A Commonsense Conclusion: Creating a Juvenile Carve Out to the Massachusetts Felony Murder Rule

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Introduction

When Frederick Christian was 17, he and an 18-year-old friend, Russell Horton, planned to rob drug dealers along with three of their peers.[1] All five drove over to the drug dealers' house, and then Christian and Horton got out of the car to scope out the residence for the robbery.[2] When they returned to the car, Horton pulled out a gun and shot the other three individuals without warning.[3] According to Christian, he had no idea Horton had even considered attacking the others.[4] Nevertheless, Christian was convicted of felony murder and sentenced to life without parole on the theory that his intent to commit robbery substituted for his lack of intent to commit homicide.[5]

Christian's felony murder conviction for a crime he committed as a juvenile is hardly surprising. The felony murder rule capitalizes on juvenile cognitive vulnerabilities — such as lack of risk aversion, lack of future orientation, and susceptibility to peer pressure — resulting in an especially high rate of juvenile felony murder convictions. Recent Supreme Court[6] and

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[1] *See* Maria Cramer & John R. Ellement, *Parole Board Ok's Release of Man Convicted as a Teen*, Boston Globe, June 5, 2014, https://www.bostonglobe.com/metro/2014/06/05/parole-board-votes-release-frederick-christian-convicted-first-degree-murder-teenager/5ar7GTPZdEaLhvYXiYLzRL/story.html, *archived at* https://perma.cc/WSY3-L36U; *see also* Mass. Parole Bd., Decision in the Matter of Frederick Christian (June 5, 2014), http://www.mass.gov/eopss/docs/pb/lifer-decisions/2014/5-29-14-christian-frederick-paroled.pdf, *archived at* https://perma.cc/P765-NBMZ [hereinafter Christian Parole Decision].

[2] *See* Christian Parole Decision, *supra* note 1.

[3] Cramer & Ellement, *supra* note 1.

[4] *Id.*

[5] *See* Christian Parole Decision, *supra* note 1 (releasing Christian on parole under Diatchenko v. Dist. Attorney, 466 Mass. 655 (2013), which prohibits life without parole sentences for juveniles in Massachusetts).

[6] *See* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) (determining that applying mandatory life without parole sentences to juveniles violates the Eighth Amendment because it fails to consider juveniles' individual characteristics); Graham v. Florida, 560 U.S. 48, 75 (2010) (holding that sentencing juveniles to life without parole for non-homicide offenses violates the Eighth Amendment); Roper v. Simmons, 543 U.S. 551, 575 (2005) (concluding that sentencing juveniles under the age of 18 to the death penalty categorically violates the Eighth Amendment).

Massachusetts[7] jurisprudence on juvenile punishment has relied on social science research demonstrating that the ongoing cognitive development of adolescents results in lesser culpability. This Note argues that the Massachusetts Legislature should lead the country in extending the logic of these cases by prohibiting application of the felony murder rule to individuals under 18. Part I explores the felony murder rule in Massachusetts and examines its application in juvenile cases. Part II delves into recent Supreme Court and Massachusetts determinations that the Eighth Amendment and its corollary in Article 26 of the Massachusetts Declaration of Rights apply differently to adolescents because of their continuing mental development. These decisions rely on the large body of social science research addressed in Part III, which shows juveniles' cognitive capacities differ from those of adults. Given the developmental differences between juveniles and adults, Part IV argues that Massachusetts should prohibit the application of the felony murder rule to juveniles under 18 since both the rationale behind the rule and its penological justifications fail when it is applied to juveniles.

