felony murder statutes to ensure that only the most culpable of offenders might be charged. "These limitations include the following:

> "[a] Requiring that the underlying felony be dangerous to life, either because the felony is inherently dangerous; the manner in which the felony is carried out is dangerous, making the killing foreseeable; or the felony is among a list of

[85] Binder, Guyora. "Making the Best of Felony Murder," 422. Citing, Malani, "Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data."
[86] Crump, "Reconsidering," 1160.
[87] Crump, "Reconsidering," 1160.

> statutorily enumerated felonies; [b] imposing merger, meaning that the felony must be done independently of the killing; [c] requiring that the killing be done in the furtherance of the felony; [d] requiring a proximate causal link between the felony and the killing; [e] imposing a narrow construction of the time period during which the felony is said to be committed; [f] permitting affirmative defenses for non-killing co-felons; [g] permitting duress defense; [h] limiting the death penalty to actual killers; [i] requiring malice; and [j] requiring gross recklessness, which is implied by the commission of a dangerous felony despite being rebuttable."[88]

These restrictions on the rule make the doctrine of felony murder significantly more defensible since they eliminate sentencing for those who truly lack culpability, eliminate arguments against the doctrine's deterrent values such as "sentencing lotteries," and lessen the likelihood that a non-culpable co-felon be convicted of felony murder.[89]

Over the past three centuries, the scholarly community has departed from its firmly rooted stance that the felony murder rule is indefensible on every level. Together, David Crump and Guyora Binder have outlined frameworks for the "best" version of a felony murder statute, and the most "just" way of determining an individual's culpability in felony murder cases. These are the strongest arguments that can possibly be made for the rule's persistence, and they both hinge upon determining individual culpability for the recklessness of the act undertaken, or the foreseeability that a death might occur. In the coming chapters, I will explain how major Supreme Court decisions have fundamentally restructured juvenile sentencing. After analysis of the cases, an argument will be presented for why it no longer makes sense to define juvenile culpability as a series of recklessness or foreseeability in the way the proposals from David Crump and Guyora Binder do. Instead, I will argue that the standard originally proposed by the Supreme Court, the *Enmund* standard, should be used for determining which juveniles exhibit

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[88] Morrison, Steven R. "Defending Vicarious Felony Murder." *Texas Tech Law Review* 47, no. 129 (2014): 129-50. Accessed October 31, 2015. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2419119.

[89] Binder, "The Culpability of Felony Murder," 981.

the requisite culpability needed to merit a sentence of life in prison without the possibility of parole. A further analysis follows in the coming chapters.

Chapter 2: Juvenile Sentencing, Culpability and the Supreme Court

Over the past decade, the Supreme Court has made several important decisions on juvenile sentencing that have radically transformed the way our Court system handles juveniles. The cases of *Roper v. Simmons* (2005),[90] *Graham v. Florida* (2010),[91] *Miller v. Alabama* (2012),[92] and *Montgomery v. Louisiana* (2016),[93] have taken steps to restrict the application of the death penalty and life without the possibility of parole for juvenile offenders. The majority opinion for all of these cases has been based on two key principles: (1) the constitutionality of "cruel and unusual" sentences under the Eighth Amendment is based on society's evolving standards of decency and the frequency that various sentences are administered throughout the United States; and (2) recent findings in neuroscience that confirm important differences between adolescent and adult brain development that diminish juvenile culpability from that of adults and make them categorically less deserving of certain punishments. Conversely, dissenting opinions in this line of cases fall into two distinct camps. In the first camp, the dissenters argue that while society's evolving standards of decency are central to the Eighth Amendment, there is no existing consensus against the practice in question and the diminished culpability of juveniles does not merit a categorical exemption to the juvenile sentencing structure at issue. Dissenters in the second camp, including Justices Scalia, Thomas, and Rehnquist, argue that the interpretation of the Eighth Amendment is unchanging, and that society's standards of decency should play no role in determining if a sentence is unconstitutional. It appears that no amount of new evidence could be presented to change their views.

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[90] *Roper v. Simmons*, 543 U.S. 551 (2005).
[91] *Graham v. Florida*, 560 U.S. 48 (2010).
[92] *Miller v. Alabama*, 567 U.S. ___ (2012).
[93] Montgomery v. Louisiana, 577 U.S. ___ (2016).

While both sides argue robustly in favor of their positions, the core of the debate centers on equity and fairness. In the views of the majority, equity and fairness are informed by findings in neuroscience that suggest juveniles are inherently less culpable than adults, and it would be unfair to sentence them as if they were fully developed adults. The dissenting side takes a more formalistic approach to its analysis, focusing on the idea that equity and fairness come from establishing and applying concrete rules by which to interpret the Constitution. They believe that since the Constitution's meaning does not change over time, the Court should not consider evolving standards of decency when determining the standards that should be applied to juvenile offenders.

Regardless of which side makes a stronger argument, the implications these decisions have on the modern understanding of juvenile sentencing under the felony murder rule are enormous. These findings in neuroscience demonstrate the diminished decision making process of people in their childhood, adolescence, and even young adulthood.[94] Implicit in these studies and findings is an increased susceptibility to outside pressures, a transient development process that gives juveniles a heightened chance of behavior modification and rehabilitation, and a decreased ability to assess risk and make decisions. These new decisions and findings in neuroscience have serious implications for society's present understanding of the felony murder rule. Juveniles' increased susceptibility to peer pressure and the inability to foresee and assess risk deeply undermine the culpability of juveniles in the context of felony murder, and their transient development process undermines life without parole sentencing. While the case of *Miller v. Alabama* did include a juvenile facing life without possibility of parole on felony

[94] Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Review 339 (1992), Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003), and E. Erikson, Identity: Youth and Crisis (1968).

murder charges, the Court did not directly address how juvenile felony murder sentencing should be carried out across the States. This leaves a legal gap in the nation's understanding of juvenile felony murder sentencing that must be addressed, or else countless juveniles who never intended for a life to be taken might spend their entire lives locked behind bars, without ever receiving the possibility of a second chance.

This chapter will examine the cases of *Roper v. Simmons* (2005), *Graham v. Florida* (2010), *Miller v. Alabama* (2012), and *Montgomery v. Louisiana* (2016). In later chapters, these cases will be used to examine how the nation's understanding of juvenile felony murder sentencing has changed because of these decisions. The discussion will also present an argument for using the *Enmund* standard for determining whether or not a juvenile can be sentenced to life without parole in a felony murder case. The application of the *Enmund* standard is the next logical and essential step for bringing State's juvenile sentencing structures in line with previous Supreme Court decisions and restoring equity to juvenile sentencing in America.

I. *Roper v. Simmons* (2005)

At age 17, the respondent, Christopher Simmons, committed capital murder.[95] Nine months later, after he had turned 18, he was sentenced to death. On appeal, Simmons relied on a Supreme Court holding in *Atkins v. Virginia*,[96] to argue that the reasoning used in *Atkins* to hold that the death penalty is unconstitutional when applied to a mentally retarded person, equally applies to juveniles under the age of 18. The Missouri Supreme Court agreed and reduced Simmons' sentence to life without possibility of parole.[97] The Missouri Supreme Court "held that, although *Stanford v. Kentucky*, 492 U.S. 361, rejected the proposition that the Constitution

[95] Kennedy: I. *Roper v. Simmons*, 543 U.S. 551 (2005).
[96] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[97] Kennedy: I. *Roper v. Simmons*, 543 U.S. 551 (2005).

bars capital punishment for juvenile offenders younger than 18, a national consensus has developed against the execution of those offenders since *Stanford*."[98] On appeal, the Supreme Court overturned its longstanding decision in *Stanford v. Kentucky*.[99] Justice Kennedy delivered the opinion of the Court, in which Justices Stevens, Souter, Ginsburg, and Breyer, joined, to hold "the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."[100]

This ruling marked a consequential turning point in juvenile sentencing by overturning the *Stanford v. Kentucky* ruling that had stood since 1989, and the Court's rationale had important consequences for the application of the felony murder rule. First, as always when analyzing an Eighth Amendment case, the Court looked to "'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be 'cruel and unusual.'"[101] In their analysis, the Justices concluded, that "the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice--provide sufficient evidence that today society views juveniles […] as 'categorically less culpable than the average criminal.'"[102] Beyond this, their ruling asserts that juvenile offenders are categorically less culpable and cannot fit into the category of the "worst offenders" for which the death penalty is usually reserved.

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[98] "United States Supreme Court, Roper, Superintendent, Potosi Correctional Center v. Simmons, (2005)." Thomas Reuters. 2016. http://caselaw.findlaw.com/us-supreme-court/543/551.html. Accessed, April 25, 2016.
[99] *Stanford v. Kentucky*, 492 US 361 (1989).
[100] "United States Supreme Court, Roper," Thomson Reuters.
[101] "United States Supreme Court, Roper," Thomson Reuters. Quoting *Atkins v. Virginia*, 536 U.S. 304 (2002).
[102] "United States Supreme Court, Roper," Thomson Reuters. Quoting *Atkins v. Virginia*, 536 U.S. 304 (2002).

After their analysis of society's evolving standards of decency, the Court then found three principal differences in the development of juveniles that separate them from adults. Justice Kennedy writes, "First, as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' [And] It has been noted that 'adolescents are overrepresented statistically in virtually every category of reckless behavior.'" [103] In other words, juveniles are substantially less likely to assess the risks associated with their behavior, and substantially more likely to act in a reckless manner, or perhaps, with reckless indifference, both of which are foundations of the current understanding of felony murder in the United States. Second, the Court found "that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[104] This finding illustrates the increased likelihood that a youth might be pulled into committing a felony he or she does not wish to commit or becomes a peripheral offender in a felony murder case. And finally, the Court found "that 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."[105] The final finding shows that juveniles are more likely to benefit from the rehabilitative purposes of the criminal justice system and that the imposition of the death penalty ignores these key facts. Together, these three findings illustrate why juveniles are categorically less culpable and deserving of the worst punishments than are their adult counterparts. Moreover, the Court held that "the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders

[103] Kennedy: III. B. *Roper v. Simmons*, 543 U.S. 551 (2005).
[104] Kennedy: III. B. *Roper v. Simmons*, 543 U.S. 551 (2005).
[105] Kennedy: III. B. *Roper v. Simmons*, 543 U.S. 551 (2005).

who were under the age of 18 when their crimes were committed,"[106] and in turn, made life without possibility of parole the maximum sentence that could possibly be afforded to a juvenile.

Justice O'Connor, Justice Scalia, Chief Justice Rehnquist and Justice Thomas dissent from this 5-4 opinion. Justice O'Connor authored a dissent of her own, as well as Justice Scalia, with whom Chief Justice Rehnquist and Justice Thomas joined. The variation between O'Connor and Scalia's dissents illustrate the key differences between the two dissenting camps discussed in the introduction of the chapter. While O'Connor's and Scalia's dissents both took issue with the overall holding of the case, their underlying arguments against the decisions posed a stark contrast. O'Connor subscribed to the first interpretation of the Eighth Amendment, which believes that the constitutionality of sentences depends on society's evolving standards of decency, however she disagrees that a societal consensus exists. This is a deliberate and incremental approach to assessing the Eighth Amendment. Conversely, Thomas, Scalia, and Rehnquist believe that the interpretation of the Constitution is forever unchanging, and society's evolving standards of decency do not matter.

Unlike the other dissents, Justice O'Connor's writes, "it is now beyond serious dispute that the Eighth Amendment's prohibition of 'cruel and unusual punishments' is not a static command"[107] and that the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[108] However, Justice O'Connor argues that there is no societal consensus against invoking the death penalty on individuals that are under the age of 18 at the time their crime was committed. O'Connor drew comparisons between the case presented before the Court and *Atkins v. Virginia*, in which the Court held it was unconstitutional

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[106] "United States Supreme Court, Roper," Thomson Reuters.
[107] O'Connor Dissent. I. A. *Roper v. Simmons*, 543 U.S. 551 (2005).
[108] O'Connor Dissent. I. A. *Roper v. Simmons*, 543 U.S. 551 (2005).

to executed a mentally retarded person. O'Connor agreed with the Court that the number of states permitting the death penalty in the case of juveniles under the age of 18 is similar to the number that allowed the death penalty for mentally retarded persons when *Atkins* was decided, yet she claimed that it was "not so much the number of [States forbidding execution of the mentally retarded] that [was] significant, but the consistency in the direction of change."[109] And while in the 13 years leading up the *Atkins* decision, 16 states banned the execution of the mentally retarded, in the 16 years leading up to *Roper*, two states had reaffirmed their support as setting the age of 16 for capital punishment, and only 4 states that previously permitted the death penalty for those under the age of 18 had reversed course.[110] In addition to her analysis of society's evolving standards of decency, O'Connor argued that the "mitigating characteristics associated with youth do not justify an absolute age limit"[111] on the death penalty. For both of these reasons, Justice O'Connor voiced her dissent.

In Justice Scalia's dissent, in which Chief Justice Rehnquist and Justice Thomas joined, these originalists argued the meaning of the Constitution is unchanging, and the Court should not have looked to society's evolving standards of decency. This position suggests that the original interpretation of the Constitution cannot change, no matter how much evidence is presented on juvenile culpability. Justices Scalia, Thomas, and Rehnquist also issued the only dissenting opinions in *Atkins v. Virginia*,[112] citing much of the same reasoning. In making his case, Justice Scalia explained that the Court's opinion somehow expresses the idea that "the meaning of our Constitution has changed over the past 15 years."[113] Justice Scalia further contented that the

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[109] O'Connor Dissent. II. B. *Roper v. Simmons*, 543 U.S. 551 (2005).
[110] O'Connor Dissent. II. B. *Roper v. Simmons*, 543 U.S. 551 (2005).
[111] O'Connor Dissent. II. D. *Roper v. Simmons*, 543 U.S. 551 (2005).
[112] *Atkins v. Virginia*, 536 U.S. 304 (2002).
[113] Scalia Dissent. 1. *Roper v. Simmons*, 543 U.S. 551 (2005).

Court issued its ruling "on the flimsiest of grounds, that a national consensus which could not be perceived in our people's laws barely 15 years ago now solidly exists."[114] Finally, Scalia voiced his opinion that the Court has "proclaim[ed] itself sole arbiter of our Nation's moral standards."[115]

While both sides presented solid arguments, the past century of Eighth Amendment decisions should prove beyond all reasonable doubt that "cruel and unusual punishment" hinges on society's evolving standards of decency. Although the dissenting opinions make a case that the standards of society have not sufficiently evolved, the parallels between the national consensus that existed during *Atkins* and the current consensus against imposing the death penalty on juveniles cannot be ignored. Finally, the factors that diminish the culpability of juveniles provide sufficient reason to believe they cannot be categorized as the class "the most deserving of execution,"[116] for which the death penalty is usually reserved. This holding marked a strong shift in the Court's interpretation of juvenile sentencing and culpability that did not become fully clear until 2010, when the Court heard the case of *Graham v. Florida*.

II. *Graham v. Florida*, 130 S. Ct. 2011 (2010)

Just five years after its decision in *Roper*, the Court heard the case of *Graham v. Florida*, involving Terrance Jamar Graham. When Graham was 16, he and three other youths attempted to rob a barbeque restaurant in Jacksonville, Florida. One of the youths who worked at the restaurant left the back door open so the co-conspirators could enter before closing time. Graham and another youth entered the back door wearing masks. The accomplice struck the store manager twice in the head with a metal bar. When the manager started yelling, the two youths

[114] Scalia Dissent. 1. *Roper v. Simmons*, 543 U.S. 551 (2005).
[115] Scalia Dissent. 1. *Roper v. Simmons*, 543 U.S. 551 (2005).
[116] *Atkins v. Virginia*, 536 U.S. 304 (2002).

ran to an escape car, where a third accomplice drove them away. The manager required stitches and no money was taken.[117]

When trial for the crime reached the courts, Graham was tried as an adult under Florida law. Graham faced the charges of "armed burglary with assault or battery, a first-degree felony carrying a maximum penalty of life imprisonment without the possibility of parole; and attempted armed-robbery, a second-degree felony carrying a maximum penalty of 15 years' imprisonment."[118] Graham pled guilty to both charges and was sentenced to three years probation and forced to spend the first 12 months of probation in the county jail.

Less than six months after his release, Graham was arrested again for participation in a robbery. He and his two accomplices, both of whom were over the age of 18, robbed the home of Carlos Rodriguez at gunpoint. Later, the group attempted a second robbery, during which one accomplice was shot. Graham drove them to the hospital and dropped them off. As he drove away, police signaled him to stop, he tried to speed off, crashed into a telephone pole, and began fleeing on foot. The police apprehended him, and Graham admitted to the detective that he was involved in two or three other robberies the night before. This event transpired 34 days before his 18th birthday.[119]

Graham's probation officer filed an affidavit with the trial court for his violation of probation. The court held another sentencing hearing for the criminal charges Graham had been charged for originally. The court found that Graham had violated probation by fleeing, committing a home robbery, possessing a firearm, and associating with persons engaged in criminal activity. The trial judge decided against the lesser recommendations of the Florida

[117] Kennedy: I. *Graham v. Florida*, 560 U.S. 48 (2010).
[118] Kennedy: I. *Graham v. Florida*, 560 U.S. 48 (2010).
[119] Kennedy: I. *Graham v. Florida*, 560 U.S. 48 (2010).

Department of Corrections as well as the State, and instead sentenced Graham to the maximum sentence for both earlier armed burglary and attempted armed robbery charges: "life imprisonment for the armed burglary and 15 years for the attempted armed robbery."[120] Since Florida does not have a parole system, this was a life sentence without possibility of parole and Graham could not be released unless granted executive clemency.[121]

The Supreme Court agreed to hear the case, and this time issued a decision with 6 justices agreeing and 3 justices dissenting. Justice Kennedy delivered the opinion of the court, in which Justices Stevens, Ginsberg, Breyer, and Sotomayor joined. Justice Steven filed a concurring opinion, in which Ginsberg and Sotomayor joined. Justice Roberts filed an opinion concurring in the judgment. In addition, Justice Thomas filed a dissenting opinion, in which Scalia joined, and in which Alito joined in parts I and III. Justice Alito also filed a dissenting opinion of his own. Once again, the majority opinions expressed that society's evolving standards of decency are central to the Eighth Amendment and recent findings in neuroscience suggest that juveniles possess a diminished culpability when compared to adults that provides reasons for a categorical exemption for juvenile under a particular sentencing structure. The dissents once again argued that the Constitution is unchanging, and no amount of evidence could change the interpretation of the Constitution.

After hearing the case, the Court held the Eighth Amendment's Cruel and Unusual Punishment Clause does not permit a juvenile offender to be sentenced to life in prison without the possibility of parole for a non-homicide crime. In issuing this ruling, the Court again first looked to society's evolving standards of decency to determine if the punishment was cruel and

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[120] Kennedy: I. *Graham v. Florida*, 560 U.S. 48 (2010).
[121] "United States Supreme Court, Graham v. Florida, (2010)." Thomson Reuters. 2016. http://caselaw.findlaw.com/us-supreme-court/08-7412.html/. Accessed, April 25, 2016.

unusual. The Court noted that "nationwide, there are only 129 juvenile offenders serving life without parole for nonhomicide [sic] crimes […] 77 of those are serving sentences imposed in Florida and the other 52 are imprisoned in just 10 States and the federal system."[122] After determining that only "12 jurisdictions nationwide in fact imposed life without parole sentences on juvenile nonhomicide [sic] offenders,"[123] the Court concluded that societal norms had emerged against the practice based upon the infrequency in application of life without parole sentencing for non-homicide crimes, and the low number of states that invoke the penalty. Next, the Court analyzed juvenile culpability using the findings established in *Roper v. Simmons*. Beyond those findings, the Court stressed that, "[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."[124] This finding undermines the rehabilitative principles of criminal law sentencing since a life with parole sentence eliminates any chance at rehabilitation. Importantly, the Court restated their findings in *Tison v. Arizona,* that "defendants that 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."[125] In addition, Justice Kennedy stated, "When compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."[126] In other words, since the offender is a juvenile and the crime committed is not considered to be one of the most heinous offenses, their culpability is diminished on two levels. The Court

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[122] "United States Supreme Court, Graham v. Florida, (2010)." Thomson Reuters. 2016. http://caselaw.findlaw.com/us-supreme-court/08-7412.html/. Accessed, April 25, 2016.
[123] "United States Supreme Court, Graham" Thomson Reuters.
[124] Kennedy: III. B. *Graham v. Florida*, 560 U.S. 48 (2010).
[125] Kennedy: III. B. *Graham v. Florida*, 560 U.S. 48 (2010). Citing, *Tison v. Arizona*, 481 U.S. 137 (1987).
[126] Kennedy: III. B. *Graham v. Florida*, 560 U.S. 48 (2010).

"likened life without parole for juveniles to the death penalty itself."[127] The Court also found that life without parole is especially harsh for juveniles because they spend a greater percentage of their life in prison. Together, this analysis led the court to hold that life without the possibility of parole for non-homicide crimes in the juvenile context is unconstitutional under the Eighth Amendment.[128]

In Justice Stevens' concurring opinion, with which Justice Ginsberg and Sotomayor joined, the justices reaffirmed that society's evolving standards of decency are central to the interpretation of Eighth Amendment cases. They also took steps to attack the rigid originalist approach to the Constitution held by some of their fellow justices, writing, "While Justice Thomas would apparently not rule out a death sentence for a $50 theft by a 7 year old […] the Court wisely rejects his static approach to the law. Standards of decency have evolved since 1980. They will never stop doing so."[129] Based on the past century of Court jurisprudence, it is clear that the concepts of proportionality and evolving standards of decency are central to interpreting the Eighth Amendment.

Chief Justice Roberts also issued a concurring opinion, agreeing with the Court's conclusion, but disagreeing with the scope of the decision and some of the rationale upon which they based their decisions. Justice Roberts argues that in issuing a holding, the Court should have only looked at two lines of precedent: "(1) cases requiring 'narrow proportionality' review to noncapital sentences and (2) [the Court's] conclusion in *Roper v. Simmons*, 543 U.S. 551, (2005), that juveniles are generally less culpable than adults who commit the same crimes."[130] Justice Roberts claims that the Court was only required to issue a narrow holding, on a case-by-

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[127] Kagan: II. *Miller v. Alabama*, 567 U.S. ___ (2012).
[128] Kennedy: III. B. *Graham v. Florida*, 560 U.S. 48 (2010).
[129] Stevens Concurring: *Graham v. Florida*, 560 U.S. 48 (2010).
[130] Roberts Concurring: *Graham v. Florida*, 560 U.S. 48 (2010).

case basis for determining if a punishment is cruel and unusual. Roberts then analyzed Graham's sentence by comparing it to the sentences adults receive for similar crimes in Florida, and considered the principle of diminished culpability of juveniles the Court established in *Roper*. Roberts reached the conclusion that Graham's sentence was harsh enough to constitute cruel and unusual punishment.[131]

Perhaps the biggest point of contention the Justice Roberts offers is a belief that the Court made too broad of a holding by issuing a categorical ban. He believes the Court was only required to narrowly address the case in front of them, and should not have issued a categorical ban. Roberts argues that this decision was the first time in which the Court had ever issued a "categorical ban" to a term-of-years sentence. The Court had previously done so only in death penalty cases. Roberts believes that the scope of the decision extends too far, and they should still leave room for cases in which the acts of a juvenile are so heinous that they merit a life in prison without parole sentence.[132]

In addition to Justice Robert's concurring opinion, Justice Thomas issued a dissent, joined by Scalia and Alito for parts I and III. After restating the facts of the case in part I, Thomas and Scalia returned to their originalist and unchanging interpretation of the Constitution. The Justices argued the same way they did in *Atkins* and *Roper*, dismissing the idea that society's evolving standards of decency are important. They also re-emphasized their static approach to Eighth Amendment interpretation, writing, "even if it were relevant, none of this psychological or sociological data is sufficient to support the Court's 'moral' conclusion that youth defeats

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[131] Roberts Concurring: II. A. *Graham v. Florida*, 560 U.S. 48 (2010).
[132] This debate regarding categorical ban will be explored in depth in the coming chapters and will be fundamentally important for the future discussion regarding the new understanding of juvenile felony murder liability and the application of the *Enmund* standard to life without possibility of parole sentencing for juvenile offenders.

culpability in every case."[133] Based on the history of decisions issued by Thomas and Scalia, it does not appear that any circumstances exist that could merit a departure from the way laws were written in 1783.