I. The Felony Murder Rule

A. The history of and justifications for the felony murder rule.

The felony murder rule is a form of strict liability.[8] When an accidental murder occurs during the course of a felony, the felony murder rule allows the intent to commit the predicate felony to substitute for the lacking intent to commit murder, permitting a murder conviction when the defendant did not intend to kill.[9] While the rule itself is relatively simple, its genesis is murky. A version of the felony murder doctrine was a part of English common law, but it is unclear how the doctrine first originated.[10] While some commentators suggest that a felony murder theory was initially used in the sixteenth century to impute malice to a defendant for his co-defendant's murder,[11] others contend that it was created when Edward Coke misinterpreted a

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[7] Diatchenko v. Dist. Attorney for Suffolk Dist., 466 Mass. 655, 669–71 (2013) (holding that even discretionary life without parole sentences that take juveniles' individual characteristics into account violate the Declaration of Rights, Art. 26, because "[g]iven current scientific research on adolescent brain development . . . a conclusive showing of traits such as an 'irretrievably depraved character,' can never be made, with integrity, by the Commonwealth [at the sentencing of a juvenile offender]" (quoting *Roper*, 543 U.S. at 570)) (citation omitted).

[8] Erin H. Flynn, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post-*Roper v. Simmons, 156 U. Pa. L. Rev. 1049, 1062 (2008).

[9] *See id.*

[10] Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham & J.D.B.*, 11 Conn. Pub. Int. L.J. 297, 303–04 (2012).

[11] Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 Cornell L. Rev. 446, 449 (1985) (citing Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. Pa. L. Rev. 50, 58 (1956)).

statement from Henry de Bracton in the seventeenth century.[12] Professor Guyora Binder asserts that Coke's writing is so muddled that deciphering a clear rule with respect to felony murder is impossible.[13] According to Professor Binder, the modern felony murder rule appeared first in English case law as dictum[14] in the 1701 case *Rex v. Plummer*.[15] Michael Foster subsequently adopted the rule in his 1762 treatise, and Blackstone then laid out the rule in his *Commentaries on the Laws of England*, which became one of the primary sources of common law in the United States.[16]

As the English conception of the felony murder rule spread into American legal thought, the rule made an appearance in George Webb's 1736 treatise and William Starke's 1774 treatise, both of which addressed Virginia law.[17] After the Revolution, the English Common Law felony murder rule would not have applied to states unless they specifically adopted it, and in post-Revolution America, many were reluctant to adopt rules from the English Common Law given its undemocratic origins.[18] Instead, states attempted to codify their own laws legislatively.[19] The influential Pennsylvania formula that differentiated between first and second degree murder based on mens rea also used felonies as a means to ratchet what would typically be a second degree murder to a first degree murder.[20] The Pennsylvania approach resulted in a slew of other legislative acts codifying murder in the mid-nineteenth century, and many states combined the Pennsylvania formula with a felony murder rule.[21] By the early nineteenth century, the felony murder rule had become common in the United States, existing through statutes in the majority of states.[22]

Two primary justifications are given for the felony murder rule: deterrence and retribution.[23] Supporters contend that the rule will provide extra deterrence, influencing individuals to avoid committing the kinds of dangerous felonies that could result in an unexpected death.[24] A second justification for the rule is retribution.[25] Regardless of what the defendant intended

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[12] *See, e.g.*, *id.* (citing Recent Development, Criminal Law: *Felony-Murder Rule—Felon's Responsibility for Death of Accomplice*, 65 COLUM. L. REV. 1496, 1496 n.2 (1965)); James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1442 (1994).

[13] Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 81 (2004).

[14] *Id.* at 88.

[15] *Id.* at 88 (citing R. v. Plummer, 84 Eng. Rep. 1103 (K.B. 1701)).

[16] *Id.* at 94–95.

[17] Binder, *supra* note 13, at 111–12.

[18] *Id.* at 116–20.

[19] *Id.* at 118–20.

[20] *Id.* at 119–20.

[21] *Id.* at 120–21. The Massachusetts felony murder rule applies to both adults and juveniles. *See, e.g.*, Commonwealth v. Hawkesworth, 405 Mass. 664, 665 (1989).

[22] Binder, *supra* note 13, at 123; *see also* Keller, *supra* note 10, at 303–04.