Justice Alito also provided a short dissenting opinion, emphasizing that the decision does not prohibit the imposition of extremely long term-of-years sentences that go beyond the average life expectancy of an individual in non-homicide crimes. For example, a juvenile can still be charged to 110 years in prison without the possibility of parole for a non-homicide crime.[134] Alito also clarified that the Court went beyond the scope that was needed in reaching the decision. For both of these reasons, Alito issued his dissent.[135]

While both sides presented compelling cases, we must now be sure beyond all reasonable doubt that society's evolving standards of decency are central to the Eighth Amendment. In the case presented before the Court, it is clear that the evidence of a societal consensus against the practice was strong enough for the Court to conclude that it is unconstitutional for a juvenile offender to be sentenced to life in prison without the possibility of parole for a non-homicide crime. This approach of evaluating sentences based on society's evolving standards of decency was once again affirmed in the case of *Miller v. Alabama*.

III. *Miller v. Alabama*, 567 U.S. (2012)

Just two years after the Justices issued their holding in the case of *Graham v. Florida*, the Supreme Court heard a consolidation of two cases, *Jackson v. Hobbs* and *Miller v. Alabama*, to determine whether mandatory life sentences without the possibility of parole for juvenile homicide offenders is considered cruel and unusual punishment. The case was decided in a 5-4

[133] Thomas Dissent: III. C. 1. *Graham v. Florida*, 560 U.S. 48 (2010).
[134] These excessively long term-of-years sentences will be further addressed in Chapter 4.
[135] Alito Dissent: *Graham v. Florida*, 560 U.S. 48 (2010).

decision. Justice Kagan delivered the opinion of the Court, in which Justices Kennedy, Ginsburg, Breyer, and Sotomayor, joined. Justice Breyer filed a concurring opinion, in which Justice Sotomayor joined. Chief Justice Roberts filed a dissenting opinion, in which Justices Scalia, Thomas and Alito joined. Justice Thomas also filed a dissenting opinion, in which Scalia joined. And Justice Alito issued a dissenting opinion, in which Justice Scalia joined. This proliferation of opinions suggests that there is a wide variation in how the Justices believe the case presented before them should be interpreted. In issuing their holding, the majority once again relied upon society's evolving standards of decency, recent findings in neuroscience, and Supreme Court precedents from the previously discussed cases. The dissents once again took one of two stances. First, Justice Roberts used a similar argument to the one he made in *Graham*, contending that while society's evolving standards of decency are central to the Eighth Amendment, no societal consensus exists against the practice. Conversely, Scalia and Thomas both make the same, originalist argument that the Constitution is an unchanging document. After much debate, the Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without parole for juvenile homicide offenders."[136] A further analysis of the background of both cases presented before the Court, as well as the rationale for making their decisions follows below.

In the case of *Jackson v. Hobbs*, Kuntrell Jackson, then 14 years old, decided to rob a videogame store with friends. On the way to the store, Jackson became aware that one of the boys was carrying a sawed off shotgun. When they reached the store, Jackson decided to wait outside. One of the boys inside held the gun at the clerk, demanded money, and when Jackson heard yelling, decided to enter the store. Jackson then yelled out either, "[we] ain't playin" to the

[136] "United States Supreme Court, Miller v. Alabama, (2012)." Thomson Reuters. 2016. http://caselaw.findlaw.com/us-supreme-court/10-9646.html. Accessed, April 25, 2016.

store clerk, or "I thought you all was playin'" to his friends. The testimonies in court diverge to some extent. The clerk then threatened to call the police, and one of Jackson's accomplices shot and killed her. They boys fled without money.[137] Jackson was tried in adult court, although only age 14 at the time, and was charged with capital felony murder and aggravated robbery. The jury later convicted Jackson of both crimes, and based on Arkansas' laws, faced only one possible sentence: life without possibility of parole. The Arkansas Supreme Court affirmed the convictions on appeal.[138]

As in the case of *Jackson v. Hobbs*, Evan Miller was only 14 at the time of his crime. Miller had a very difficult upbringing at the hands of abusive and alcoholic parents. One night while home with a friend, Cole Cannon came to make a drug deal with Miller's mother. The boys went back to Cannon's trailer where the three smoked marijuana and played drinking games. When Cannon passed out, the boys stole money from his wallet. When they attempted to put the wallet back, Cannon woke up and grabbed Miller by his throat.[139] Miller's friend grabbed a baseball bat, started hitting Cannon with it, and then Miller placed a sheet over Cannon's head and "told him, 'I am God, I've come to take your life.'"[140] The boys then went back to Miller's trailer, and soon returned to cover up evidence of the crime. The boys lit two fires around the trailer, causing Cannon to eventually die from injuries and smoke inhalation.[141] Miller's trial originally went to juvenile court, but based on "Miller's 'mental maturity,' and his prior juvenile offenses (truancy and 'criminal mischief'),"[142] his trial was moved to adult court, as is permitted by Alabama law. Miller was charged with arson, a crime carrying a minimum sentence of life in

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[137] Kagan: I. A. *Miller v. Alabama*, 567 U.S. ___ (2012).
[138] Kagan: I. A. *Miller v. Alabama*, 567 U.S. ___ (2012).
[139] Kagan: I. A. *Miller v. Alabama*, 567 U.S. ___ (2012).
[140] Kagan: I. A. *Miller v. Alabama*, 567 U.S. ___ (2012).
[141] Kagan: I. A. *Miller v. Alabama*, 567 U.S. ___ (2012).
[142] Kagan: I. A. *Miller v. Alabama*, 567 U.S. ___ (2012).

prison without possibility of parole. A jury found Miller guilty and he was sentenced with the only possible outcome of life without possibility of parole. The Alabama Supreme Court denied Miller's request for review.[143]

The Supreme Court granted certiorari in both cases and Justice Kagan wrote the opinion of the Court, holding that; "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile homicide offenders."[144] In issuing this decision, the case looked toward two lines of precedent: (1) the first line includes cases where the Court "has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty."[145] These cases include *Graham v. Florida*, *Atkins v. Virginia*, and *Kennedy v. Louisiana*.[146] In these cases, the Court has looked to mitigating factors that reduce the culpability of a particular class of offender, and determined that the entire class, as a category, is less deserving of a particular punishment. Prior to *Graham*, this categorical approach had never been used to challenge a term-of-years sentence; however, the Court affirmed this approach in the case presented before them. (2) The second line of precedent includes cases where the Court has "prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death."[147] Since the case of *Graham* established that life without parole for juveniles and the death penalty for adults are analogous, it can be argued that life without parole operates as capital punishment for juvenile offenders.

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[143] Kagan: I. A. *Miller v. Alabama*, 567 U.S. ___ (2012).
[144] "United States Supreme Court, Miller," Thomson Reuters.
[145] Kagan: II. *Miller v. Alabama*, 567 U.S. ___ (2012).
[146] *Kennedy v. Louisiana*, 554 U. S. 407 (2008),
[147] Kagan: II. *Miller v. Alabama*, 567 U.S. ___ (2012).

This first line of precedent follows the findings in *Roper* and *Graham* that children are constitutionally different from adults. The Court relied on its findings that "juveniles have diminished culpability and greater prospects for reform, [and] explained, 'they are less deserving of the most severe punishments.'"[148] Once again, the Court found that:

> "children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U. S., at 569. Second, children 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings. Ibid. And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'"[149]

Together, these findings therefore make juveniles categorically less deserving of the most severe punishments.

The second line of precedent relies on the findings of *Graham* that likened "life without parole sentences imposed on juveniles to the death penalty itself."[150] Since the Court "viewed this ultimate death penalty for juveniles as akin to the death penalty, we treated it similarly to the most severe punishment."[151] In the case of *Woodson v. North Carolina*, 428 U.S. 280 (1976), the Court held that mandatory death sentences for first-degree murder violated the Eighth Amendment.[152] Based on the analogous nature of these two sentencing schemes, the Court created a categorical ban against mandatory life sentences without parole for juvenile offenders.

In agreement with the Court, Justice Breyer filed a concurring opinion, joined by Justice Sotomayor. The concurrence fully supported the opinion of the Court, but it emphasized that to impose a life without parole sentence on a juvenile, a court must determine that the juvenile

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[148] Kagan: II. *Miller v. Alabama*, 567 U.S. ___ (2012).
[149] Kagan: II. *Miller v. Alabama*, 567 U.S. ___ (2012).
[150] Kagan: II. *Miller v. Alabama*, 567 U.S. ___ (2012).
[151] Kagan: II. *Miller v. Alabama*, 567 U.S. ___ (2012).
[152] *Woodson v. North Carolina*, 428 U.S. 280 (1976).

defendant, "kill[ed] or intend[ed] to kill."[153] Breyer stressed the Court's findings in *Graham*, that "when compared to an adult murderer, a juvenile offender that does not kill or intend to kill has a twice diminished moral culpability."[154] Breyer then brings up felony murder, writing, "I recognize that in the context of felony-murder cases, the question of intent is a complicated one,"[155] but in the case of juveniles, "even juveniles who meet the *Tison* standard of 'reckless disregard' may not be eligible for life without parole. Rather, *Graham* dictates a clear rule: The only juveniles who may constitutionally be sentenced to life without possibility of parole are those convicted of homicide offenses who 'kill or intend to kill.'"[156] When discussing his rationale, he explained that basing liability on foreseeable risk is a wrong because "the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what juveniles lack the capacity to do effectively."[157] The concurring opinion's emphasis on those who "kill or intend to kill" becomes important for the recommendation of applying the *Enmund* standard to juvenile felony murder offenders discussed in Chapter 3.

In contrast to the opinion of the Court, Chief Justice Roberts filed a dissent, with whom Justices Scalia, Thomas, and Alito joined. These Justices ascribed to the first camp of dissenters discussed in the introduction, arguing that while society's evolving standards of decency are central to the Eighth Amendment, there is no societal consensus against the practice. To back this claim up, the Justices cited that nearly 2,500 juveniles are currently serving mandatory life sentences, which suggests that society still fully condones this sentencing structure. Additionally,

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[153] Breyer Concurring: *Miller v. Alabama*, 567 U.S. ___ (2012). Citing, *Graham v. Florida*, 560 U.S. 48 (2010).
[154] Breyer Concurring: *Miller v. Alabama*, 567 U.S. ___ (2012). Citing, *Graham v. Florida*, 560 U.S. 48 (2010).
[155] Breyer Concurring: *Miller v. Alabama*, 567 U.S. ___ (2012).
[156] Breyer Concurring: *Miller v. Alabama*, 567 U.S. ___ (2012).
[157] Breyer Concurring: *Miller v. Alabama*, 567 U.S. ___ (2012).

the Justices emphasized that mandatory sentences have become more popular in the last half-century, and thus does not support the idea that society has "evolved" to the point of reaching a consensus against the practice of mandatory life without parole sentencing for juveniles.[158]

Finally, Justice Thomas also filed a dissent, with whom Justice Scalia joined. And Justice Alito filed a dissent, with whom Justice Scalia joined. In both of these dissents, the Justices once again argue that the constitution is forever unchanging, and interpretation of the Eighth Amendment should not look to society's evolving standards of decency.

IV. *Montgomery v. Louisiana*, 135 S. Ct. 1546 (2016)

The final relevant case for the analysis of the felony murder rule in the context of juveniles is the case of *Montgomery v. Louisiana*,[159] which was decided four years after the Court issued its holding in *Miller v. Alabama*. In this 6-3 decision written by Justice Kennedy, the Court ruled that its holding in *Miller v. Alabama*, which banned mandatory life without parole sentencing for juveniles, must be applied retroactively. This decision demands that individuals previously convicted under this sentencing scheme should be granted retrial,[160] requiring that 2,300 cases nationwide be reheard.[161]

This ruling indicates that we are at a critical juncture for society's understanding of the felony murder rule. While *Miller v. Alabama* did involve a juvenile convicted of felony murder, the Court decided to narrowly tailor their decision to only ban mandatory life sentences for juveniles and chose not to address the constitutionality of life sentences without parole for juvenile offenders under the felony murder rule. While Justice Breyer, with Justice Sotomayor, did offer insights to juvenile life without parole felony murder sentencing, their analysis is not

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[158] Roberts Dissent: *Miller v. Alabama*, 567 U.S. ___ (2012).
[159] *Montgomery v. Louisiana*, 135 S. Ct. 1546 (2016)
[160] *Montgomery v. Louisiana*, 135 S. Ct. 1546 (2016).
[161] *Montgomery v. Louisiana*, 135 S. Ct. 1546 (2016).

legal precedent. This leaves a legal gap in the nation's understanding of the felony murder rule for juveniles that must be filled, or susceptible youths that never killed or intended to kill may be locked away for their entire life without ever receiving a chance of rehabilitation. In the following chapter, an argument will be proposed for using the *Enmund* standard to determine whether or not juveniles can be sentenced to life in prison without possibility of parole. Chapter 4 will then provide a framework for States to follow when adopting the *Enmund* standard in their Court systems.

Chapter 3: Proposing the *Enmund* Standard as the Benchmark for Juvenile Life without Parole Sentencing

The Supreme Court decisions discussed in Chapter 2 regarding capital punishment have profound effects on the way States handle juvenile sentencing under the felony murder rule. In this Chapter, I propose that in the future courts and States should use the *Enmund* standard, instead of the *Tison* standard, for determining which juveniles can be sentenced to life without the possibility of parole. The *Enmund* standard requires that for an individual to be sentenced to life without parole, he or she must personally kill or attempt to kill, intend to kill, or facilitate the killing of a person.[162] The application of the *Enmund* standard to juvenile life without parole sentencing is the next essential step for bringing together recent Supreme Court decisions and restoring equity to juvenile sentencing in America.

The recent string of Supreme Court decisions has taken large steps to restructure juvenile criminal justice sentencing, and while the case of *Jackson v. Hobbs*, which was consolidated with *Miller v. Alabama*, did involve a juvenile peripheral accomplice[163] convicted of felony murder, the Court did not directly address how to handle the sentencing of juvenile peripheral accomplices in felony murder cases. This leaves a legal gap in the nation's understanding of juvenile felony murder sentencing. In the context of adult criminal court, it remains clear that for an adult peripheral accomplice to be sentenced to death in a felony murder case, the individual must meet the standard established in the case of *Tison v. Arizona*, which held, "the Eighth Amendment does not prohibit the death penalty as disproportionate in the case of a defendant whose participation in a felony that results in murder is major and whose mental state is one of

[162] *Enmund v. Florida*, 458 U.S. 782 (1982).
[163] "Peripheral Accomplice" being defined as a juvenile participating in a felony that does not intentionally cause or attempt to cause the death of an individual, or intend that a death is taken during the commission of a crime.

reckless indifference."[164] While this standard is still fully in effect for adult criminal offenders, it leaves a grey area in the case of juvenile offenders since the Court eliminated the death penalty for juveniles under the age of 18 in *Roper v. Simmons* (2005). And, in the two subsequent cases of *Graham v. Florida* and *Miller v. Alabama* the Court drew parallels between life without parole sentencing for juveniles and the death penalty for adults.

The United States is at a critical juncture for juvenile felony murder sentencing because in the 2016 case of *Montgomery v. Louisiana*, the Supreme Court held that its categorical ban against mandatory life sentences without the possibility of parole for juveniles established in *Miller v. Alabama* must be applied retroactively, and that all individuals convicted under this mandatory sentencing scheme must be granted retrials. This means that 2,300 cases involving juveniles sentenced to mandatory life in prison without parole will be reheard, many of which involve juveniles convicted of felony murder.[165] It is imperative that States conduct these retrials with care, and that they have a uniform understanding of how to handle sentences for juvenile peripheral accomplices in felony murder cases. Otherwise youths who had yet to finish High School when they committed a crime might spend their entire lives in prison for a death they never intended to happen, without the possibility of a second chance.

In this chapter, I will outline an argument for why courts should use the *Enmund* standard, and not the *Tison* standard, to determine whether or not a juvenile can be sentenced to life without parole.[166] This proposal echoes Justice Breyer's concurring opinion in *Miller v. Alabama*, in which he asserts, "even juveniles that meet the *Tison* standard of 'reckless

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[164] "United States Supreme Court, Tison v. Arizona, (1987)." Thomson Reuters.
[165] Montgomery v. Louisiana, 577 U.S. ___ (2016).
[166] 158. *Tison v. Arizona*, 481 U.S. 137 (1987).

disregard' may not be eligible for life without parole."[167] This stricter *Enmund* standard should be used because the same rationale regarding juvenile culpability the Court used to lessen the severity of juvenile sentencing schemes in the cases of *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*, also undermines the logic behind the *Tison* standard. Additionally, the *Enmund* standard provides a more accurate link between the sentence a juvenile faces and their individual culpability for the crime committed. The *Enmund* standard also ensures that juveniles who never intend for a life to be taken receive a chance of rehabilitation.

This chapter begins with an argument for why the death penalty for adults and life without parole for juveniles are analogous. The following section analyzes how recent findings in neuroscience undermine the underlying rationale of the *Tison* standard in the context of juveniles. Section III makes a case for why the *Enmund* standard should replace the *Tison* standard for determining juvenile culpability in life without parole sentencing. I also use the same facts of the *Tison* case to illustrate why the sentence the Tison boys received would not make sense if they were juveniles and recent findings in neuroscience were considered. Finally, I provide further reasons for why courts, judges, and States should hesitate in issuing life without parole sentences for juveniles. [168]

I. Juvenile Life without Parole as Equal to the Death Penalty for Adults

To understand why it makes sense to use any standard, whether it be the *Enmund* or the *Tison* standard, for determining if a juvenile can be sentenced to life without parole, it is essential to note that in the series of opinions discussed in the previous chapter, the Court has in effect

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[167] Breyer Concurring: *Miller v. Alabama*, 567 U.S. ___ (2012). Quoting *Tison v. Arizona*, 481 U.S. 137 (1987).

[168] Chapter 4 will provide recommendations for the specific ways States should restructure their juvenile felony murder sentencing in light of this new standard, and give warnings to States to avoid trying juveniles in adult courts.

equated life without parole for juveniles to the death penalty for adults. These recent Supreme Court decisions have created a categorical distinction between adult and juvenile sentencing in the United States justice system. In the case of *Roper v. Simmons*, the Court found that juvenile culpability is more analogous to mentally retarded individuals than to their adult counterparts. In its analysis, the Court first looked to "society's evolving standards of decency"[169] to determine whether the death penalty for juveniles could be considered cruel and unusual punishment. In making this determination, the Court examined the commonality of executions for juveniles under the age of 18 throughout the United States. In their analysis, the Justices found, "the objective indicia of consensus in this case -- the rejection of the juvenile death penalty in the majority of states; the infrequency of its use even where it remains on the books; and the consistency in the trend towards abolition of the practice -- provide sufficient evidence that today our society views juveniles […] as 'categorically less culpable than the average criminal' 536 U.S., at 316."[170] This societal consensus against the practice led the Court to determine that the death penalty for juveniles constituted cruel and unusual punishment, clearly distinguishing between the culpability of juveniles and adults.[171]

The Court also looked to existing valid penological justifications for the death penalty established in *Atkins v. Virginia*, namely, "retribution and deterrence of capital crimes by prospective offenders."[172] In its analysis of retribution, the Court first examined recent findings in neuroscience showing that juveniles have an "underdeveloped sense of responsibility,"[173] are more "vulnerable or susceptible to negative influences and outside pressures, including peer

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[169] Kennedy: III. B. *Roper v. Simmons*, 543 U.S. 551 (2005).
[170] Kennedy: III. A. *Roper v. Simmons*, 543 U.S. 551 (2005). Quoting, *Atkins v. Virginia*, 536 U.S. 304 (2002).
[171] Kennedy: III. B. *Roper v. Simmons*, 543 U.S. 551 (2005).
[172] Kennedy: III. B. *Roper v. Simmons*, 543 U.S. 551 (2005).
[173] Kennedy: III. B. *Roper v. Simmons*, 543 U.S. 551 (2005).

pressure,"[174] and that the "character of a juvenile is not as well formed as that of an adult."[175] These findings led the Court to conclude that juveniles, as a category of offenders, are less culpable than adults. Court precedent reveals that "[c]apital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution' *Atkins v. Virginia*, 487 U.S. at 316."[176] In other words, since the death penalty is the harshest possible penalty that can be evoked in the American justice system, it must be reserved for the most heinous and culpable of all defendants. Therefore, since recent findings in neuroscience suggest that juveniles are categorically less culpable than adults based on their development process, they cannot be placed into the class of the worst offenders, and thus, as a group, are less deserving of the most severe forms of punishment.[177] Together, these findings led the Court to categorically eliminate the death penalty as a constitutional punishment for juvenile offenders.

The implications of this decision did not become fully clear until the Court heard the cases of *Graham v. Florida* (2010) and *Miller v. Alabama* (2012). In *Graham v. Florida*, the Court held that the Eighth Amendment "does not permit a juvenile offender to be sentenced to life in prison without parole for a non-homicide crime."[178] However, the decision itself is not as important for the analysis of felony murder as the dicta the Court used to reach their conclusion. First, the Court emphasized that in the past, "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

[174] Kennedy: III. B. *Roper v. Simmons*, 543 U.S. 551 (2005).
[175] Kennedy: III. B. *Roper v. Simmons*, 543 U.S. 551 (2005).
[176] "United States Supreme Court, Roper," Thomson Reuters.
[177] Kennedy: III. B. *Roper v. Simmons*, 543 U.S. 551 (2005).
[178] "United States Supreme Court, Graham," Thomson Reuters.

most serious forms of punishment than are murderers."[179] The precedent for this statement stems from the Court's holdings in *Tison v. Arizona* and *Enmund v. Florida*. Next, the Court declared: "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis."[180] The Court then noted that life without parole is the second most severe penalty permitted by law.[181] This implies, that since the harshest penalty juveniles can receive is life without parole, it is, in effect, analogous to capital punishment for adults. The Court reaffirmed this conclusion in *Miller v. Alabama*, explaining, "*Graham* further likened life without parole for juveniles to the death penalty itself."[182] This finding is critical to our analysis.