[23] *See* Flynn, *supra* note 8, at 1063.

[24] *Id.* at 1063–64.

[25] *Id.* at 1065.

to do in a felony murder case, the argument goes, an individual dies as a result of her act.[26] Thus, from this viewpoint, because the defendant's choices resulted in a death, the defendant is a bad actor and society finds it appropriate to punish her for the death through a murder conviction.[27] These rationales have faced severe criticism from many commentators, who assert that the deterrence justification fails because the felony murder rule is a strict liability crime and the retribution justification fails because the felony murder rule metes out a harsher punishment than the culpability of such defendants merits.[28] Yet forty-six states, including Massachusetts, currently have some version of the felony murder rule on the books.[29]

B. The Massachusetts felony murder rule.

Massachusetts has a common law felony murder rule.[30] The rule relaxes the mens rea requirements for murder by substituting the defendant's intent to commit the predicate felony — perhaps robbery, arson, or drug distribution — for the intent to kill.[31] In Massachusetts, for both first and second degree felony murder, an individual must have died in the course of a felony that is inherently dangerous to human life or the defendant must have displayed a conscious disregard for human life.[32] In order to be convicted of felony murder in the first degree, the predicate felony must have life imprisonment as a sentencing option.[33] On the other hand, if the maximum sentence for the predicate felony is less than life in prison, the defendant may only be convicted of second degree felony murder.[34] Under the Massachusetts felony murder doctrine, if a defendant was part of a joint criminal en-

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[26] *Id.* at 1063.

[27] *Id.*

[28] *Id.* at 1064–65.

[29] See Kevin E. McCarthy, *Felony Murder,* OLR Research Report (Feb. 13, 2008), https://www.cga.ct.gov/2008/rpt/2008-r-0087.htm, *archived at* https://perma.cc/722F-D4GC. Three states (Hawaii, Michigan, and Kentucky) have either legislatively repealed or judicially overturned the felony murder rule, and Ohio has effectively legislatively nullified the rule by including acts that would have formerly fallen within the felony murder statute in a voluntary manslaughter statute. *Id.*; see also Leonard Birdsong, *Felony Murder: A Historical Perspective by Which to Understand Today's Modern Felony Murder Rule Statutes*, 32 T. Marshall L. Rev. 1, 20 (2006) (citing Note, *Kansas Felony Murder: Agency or Proximate Cause*, 48 Kan. L. Rev. 1047, 1057 (2000)); Licardo Gwira, *A Look At the Felony Murder Rule Across Three States,* Criminal Law Newsletter (Spring 2015), https://www.justice.org/sections/newsletters/articles/look-felony-murder-rule-across-three-states, *archived at* https://perma.cc/8LNG-JXR7.

[30] *See* Commonwealth v. Matchett, 386 Mass. 492, 502 (1982).

[31] Commonwealth v. Moran, 387 Mass. 644, 648–50 (1982).

[32] Commonwealth v. Bell, 460 Mass. 294, 308 (2011); Commonwealth v. Jackson, 432 Mass. 82, 89 (2000).

[33] *Jackson*, 432 Mass. at 89.

[34] *Bell,* 460 Mass. at 308.

terprise, and someone died during the course of the enterprise, the defendant is liable for the death even if the killing did not occur at her hands.[35]

The predicate felony for a felony murder conviction can derive from either a statute or the common law.[36] Courts examine the predicate felony in light of the facts of the case: in order for the felony murder rule to apply, death must be a "natural and probable" consequence of the criminal act.[37] According to the Massachusetts Supreme Judicial Court ("SJC"), this requirement is met when the homicide "naturally . . . flow[s]" from the unlawful act; it is "'not essential that murder should be a part of the original plan, if it were one of the probable consequences of the [crime]."[38] For instance, if multiple individuals conspire to commit an armed robbery and an accidental death occurs, death is considered a natural and probable consequence of a robbery.[39] Conversely, because death is not a likely consequence of buying stolen property, making threatening phone calls, or extortion, these crimes cannot be the predicate felony leading to the application of the felony murder rule.[40]