Once the equivalence between life without parole for juveniles and the death penalty for adults has been established, many might assume that the framework established in *Tison v. Arizona* to determine whether the death penalty can be invoked for an adult felony murder participant should also be applied to determine if a juvenile can be sentenced to life in prison without parole. However, these recent Supreme Court decisions undermine the *Tison* standard in the context of juveniles. Instead, the *Enmund* should be used to determine if a juvenile's culpability in a felony murder case merits a life without parole sentence because it directly links the culpability of juveniles to the punishment they receive for their crime. Since juveniles have a significantly diminished culpability that undermines their blameworthiness, it is unjust to sentence them with life in prison without the possibility of parole unless they directly intend for a life to be taken. A further examination of why recent decisions undermine the *Tison* standard follows in Section II.

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[179] Kennedy: III. B. *Graham v. Florida*, 560 U.S. 48 (2010).
[180] Kennedy: III. B. *Graham v. Florida*, 560 U.S. 48 (2010).
[181] Kennedy: III. B. *Graham v. Florida*, 560 U.S. 48 (2010).
[182] Kagan: II. *Miller v. Alabama*, 567 U.S. ___ (2012).

II. Analyzing the Foreseeability Requirements of the *Tison* Standard

In the case of *Tison v. Arizona*, the Court's majority opinion determined that an adult who is a "major participant in an underlying felony" and behaved with "reckless indifference to human life" could be found culpable enough to warrant the death penalty. Specifically, within the confines of the case presented before them, the Court concluded that the participants "could have anticipated the use of lethal force."[183] This decision essentially means that the possibility of foreseeing a death might be taken or behaving recklessly during the commission of a crime is enough to merit the harshest penalty available to the offender. This "foreseeable" or "reckless" understanding of culpability has serious flaws when considered in the juvenile context. In the cases of *Roper*, *Graham*, and *Miller,* the Court found that juveniles cannot foresee the consequences of their actions, behave recklessly or impulsively, and are more susceptible to outside pressures, including peer pressure. These three findings fundamentally undermine the *Tison* standard. Therefore, it is irrational to apply the adult version of felony murder culpability to juveniles, as the following discussion will demonstrate.

A. Juvenile Risk Assessment and Decision Making Capabilities

The first finding that undermines the *Tison* standard is that juveniles have diminished risk assessment and decision making capabilities. In *Roper v. Simmons*, Justice Kennedy remarked, "any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'"[184] The point Justice Kennedy raises should come as a surprise to nobody. In the United States, "almost every state

[183] "United States Supreme Court, Tison v. Arizona, (1987)." Thomson Reuters.
[184] Kennedy: III. B. *Roper v. Simmons*, 543 U.S. 551 (2005).

prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent,"[185] precisely because the government has long known that juveniles are incapable of making informed, difficult life decisions. These findings are well backed up by neuroscience, as the Court has used numerous studies to illustrate the poor decision-making and risk assessment skills of juveniles.[186]

While these findings by no means prove that juveniles are incapable of being culpable or blameworthy for their actions, it does explain why they are more likely to commit a crime without fully assessing the consequences of their actions. These findings indicate that a juvenile is not as likely to think about the trouble they will get into for their crime and are more likely to perform a criminal act, such as a bank robbery, but most importantly, juveniles are less likely to foresee that a death might occur during the commission of a felony. Since the *Tison* standard bases felony murder culpability on foreseeability, and juveniles cannot foresee the consequences of their actions and make rational decisions the way adults can, it does not make sense to determine a juvenile's culpability based on the potential foreseeability that a death might occur while committing a felony. This inability to foresee potential outcomes is one of the main reasons the *Tison* standard should no longer be used for determining juvenile felony murder culpability.

B. Juvenile Recklessness and Impulsivity

Beyond the fact that juveniles are less likely to assess the consequence and risks of their actions, they are also increasingly likely to behave in reckless and impulsive manner. In *Roper v. Simmons*, the Court noted "adolescents are overrepresented statistically in virtually every

[185] Kennedy: III. B. *Roper v. Simmons*, 543 U.S. 551 (2005).
[186] See Chapter 2 for an in-depth discussion of recent neuroscience studies

category of reckless behavior."[187] Take driving for example. When it comes to driving, "16-year-olds have higher crash rates than drivers of any other age" and "33% of deaths among 13 to 19-year-olds in 2010 occurred in motor vehicle crashes."[188] The impulsive nature of adolescent brain processing makes them more likely to drive fast, text while driving, and when faced with split second driving decision, cannot process the information surrounding them and react quickly.

As stated before, the *Tison* standard includes felony participants that behave with reckless disregard for human life. Using the *Tison* standard means that if a juvenile were to rob a store with their friend, and hit a person while swerving through a park to escape, they could be sentenced to life in prison without the possibility of parole. While in the United States the juvenile usually would not receive life without parole for this act, this type of sentence does still happen on occasion, and society must do its part to eliminate this form of sentencing at all costs. Knowing that juveniles behave recklessly and cannot fully foresee the risks of their actions, it is unlikely that the juvenile entering this crime will foresee that they might swerve through a park while making an escape. Beyond this, the impulse prone behavior of juveniles makes them less likely to think through the situation and pull over, and more likely to impulsively swerve through the fence of a nearby park. It is for these reasons that a juvenile exhibits diminished culpability that undermines the use of the *Tison* standard, and why the *Enmund* standard of direct intent should be used for juveniles.

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[187] 15. *Roper v. Simmons*, 543 U.S. 551 (2005).
[188] "11 Facts about Teen Driving," DoSomething.org. 2016. Accessed April 25, 2016. https://www.dosomething.org/us/facts/11-facts-about-teen-driving

C. Juvenile Susceptibility to Outside Pressures, including Peer Pressure

Without question, the most relevant finding in recent Supreme Court cases for the felony murder rule is that "juveniles are more vulnerable and susceptible to negative influences and outside pressures, including peer pressure."[189] For decades, the felony murder rule has been understood as a crime of strict liability, whereby accomplices in felony murder cases are found strictly liable for the behavior of all those undertaking the criminal act. While this interpretation of felony murder liability is sometimes contested, it does illustrate a serious flaw in felony murder liability, particularly in the context of juveniles.

During an individual's developmental years, finding a place in society feels like the most important thing in the world. When facing a school transfer, the first cause of emotional stress for adolescents is losing contact with their peer group and the fear of future exclusion. Many studies confirm, "becoming a member of a peer group is one of the primary developmental tasks of adolescence,"[190] yet involvement in these groups can be both a huge advantage or disadvantage to the youth depending on the community they find. Youths are increasingly likely to behave in similar ways to the rest of the members of their group.

> "Some have considered peer pressure the 'price of group membership' (Clasen and Brown, 1985), which research has linked to a variety of potential problems, including substance abuse (Bauman and Ennett, 1996; Robin and Johnson, 1996; Hawkins, 1982), risk-taking behavior and delinquency (Keena, Loeber, Zhang, and Stouthamer, 1995), as well as dating attitudes and sexual behavior (Newcomer, Udry, and Cameron, 1983). Belonging to a group requires conformity to group interests and desires, which may not be strictly a matter of individual preference."[191]

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[189] Kennedy: III. B. *Roper v. Simmons*, 543 U.S. 551 (2005).

[190] Santor, Darcy. Messervey, Deanna. Kusumakar, Vivek. "Measuring Peer Pressure, Popularity, and Conformity in Adolescent Boys and Girls: Predicting School Performance, Sexual Attitudes, and Substance Abuse." *Journal of Youth and Adolescence* 29, no 2. (April 2000): 164. http://link.springer.com/article/10.1023/A:1005152515264. (Accessed April 25, 2016).

[191] Santor, Darcy. Messervey, Deanna. Kusumakar, Vivek. "Measuring Peer Pressure," 164.

These findings about juveniles' increased susceptibility to peer pressure extend beyond simply being pressured by peers, to all forms of outside pressure like that from parents or adults. These findings might explain why juveniles are much "more likely than adults to commit crimes in groups,"[192] and as Emily Keller points out, "a survey of individuals serving life without parole sentences in California […] found that over 75 percent of these individuals committed their crimes in groups of two to eight people."[193]

In the case of felony murder, this increased susceptibility to peer pressure becomes substantially magnified. The felony murder rule, by its very nature, imparts the behavior of a single individual onto the surrounding group involved. Should an individual be involved in a felony where a killing is committed by one of the group members, all parties involved can be found culpable for the resulting death. Take for example, the juvenile felony murder case of *Jackson v. Hobbs*, which was consolidated with *Miller v. Alabama* for the Supreme Court's decision. In the case, Kuntrell Jackson was convinced by his friends to rob a store with his peers. On the way, he became aware one member of the group was carrying a gun. He decided to wait outside when the group reached the store and only entered briefly at one point during the robbery. The store clerk then threatened to call the cops and one of the accomplices shot and killed the store clerk.[194] Although Jackson was unarmed, did not know anybody was armed when he originally agreed to commit the crime, and did not perform the action that resulted in death, he was initially sentenced to life in prison without parole.

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[192] Keller, "Constitutional Sentences," 314. Citing, J.D.B., 131 S. Ct. at 2403.
[193] Keller, "Constitutional Sentences," 314. Citing, 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.
[194] *Miller v. Alabama*, 567 U.S. ___ (2012).

The case of *Jackson v. Hobbs* is a good illustration of how a juvenile might get pulled into a crime in which they might otherwise not have participated. Jackson committed the crime with a group of friends. Jackson's increased susceptibility to peer pressure could easily have played a part in his decision to participate in the crime. Beyond this, his lack of a weapon showed that he would not have even been able to use lethal force given his own capabilities. Luckily, the Supreme Court agreed that Jackson's sentence of life without parole sentence constituted cruel and unusual punishment. However, the case does still illustrate the diminished culpability of juvenile peripheral accomplices in felony murder cases. Since juveniles have an increased likelihood of being pressured into crimes, and have a difficult time removing themselves from situations they do not want to participate in, it is irrational to impute the culpability of primary actors in felony murder cases onto their juvenile peripheral accomplices, as is done by the "major participant" requirement of the *Tison* standard.[195]

III. Comparing the *Tison* and *Enmund* Standards in Light of Recent Neuroscience

As shown, recent Supreme Court decisions have drastically transformed the way society must conduct modern felony murder sentencing for juveniles. In the case of felony murder, the two most important findings from these recent decisions to consider, as discussed in Sections I and II of this chapter, are: (1) the death penalty for adults can be viewed as analogous to life without parole sentencing for juveniles, and (2) recent findings in neuroscience show the diminished decision making capacities of juvenile make them substantially less likely to foresee the risks associated with their actions. In *Enmund v. Florida* (1982), the Supreme Court held that the death penalty is not a valid sentence for an individual who does not personally kill or attempt to kill, intend to kill, or facilitate the killing of a person. In their analysis, the Justices wrote, "It

[195] *Miller v. Alabama*, 567 U.S. ___ (2012).

is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" [196] In addition to analyzing the retributive grading of the punishment, the Court wrote, "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."[197] And finally, the Court declared that "because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken,"[198] the decision to invoke the death penalty in the lower courts must be reversed.

This holding that in order for an individual to be sentenced to death under the felony murder rule, he or she must intend, attempt, or facilitate the taking of a life stood firm until five years later when the Court heard *Tison v. Arizona*. The *Tison* case marked a strong departure from the Court's original interpretation in *Enmund*, as the Court expanded its holding to allow states to invoke the death penalty for "a defendant whose participation in a felony that results in murder is major or whose mental state is one of reckless indifference." [199] The key finding of this case was that the Tison boys were liable for the deaths in the crime because they could have "anticipated that legal force would or might be used or that life would or might be taken."[200] As shown in Section II of this chapter, using the "foreseeability" of a death being taken does not make sense for determining juvenile culpability in felony murder cases. Nonetheless, the *Tison* standard is based on the foreseeability of a life being taken.

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[196] 798. *Enmund v. Florida*, 458 U.S. 782 (1982).
[197] 801. *Enmund v. Florida*, 458 U.S. 782 (1982).
[198] 801. *Enmund v. Florida*, 458 U.S. 782 (1982).
[199] "United States Supreme Court, *Enmund v. Florida*, (1982)." Thomson Reuters. 2016. http://caselaw.findlaw.com/us-supreme-court/458/782.html. Accessed, April 25, 2016.
[200] "United States Supreme Court, *Enmund*." Thomson Reuters.

Let us now analyze the *Tison* standard, using the exact same facts the Court used to determine that Tison boys could be sentenced to death, except assume they were under the age of 18 at the time of the crime. First, since in this hypothetical, the Tisons are considered juveniles, it is important to note the trial is now to determine if the boys can be sentenced to life without the possibility of parole, instead of the death penalty.

As discussed in Chapter 1, in the case of *Tison v. Arizona*, the crime begins with the father of three brothers, who committed murder and was sentenced to life in prison. The boys planned to break their father out of prison with the guidance of other family members. The boys packed a cooler with guns, broke into the prison, armed their father and his friend, Randy Greenwalt, and made their escape. None of the boys shot a gun during the break in. While escaping through the desert, the boys' father and Greenwalt shot and killed an innocent family to escape from the police chasing them. The boys were later sentenced with the death penalty, and the Supreme Court affirmed the lower court holding, which resulted in the creation of the *Tison* standard.

Each of these factors that proved the Tisons were culpability as adults, is directly diminished if the defendant is a juvenile. Since the Court has previously declared that juveniles are more susceptible to outside pressures, having a father who has been previously convicted of murder instruct you to break him out of prison, and having your family push you along, seems like the most pressure an adolescent could possibly face.[201] The juveniles might not have devised this plan on their own, and because of juveniles increased susceptibility to outside pressures, it was likely a large contributing factor for their participation in the crime.

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[201] While this might not be considered "peer pressure" in the sense that pressure came from people their own age, the pressure of family members is often just as strong, if not stronger than the pressure expressed from people the same age.

Next, the Court decision claims that since the boys brought guns with them to break their father out of prison, they could have foreseen or anticipated that a life might be taken. This conclusion does not seem like a stretch for an adult, however a juvenile might not have seen it as a possibility. They did not fire any guns and the guns were kept hidden in a water cooler until the boys reached their father. Yes, they might have armed a convicted murder with a gun, but that murderer was their father, and that does not imply that the kids could have possibly foreseen that their father would eventually kill an innocent family with the gun in the middle of the desert.

Finally, some might attempt to argue that the juveniles should have been more careful and considered the risks and penalties of their behavior, but the Supreme Court has clearly held that "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles,"[202] and if the death penalty does not serve as a deterrent, then life without parole definitely does not either.

All of these facts from the exact case the Court used to allow the death penalty to be invoked on accomplices in felony murder cases if they are "major participants" [203] and exhibit a mental state of "reckless indifference" [204] are directly undermined when the case is taken under the consideration of juveniles. This means that basing juvenile felony murder culpability on recklessness or foreseeability does not make sense, as it is done using the *Tison* standard and proves the *Tison* standard should no longer be used for juveniles. Instead, a juvenile should only be culpable for a death that occurs during the commission of a felony if they directly intend that a life be taken, as is stipulated by the *Enmund* standard.

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[202] Kennedy. III. A. *Roper v. Simmons*, 543 U.S. 551 (2005).
[203] "United States Supreme Court, Tison v. Arizona, (1987)." Thomson Reuters.
[204] "United States Supreme Court, Tison v. Arizona, (1987)." Thomson Reuters.

Perhaps most importantly of all, we should review the long-term outcome of the *Tison* case. The two boys charged with the death penalty were Raymond and Ricky Tison. Prior to breaking their father out of prison, the only crime Tison boys had ever been charged with was stealing a case of beer from behind a Casa Grande saloon. At the time the crime was committed, the boys were 19 and 20 years old, respectively. After the Supreme Court determined the boys could be sentenced with the death penalty, the Arizona Lower Court reheard the case in 1992, and "their sentences were reduced to four life terms, two consecutive and two concurrent."[205] The Court also cited their young age as a major reason for the resentencing.

The Tison boys have now spent a total of 38 years in prison for the crime they committed. Since the time of the crime their father has passed away and Randy Greenwalt has been executed. In 1997, reporters from the *Tucson Citizen* Newspaper got a rare chance to interview Raymond Tison. In the interview, the journalist found that, "Neither brother has ever been written up for any infraction in prison. Work records consistently praise the brothers' attentiveness to detail and competency […] Rick [now] works as an academic aide, helping teach basic General Educational Development and English as a Second Language classes."[206] The boys have both become upstanding role models for the other criminals in jail. They both actively contribute to make the prison community better. Guards at the prison describe the two as easygoing, friendly, attentive, and one guard reported he had never heard the boys badmouth anybody.[207]

When the boys were first sentenced to death by the Supreme Court, Justice Brennan wrote in his dissenting view, citing a psychological report, "These most unfortunate youngsters

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[205] Flick, A.J., "Tisons." *Tucson Citizen*, January, 23, 1997. http://tucsoncitizen.com/morgue2/1997/01/23/105461-tisons/.
[206] Flick, "Tisons."
[207] Flick, "Tisons."

were born into an extremely pathological family and were exposed to one of the premier sociopaths of recent Arizona history… I do believe that their father, Gary Tison, exerted a strong, consistent, destructive but subtle pressure upon these youngsters and I believe that (the sons) got committed to an act which was essentially 'over their heads.' Once committed, it was too late…"[208] These boys were young. They made a mistake based on the pressure of their family. They have become upstanding members of their community. They have only committed one crime besides helping their father break out of jail: stealing beers as teenagers. And they are now spending four life terms in prison without a possibility of being let out early. As Raymond reflected on his childhood, he said, "All I can remember is that I wanted to grow up and have a family and be happy."[209] This dream is now impossible because of a poor choice he made before he could legally drink. And when asked what his biggest regret in life was, he replied, "We're all brought up to love and respect our parents. And that's the environment that I was brought up in. And it's a good environment normally. But I guess the biggest regret I have would be in loving the wrong man."[210] Upon further analysis, it seems as though there is no reason for the Tison boys to still be locked behind bars.[211]

If we are to accept that juveniles are more susceptible to peer pressure, cannot foresee the consequences of their actions, and are more likely to participate in risky behavior, then we must also accept that being sentenced with life in prison without parole as a juvenile should at very least require that the defendant directly intended or attempted to kill in the furtherance of their crime. It is for this reason that *Enmund* standard should be the benchmark for juvenile life

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[208] Brennan Dissent: *Tison v. Arizona*, 481 U.S. 137 (1987).
[209] Flick, "Tisons."
[210] Flick, "Tisons."
[211] Rempel, William. "Family Reunion: Three Kids Spring Dad From State Prison." *Los Angeles Times*. April 1, 1979. http://williamrempel.com/sensational-arizona-prison-break/.

without parole sentencing in felony murder convictions, instead of basing the sentence on the foreseeability of risk imposed as in the case of *Tison* standard.

IV. Additional Reasons for Avoiding Juvenile Life Without Possibility of Parole Sentencing

Beyond the lack of maturity and recent findings in neuroscience undermining the rationale of the felony murder rule for juveniles, courts throughout the country have additional reasons for avoiding juvenile life without parole sentences. When it comes to creating any sentencing structure, courts must look to the valid penological justifications for the sentence. The Supreme Court held in *Graham v. Florida* that "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."[212] The Court has historically recognized four legitimate penological goals for juveniles as: retribution, deterrence, incapacitation, and rehabilitation.[213] It is therefore imperative that the Court determines whether a sentence of life without possibility of parole based on the culpability of a juvenile peripheral felony murder accomplice, who only could have *potentially* foreseen that a life might be taken, serves any legitimate penological purpose. A further analysis follows below.

A. Retribution

The penological goal of retribution takes on many different meanings ranging from "just deserts" to "proportionality" to "let the punishment fit the crime" to "retributive grading." In its essence, retributive justice, "defines justice as appropriately punishing a person for an act which is harmful to society."[214] For the sake of examining retribution in the context of juvenile felony

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[212] *Graham v. Florida*, 560 U.S. 48 (2010).
[213] Keller, "Constitutional Sentences," 316.
[214] "Debate on Retributive or Restorative Justice System." *The New Nation (Bangladesh)*. March 22, 2013. Dakah.
http://www.lexisnexis.com.ezproxy.trincoll.edu/lnacui2api/api/version1/getDocCui?lni=5819-DS21-F12F-

murder, the key question to ask is, "Does the behavior of a juvenile peripheral felony murder accomplice, who is involved in the commission of a felony that results in a death they did not intend to happen, warrant a sentence of life without possibility of parole?"

In the original case of *Enmund v. Florida*, the Court wrote, "It is fundamental that 'causing harm intentionally must be punished more than causing the same harm unintentionally.'"[215] Additionally, the Court determined that when it comes to determining culpability, courts should focus "not on the harm caused, but on the individual's role in creating that harm."[216] In *Graham v. Florida*, the Court analyzed juvenile culpability to determine that based on the development process of adolescents, "when compared to an adult murderer, a juvenile offender who does not kill or intend to kill has a twice diminished moral culpability."[217] Their culpability is first diminished by their age, and next diminished by their individual intent. If juveniles cannot fully foresee the consequences of their actions, then punishing them to life without a second chance for the result of a crime they could not have imagined might happen is completely unreasonable and does not meet society's standards of "just deserts." Therefore, only the direct "intent to kill" requirement dictated by the *Enmund* standard should be enough to exhibit the culpability required for a life without the possibility of parole sentence for a juvenile facing felony murder charges.

B. Deterrence

As was discussed in the first chapter, there has been much debate over the underlying rationale of the felony murder rule, and one major argument is for its basis in deterrent

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[215] *Enmund v. Florida*, 458 U.S. 782 (1982).

[216] Keller, "Constitutional Sentences," 316.