The merger doctrine and agency theory further limit the application of the felony murder rule. Under the merger doctrine, if the predicate felony involves a crime of violence, such as assault, that is an integral part of the homicide, then the underlying crime "merges" with the homicide and a felony murder theory cannot be used.[41] In other words, the requisite felony for the felony murder rule must not be a necessary component of homicide. The merger doctrine attempts to prevent prosecutors from simply circumventing the mens rea required for different degrees of murder by using the felony murder rule in conjunction with proving the mens rea for assault.[42] The agency theory of felony murder also confines the application of the felony murder rule in Massachusetts.[43] Under the agency theory, the death must occur because of one of the individuals committing the crime in order for the felony murder rule to apply.[44] Consequently, if an individual resisting the

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[35] *Matchett*, 386 Mass. at 502 (citing Commonwealth v. Watkins, 375 Mass. 472, 486 (1978)).

[36] *See id.* at 505.

[37] *Id.* at 505 (citing Commonwealth v. Devlin, 335 Mass. 555, 566–67 (1957)).

[38] *Devlin*, 335 Mass. at 567 (citing Commonwealth v. Devereaux, 256 Mass. 387, 395 (1926); Commonwealth v. Campbell, 7 Allen 541, 543–44 (1863)) (internal quotation omitted).

[39] *Id*. at 562–63, 566–67.

[40] *Supra* note 33; Commonwealth v. Matchett, 386 Mass. 492, 507–08 (1982).

[41] *See* Commonwealth v. Gunter, 427 Mass. 259, 271–73 (1998). In addition to Massachusetts, seven other states moderate the felony murder rule with the merger doctrine. *See* Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. Rev. 403, 549 (2011).

[42] *See* Binder, *supra* note 41, at 519.

[43] Commonwealth v. Tejeda, 473 Mass. 269, 279 (2015) (citing Commonwealth v. Balliro, 349 Mass. 505, 515 (1965)). A total of fifteen jurisdictions use the agency rule to restrict the application of the felony murder doctrine. *See* Binder, *supra* note 41, at 484–85.

[44] *See Tejeda*, 473 Mass. at 279.

crime kills one of the perpetrators, the other perpetrators cannot be held accountable for the death under a felony murder theory.[45]

C. Application of the Massachusetts felony murder rule to juveniles.

In Massachusetts, children ages 7 to 17 who are charged with criminal offenses are typically tried in juvenile court.[46] Before 1996, Massachusetts judges were permitted to transfer juveniles to adult court only if, after conducting a two-part hearing, the judge found that there was (1) probable cause for the offense and (2) the juvenile was dangerous and would be unresponsive to rehabilitative efforts.[47] The hearing requirement created a default of trying children under 18 in juvenile court, which meant that when they turned 21 they were released, even if they had committed a crime like murder.[48] In her *Commonwealth v. Walczak* concurrence, SJC Justice Lenk laid out some of the differences between being tried in a juvenile court and being tried as an adult.[49] Juvenile court focuses on rehabilitation in contrast to the more punitive goals of adult court.[50] Additionally, the Massachusetts juvenile court offers children "a unique and protected status," attempting to mimic the parental role in correcting behavior and offering guidance.[51]

However, following the 1996 Massachusetts Juvenile Justice Reform Act, juveniles between ages 14 and 18 who are charged with murder are no longer entitled to the special aspects of juvenile court; instead, they are automatically tried as adults.[52] The catalyst for the 1996 law was a 1995 homicide. Edward O'Brien, Jr., who was 15 at the time, stabbed his friend's mother to death in Somerville.[53] Capitalizing on the subsequent wave of fear about juvenile "super predators,"[54] the Massachusetts legislature enacted the Juvenile Justice Reform Act.[55] The Act reflected a national trend towards getting "tough" on juvenile crime and making sure that juveniles serve

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[45] *See id.*

[46] MASS. GEN. LAWS ch. 119, § 52 (2013).