[217] *Graham v. Florida*, 560 U.S. 48 (2010).

principles. The concept of deterrence essentially states that by adding a large punishment to a crime, or simply adding a punishment in general, individuals will think twice before committing criminal acts from fear of consequences. Deterrence is a widely contested issue in all of criminal law, but poses an even larger challenge when in the context of the felony murder rule or in juvenile sentencing. In the case of *Enmund*, 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 the life will be taken."[218] In other words, it is impossible to deter an act that is not intended in the first place. Nevertheless, many scholars, including David Crump, argue that the rule's deterrent effect will make individuals behave in a more careful manner and that "[t]he proposition that accidental killings cannot be deterred is inconsistent with the widespread belief that the penalizing of negligence, and even the imposition of strict liability, may have deterrent consequences;"[219] however, this analogy does not hold up. Punishing an adolescent to life in prison without parole seems unreasonable with only a possibility that deterrence works, especially since the only study of the deterrent effect of the felony murder rule concluded that there is little to no deterrent effect in the first place.[220]

If claims of the felony murder rule having deterrent effect among adults are widely contested, then it is even more uncertain in the context of juveniles. As was said before, in the case of *Roper v. Simmons*, the Court found that, "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles."[221] All of the principles that lead juveniles to have a diminished culpability when compared to adults, including increased

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[218] 798-99. *Enmund v. Florida*, 458 U.S. 782 (1982).
[219] Crump, "In Defense," 371.
[220] Malani, Anup. "Does the Felony-Murder Rule Deter? Evidence from FBI Crime Data." *Virginia Law Review*, 2002. Accessed October 31, 2015. http://www.law.virginia.edu/pdf/malani/felonymurder021111rand.pdf.
[221] Kennedy: III. B. *Roper v. Simmons*, 543 U.S. 551 (2005).

susceptibility to outside pressures, increased impulsive behavior, and inability to fully consider the consequences of their actions, undermine a juvenile's ability to be deterred from their crime. The Court noted that "[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.'"[222] Or, in the words of Emily Keller, "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."[223]

C. Incapacitation

The third possible penological justification for life without parole sentencing is incapacitation. Incapacitation is a justification for the most heinous offenders and argues that by locking a criminal behind bars, it "prevent[s] the offender from re-offending."[224] This penological goal cannot be justified for a person who steals a candy bar. Incapacitation can only be considered a just punishment if the criminals re-entrance to society poses a threat. In *Graham*, the Court noted that, "to justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make the judgment that the juvenile is incorrigible. The characteristics of a juvenile make that judgment questionable."[225] Specifically, Justice Kennedy wrote in *Roper v. Simmons*, and as affirmed by *Graham* and *Miller*, "the character of a juvenile is not as well formed as that of an adult."[226] This less formed character makes them more likely to change their personality later in life and become a contributing member of society. The Court stressed, "it is difficult even for experts to distinguish

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[222] *Roper v. Simmons*, 543 U.S. 551 (2005). Quoting *Thompson v. Oklahoma*, 487 U.S. 815 (1988).
[223] Keller, "Constitutional Sentences," 318.
[224] Anderson, "Applying the Tison," 27.
[225] *Graham v. Florida*, 560 U.S. 48 (2010).
[226] Kennedy. III. B. *Roper v. Simmons*, 543 U.S. 551 (2005).

transient immaturity, and the rare juvenile offender whose crimes reflect irreparable corruption,"[227] and we should not sentence a juvenile to life without parole until more information on the true nature of their character is understood.

D. Rehabilitation

The final, and by far the most important penological justification that is commonly identified by the Court in juvenile cases, is rehabilitation. Rehabilitation is the opportunity for an individual to change their ways and re-enter society. Many experts argue the primary goal of criminal justice should be rehabilitation, and sentencing a juvenile to life without the possibility of parole denies them the possibility for change. A life without possibility of parole sentence, by its very definition, forbids any chance of rehabilitation. This should be especially concerning, since, as the Court has argued, "a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'"[228] The less fixed nature of a juvenile offender makes them have a higher chance for rehabilitation than adults, and it is the duty of an evolved and developed society to ensure that all young people are given a second chance, or we remove the opportunity for them to grow and deprive them of the basic rights guaranteed by our Constitution.

V. Chapter Conclusion

The recent line of Supreme Court cases clearly undermines defining juvenile felony murder culpability in terms of recklessness and foreseeability, as well using the *Tison* standard as the benchmark for juvenile life without parole sentencing. The inability of juveniles to fully assess risk and consequences, their increased likelihood of impulsive behavior, and their increased susceptibility to peer pressure diminish their culpability in felony murder cases.

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[227] *Graham v. Florida*, 560 U.S. 48 (2010).
[228] *Miller v. Alabama*, 567 U.S. ___ (2012). Quoting *Roper v. Simmons*, 543 U.S. 551 (2005).

Additionally, juvenile's transient[229] nature provides additional support for why juveniles should be granted chances of parole in felony murder sentencing. By reinstating the *Enmund* standard as the benchmark of juvenile felony murder life without parole sentencing, the final grey area of recent Supreme Court decisions comes together, and we ensure that only juveniles that personally kill or attempt to kill, intend to kill, or facilitate the killing of a person may be charged to life in prison without parole. The following chapter outlines a guide for how states should restructure their sentencing in felony murder cases, as well as provide warnings for how unjust felony murder sentences might manifest themselves.

[229] "Transient Nature" in this situation means that juvenile's personality traits are less fixed than adults, and more likely to benefit from the rehabilitative goals of the criminal justice system and less likely to be corrupted for life. The Supreme Court has spoken to the transient nature of juveniles on numerous occasions. See *Roper*, *Graham*, and *Miller*.

Chapter 4: Implications on State Sentencing

Over the past few decades, the Supreme Court has issued rulings that fundamentally restructure the way courts and States throughout the Country must handle juvenile sentencing. The application of the *Enmund* standard to juvenile felony murder sentencing is the final adjustment needed for bringing juvenile criminal sentencing in line with the rest of the Court's previous rulings. While the proposed method of using the *Enmund* standard to determine whether or not a juvenile can be sentenced to life without possibility of parole might be foreign to many states, it is nonetheless a key development in a society with evolving standards of decency. As stated before, in *Montgomery v. Alabama*, the Court ruled that all juveniles convicted of mandatory life without parole must have their cases reheard. In other words, 2,300 juveniles will be granted retrials and many of these cases will involve juveniles convicted of life without parole in felony murder cases.[230] It is the responsibility of state legislatures to restructure their juvenile sentencing requirement, as well as the consideration of judges throughout the Country, to ensure they have a uniform understanding of how to apply the *Enmund* standard to juvenile life without parole sentencing, or juveniles who never truly intend to cause harm might spend their entire lives behind bars, without ever being given a second chance.

In making the transition to this new framework for juvenile sentencing, states should:

(I) Avoid giving juveniles term-of-years sentences that vastly outnumber the life expectancy of a person;
(II) Look to North Carolina as a guide for using 25 years as the maximum time a juvenile should spend in prison before being granted a chance of parole;
(III) Not try juveniles convicted of felony murder in adult courts;
(IV) Consider that the culpability of a 19 year old might be similarly diminished to that of a 17 year old; and finally
(V) Recognize that in a society with evolving standards of decency, the cutoff at 18 years for determining if somebody is a juvenile might someday change.

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[230] Montgomery v. Louisiana, 577 U.S. ___ (2016).

A closer explanation of all of these recommendations follows below.

I. Avoiding Term-of-Years Sentences beyond the Life Expectancy of the Average Person

After the Supreme Court issued its holdings in *Graham* and *Miller*, "lower courts around the country [began] to sentence juvenile offenders to term-of-years sentences that far exceed the expected lifetime of the juvenile."[231] While the Supreme Court issued a categorical ban on "life without parole" sentences for juveniles convicted of non-homicide crimes in *Graham*, lower Courts attempted to get around the ruling by issuing extremely long "term-of-years" sentences that were life sentences by the nature of their length. In the California Court case, *People v. Caballero* (2012),[232] Rodrigo Caballero, a 16 year old, was sentenced to "110-years for his involvement in a non-homicide crime."[233] This sentence would have made Caballero 126 by the time be was freed from jail. Not only does this sentence far exceed the average life expectancy of a person in the United States, but it is also 4 years beyond the longest lifespan ever recorded in human history.[234] Florida heard a similar case in *Adams v. State*, where a "juvenile offender was originally sentenced to a term of sixty years, with a mandatory minimum of 58.5 years,"[235] as well as Washington, where "a sixteen year old was sentenced to a term of 1,111 months (92.5 years) for a non-homicide crime."[236]

These term-of-years life sentences that exceed the life expectancy of the average human undermine the core of both my argument and the arguments of the Supreme Court. It is clear, based on the rationale of the Supreme Court decisions that have previously been articulated, that

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[231] Anderson, "Applying the Tison," 28.
[232] *People v. Caballero*, 282 P.3d 291 (Cal. 2012)
[233] Anderson, "Applying the Tison," 28.
[234] Whitney, Craig. "Jeanne Calment, World's Elder, Dies at 122." *New York Times*. August 5, 1997. http://www.nytimes.com/1997/08/05/world/jeanne-calment-world-s-elder-dies-at-122.html. Accessed April 25, 2016.
[235] Anderson, "Applying the Tison," 29.
[236] Anderson, "Applying the Tison," 29.

the Court never intended for these excessively long sentences to be issued. In deciding the cases of *Roper*, *Graham*, and *Miller*, the Court looked to the Eighth Amendment to determine whether the juvenile sentences in each case could be categorized as cruel and unusual punishment. In assessing the proportionality of the charges the juveniles faced, the Court had to consider two separate and distinct lines of precedent. The first line "involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty."[237]

The first line of precedent, challenges to term-of-years sentencing, are cases where the Court has had to determine whether the number of years of a particular sentence is proportional, or "grossly disproportional,"[238] to the crime they committed. The scope of sentences understood as term-of-years sentences commonly extends beyond prison terms categorized with a specific number of years into life without parole sentences. When determining if a sentence is disproportionate, both the Supreme Court and lower courts "must begin by comparing the gravity of the offense and the severity of the sentence."[239] Should the Court have reason to believe the sentence is disproportionate, it should then move to comparisons of the way in which other jurisdictions handle sentences for the same crime. The Court has determined the constitutionality of various term-of-years sentences for different crimes under the Eighth Amendment on many occasions.[240]

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[237] Kennedy. II. *Graham v. Florida*, 560 U.S. 48 (2010).
[238] Kennedy: II. *Graham v. Florida*, 560 U.S. 48 (2010).
[239] Kennedy: II. *Graham v. Florida*, 560 U.S. 48 (2010).
[240] *Solem v. Helm*, 463 U. S. 277 (1983); *Ewing v. California*, 538 U. S. 11 (2003); *Rummel v. Estelle*, 445 U. S. 263 (1980); *Hutto v. Davis*, 454 U. S. 370 (1982)

The second line of precedent for assessing the proportionality of criminal sentences under the Eighth Amendment includes a string of cases in which the Court created specific "categorical bans" on certain sentences. In *Graham*, the Court wrote that, this classification:

> "[C]onsists of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender. With respect to the nature of the offense, the Court has concluded that capital punishment is impermissible for non-homicide crimes against individuals […] In cases turning on the characteristics of the offender, the Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before the age of 18, Roper v. Simmons, 543 U. S. 551 (2005), or whose intellectual functioning is in a low range, Atkins v. Virginia, 536 U. S. 304 (2002)."[241]

Graham presented an interesting situation for the Court, since the case involved, "a categorical challenge to a term-of-years sentence."[242] After much deliberation, the Court determined that the case required a categorical approach because "the categorical approach gives juvenile offenders an opportunity to demonstrate maturity and reform."[243] In issuing a holding using this categorical approach, the Court held that life without parole for non-homicide crimes in the juvenile context is cruel and unusual punishment and unconstitutional based on the Eighth Amendment.[244]

This case represented the first time the Court ever placed a categorical ban on a term-of-years sentence, as it had previously only issued categorical bans in death penalty cases. Many scholars did not believe this decision in *Graham* to approach juvenile life without parole sentencing with a categorical ban would be used again; however, the Court re-affirmed this categorical approach in *Miller v. Alabama* (2012) and *Montgomery v. Louisiana* (2016). The clear intention of the Court in making these decisions was to eliminate any chance of juveniles being sentenced to life without the possibility of parole for non-homicide crimes and to eliminate

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[241] Kennedy: II. *Graham v. Florida*, 560 U.S. 48 (2010).
[242] Kennedy: II. *Graham v. Florida*, 560 U.S. 48 (2010).
[243] Anderson, "Applying the Tison," 24.
[244] Kennedy: II. *Graham v. Florida*, 560 U.S. 48 (2010).

mandatory life sentences. This intention should not be overlooked. The Court has firmly decided after hearing numerous cases that juveniles convicted of non-homicide crimes must be granted an eventual chance of parole, and these excessive term-of-years sentences clearly undermine their intention.

When it comes to felony murder cases, this categorical approach of banning life sentences without possibility of parole should not be abandoned, and juveniles should not be convicted to life without parole unless they meet the *Enmund* standard. These life sentences that exceed a person's life expectancy undermine the direct intention of these categorical bans. Since juveniles have a transient development process, diminished culpability, and increased susceptibility to peer pressure, juveniles must be given a chance at rehabilitation and correction. The aim of this categorical restriction is to give individuals a chance to prove they have learned from their mistakes and eventually become contributing members of society, and excessively long sentences eliminate all possibility of that rehabilitation.

While the Supreme Court has yet to issue a holding on the constitutionality of these excessively long sentences, some states, including California and Florida, have chosen to implement restrictions on their own.[245] Unfortunately, many states have not gone so far as to eliminate these excessively long sentences. In the future, state legislatures should create laws to further prevent against these injustices, both for cases similar to *Graham* and *Miller*, but also for felony murder cases that fail to meet the *Enmund* standard, or else juveniles will face the injustice of never being granted a second chance. The following section provides a more concrete recommendation for the maximum length juveniles should spend in prison before being granted with a chance of parole if they fail to meet the *Enmund* standard.

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[245] Anderson, "Applying the Tison," 30.

II. North Carolina as a Case Study: 25-Year Maximum before a Chance of Parole

In light of the arguments that have been presented, some states will wonder what length of time constitutes a life sentence. When the Washington Court of Appeals heard the case regarding a juvenile sentenced with a term-of-years sentence that became a life sentence by the nature if its length, the Court "struggled with the length of the sentence as a categorical standard, asking whether 20, 30, 40 or longer be constituted as a [by nature life] sentence."[246] This is an interesting question and most states will likely have to answer it in the near future. The Elkhart Four, described in the introduction of the paper, faced a similar problem. The boys received sentences ranging from 45 to 55 years, which would have made them all between 61 and 73 when they were released from prison. This sentence means that the Elkhart Four would have been released from prison 4 years before the national retirement age of 65 at very minimum. By being released at such an old age, the Indiana criminal justice system is not giving these youths any meaningful or lasting chance at rehabilitation, and these are therefore unjust sentences.

As the Supreme Court frequently does when deciding Eighth Amendment cases, lower courts and state legislatures should look to other states to get a sense of "the evolving standards of decency that mark the progress of a maturing society,"[247] and to understand how common various sentences are for juveniles charged with felony murder. Interestingly, North Carolina might just hold the answer. Under North Carolina law, "if the juvenile defendant was convicted of first degree murder *solely* on the basis of the felony murder rule, his sentence shall be […] life imprisonment with parole. The law further defines 'life imprisonment with parole' as a minimum of 25 years imprisonment.'"[248] While North Carolina stipulates that 25 years imprisonment

[246] Anderson, "Applying the Tison," 30.
[247] *Trop v. Dulles* (No. 70), 356 U.S. 86 (1957).
[248] Martinson, "Negotiating Miller," 2209.

before being granted a chance at parole should be the minimum, states should be vary careful not to go beyond 25 years before giving juveniles a chance at receiving parole. By setting possible parole after 25 years, the justice system has ample time to determine if an individual has achieved the penological goal of rehabilitation. If a 17 year old is sentenced to life imprisonment with possibility of parole after 25 years, he or she will be 42 years old upon their release. People are much different at age 42, than they are at age 17. Over the course of 25 years, an individual is able to reflect on his or her actions, and states are given enough time to determine whether or not the juvenile falls into the category of the most heinous offenders for which the most serious forms of punishment are reserved. Additionally, 25 years ensures that juveniles receive a second chance at a fulfilling life before its too late. While by age 42, the defendant likely will not have time to start a family, it does give them time to find a job and earn a living before the legal retirement age, and it is substantially more practical than a longer sentence.

Some have argued that in the case of juvenile "offenders who kill, their acts are most likely analogous to involuntary manslaughter, for which sentences normally range one to ten years imprisonment."[249] However, when compared to most state laws, 25 years is a solid benchmark for the maximum time a juvenile who does not kill or intend to kill should spend in prison before receiving a chance at parole. In the future, more evidence of society's evolving standards of decency might move the sentence to be more closely equated with involuntary manslaughter, but for the time being it appears that 25 years imprisonment is a reasonable maximum sentence before parole. Since 2012, 23 states have changed their homicide laws for juveniles. Across the United States, these new potential juvenile felony murder sentences range "from a chance of parole after 15 years (as in Nevada and West Virginia) to 40 years (as in

[249] Flynn, "Dismantling the Felony Murder Rule," 1027.

Texas and Nebraska)."[250] The choice to give a chance of parole after 25 years falls in the middle of the range of sentences that states currently allow. It allows for the Courts to accurately assess the development of the teen, gives the teen time to reflect on their crime, gives the offender time to assimilate back into society, and it saves the state money, since holding a 16 year old to 50 years in prison costs approximately $2.25 million.[251] This sentence also fits the proportionality requirements of the crime they committed. For all of these reasons, North Carolina serves as a solid example for the rest of the states.

III. Avoiding Trying Juveniles in Adult Court

While the case of *Roper*, *Graham*, *Miller*, and *Montgomery* created categorical bans centered around the age of 18, the possibility of a juvenile being sentenced to life in prison without parole for a homicide crime is still possible if the sentence is individualized, and the felony murder rule falls directly in the gray area with the highest likelihood of an unjust sentence. Assuming states comply with the argument put fourth in this paper that for any juvenile to receive life imprisonment without the possibility of parole under the felony murder rule they must meet the intent requirements dictated by *Enmund*, then juveniles have the highest likelihood of being wrongly charged if their trial takes place in adult courts. As stated before, the proposed use of the *Enmund* standard intends to be a categorical clarification for all individuals under the age of 18. Unfortunately, many states have long histories of placing juveniles on trial in adult Courts when they are under the age of 18, specifically for dangerous crimes such as homicides (which includes felony murder sentencing). The cases of *Graham v. Florida*, *Jackson v. Hobbs*, and *Miller v. Alabama* all involved juveniles under the age of 18 who had their trials moved to

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[250] "Juvenile Life Without Parole: An Overview." *The Sentencing Project*. April, 2016. http://sentencingproject.org/doc/publications/jj_Juvenile_Life_Without_Parole.pdf. Accessed April 25, 2016.

[251] "Juvenile Life Without Parole" *The Sentencing Project*.

adult court, and according to the Open Society Foundations, 200,000 children are charged and incinerated as adults every year.[252] "Fourteen states have no minimum age at which children can be prosecuted as adults, according to the Equal Justice Initiative."[253] Since the findings that undermine the culpability of juvenile offenders that lead the Court to issue their rulings in *Roper*, *Graham*, *Miller*, and *Montgomery*, as well as the argument I currently put fourth, are all grounded in scientific findings, it is essential that all juveniles facing felony murder charges are tried in juvenile courts, or their sentences may be unjustly disproportionate to the offense.

IV. How to Conduct the Trial of a 19 Year Old

The final consideration courts should contemplate in light of these rulings and findings in neuroscience is that the culpability of a person that is 19 years old might be as diminished as that of a 16 year old. Many child psychologists have now been given new directives to consider individuals up to the age of 25 as children.[254] In fact, arguments for setting the benchmark age of criminal justice at 25 have become increasingly common because "emerging science about brain development suggests that most people don't reach full maturity until the age 25."[255] It is this same scientific understanding of the juvenile development process that has set the drinking age in the country at 21 years old. The Court acknowledges in their decisions that setting the age at 18 might appear arbitrary, but the Court nonetheless had to create a line for the purposes of issuing a categorical ruling. Despite the Court's categorical holdings that set the age limit for

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[252] Taveras, Luisa. "Stop Prosecuting Children as Adults." *Open Society Foundation*. March 26, 2015. https://www.opensocietyfoundations.org/voices/stop-prosecuting-children-adults. Accessed April 25, 2016.
[253] Holloway, Philip. "Should 11-year-olds be charged with adult crimes?" CNN. October 14, 2015. http://www.cnn.com/2015/10/14/opinions/holloway-charging-juveniles-as-adults/. Accessed April 20, 2016.
[254] Wallis, Lucy. "Is 25 the new cut-off point for adulthood?" *BBC News*. September 23, 2013. http://www.bbc.com/news/magazine-24173194. Accessed April 25, 2016.
[255] Candy, Brain. "Brain Maturity Extends Well Beyond Teen Years." *NPR*. October 10, 2011. http://www.npr.org/templates/story/story.php?storyId=141164708. Accessed April 25, 2016.

juvenile sentencing at 18, it is essential that judges and courts throughout the country understand that a 19, 20, or even 22 year old might need to be given the leniency expected for a person under the age of 18.

The Court also acknowledges that, "it 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."[256] However, the Court simultaneously make clear that each individual should be granted an "individualized sentence"[257] when facing capital punishment. This distinction should not end the day the individual turns 18 years of age. When a judge hears the case of a 19 year old, the judge should still consider that the life inexperience of the offender might be a large factor in their criminal actions. While it may seem highly unlikely that courts adopt this cautious approach and awareness, the *Tison* case can shed more light on this issue.

When the Tison boys committed their crime that eventually reached the Supreme Court, the boys were 19 and 20 years old. They still lived at home and their father and family pressured them into committing the prison break. They had no past criminal record. They never attempted, intended, or wished, to kill. Since their arrival in prison they have both become upstanding members of the community. They have never been in any altercations while in prison.[258] Yet both of them have now spent 38 years in federal prison, many of which were on death row, and there is no chance they will ever see the world from outside of bars again. These two have clearly demonstrated that rehabilitation is possible. They have shown they are not a part of the most depraved of all offenders. Eliminating moral arguments for a moment, these boys have

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[256] Kennedy: III. B. *Roper v. Simmons*, 543 U.S. 551 (2005).
[257] Kagan: II. *Miller v. Alabama*, 567 U.S. ___ (2012).
[258] Flick, "Tisons."

shown they can contribute to society and help the economy, yet they remain behind bars and will likely cost the state over $2.25 million throughout the course of their lifetime.

For all of these reasons, it is essential that Courts consider individualized sentences with chances of parole and rehabilitation for all those near the age of 18 convicted of felony murder, or else countless others may slip through the cracks, just as the Tison boys have. In the words of the Court, when it comes to mandatory sentencing, "'A State is not required to guarantee eventual freedom,' but must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'"[259] It should be no different for felony murder cases involving young offenders. By using "life with possibility of parole sentencing," Courts are not even guaranteeing a second chance to juveniles, but only a chance at a second chance, and based on the rehabilitative functions of the criminal justice system, this is the very least a person could ask.

The world is constantly evolving and changing. Ideas continue to grow and what is true one day might not be true another. Over the past ten years, the Supreme Court has completely restructured the juvenile criminal justice system, and implementing *Enmund* as the benchmark for life without parole sentencing in juvenile courts is the next essential step. In the future, society will continue to evolve, and sentencing structures may change once again. There is already a growing movement to push the cutoff of juvenile sentencing back to 25 years, as a mounting body of neurological evidence continues to grow. In the future, it is essential that society continue to keep an open mind, and hope that one day we might reach a point where there is no longer injustice in the juvenile courts.

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[259] Kagan: II. *Miller v. Alabama*, 567 U.S. ___ (2012).

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