[47] *See, e.g.*, Commonwealth v. Walczak, 463 Mass. 808, 825–26 (2012); Commonwealth v. Dale D., 431 Mass. 757, 758 (2000).

[48] *Teenager Charged in Slaying Of His Best Friend's Mother*, N. Y. TIMES (Jul. 30, 1995), http://www.nytimes.com/1995/07/30/us/teen-ager-charged-in-slaying-of-his-best-friend-s-mother.html, *archived at* https://perma.cc/VB7A-QXJV.

[49] *Supra* note 46, *Walczak*, 463 Mass. at 827–28 (Lenk, J., concurring).

[50] *Id.* (citing Commonwealth v. Magnus M., 461 Mass. 459, 461 (2012)).

[51] *Id.* (quoting Commonwealth v. A Juvenile, 389 Mass. 128, 132 (1983)).

[52] MASS. GEN. LAWS ch. 119, § 74 (2013); *Walczak*, 463 Mass. at 827.

[53] *Supra* note 48.

[54] Sarah Favot, et al., *For Teens Guilty of Murder, Penalties Can Vary Widely*, NEW ENG. CTR. FOR INVESTIGATIVE REPORTING (Dec. 27, 2011), https://www.bostonglobe.com/metro/2011/12/27/for-teens-guilty-murder-penalties-can-vary-widely/kR8J36bC1mvbcO7udF7ByJ/story.html, *archived at* https://perma.cc/E7TC-DCD2.

[55] Asma Khalid, *Should Young Murder Suspects Be Tried As Adults?* WBUR (Nov. 15, 2013), http://www.wbur.org/2013/11/05/massachusetts-juvenile-murder-cases, *archived at* https://perma.cc/B8TF-PLMV; *see also* MASS. GEN. LAWS ch. 119, § 74 (2013); *Juvenile Justice Legal Issues*, MASS.GOV, http://www.mass.gov/eohhs/gov/laws-regs/dys/juvenile-justice-legal-issues.html (last visited Mar. 8, 2016), *archived at* https://perma.cc/V3AW-G9PG.

"adult time for adult crime."[56] Pursuant to the Juvenile Justice Reform Act, regardless of mitigating circumstances, juveniles over the age of 14 who are charged with murder, including felony murder, are automatically transferred to the district court and tried as adults.[57] Prosecutors must instruct grand jurors about mitigating factors that could reduce a murder charge to a manslaughter charge, thereby allowing juveniles to remain in juvenile court. But, if a juvenile over 14 is indicted for murder, she will be tried in district court.[58]

II. Recent U.S. and Massachusetts Case Law Recognizes that, Due to Developmental Differences, Juvenile Offenders Should be Treated Differently Than Adults

A. Recent Supreme Court jurisprudence establishes that the Eighth Amendment prohibits certain juvenile sentences.

The Eighth Amendment prohibits cruel and unusual punishment.[59] While some punishments, such as torture, are obvious Eighth Amendment violations, the Supreme Court has also found that the Eighth Amendment will adapt to "the evolving standards of decency that mark the progress of a maturing society,"[60] and that the Eighth Amendment prohibits punishments disproportionate to the crime.[61] In evaluating proportionality, the Court considers whether a punishment is "graduated and proportioned to [the] offense."[62] The Court has divided Eighth Amendment proportionality challenges into two subsets. Under the first subset, the Court considers whether the length of a term-of-years sentence is grossly disproportional to the culpability of the defendant and the harm caused by the crime.[63] Under the second subset, the Court applies categorical bans on certain sentences for

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[56] *See* MacArthur Foundation, Juvenile Justice in a Developmental Framework: A 2015 Status Report 5 (2015), https://www.macfound.org/media/files/MacArthur_Foundation_2015_Status_Report.pdf, *archived at* https://perma.cc/VRG3-N6SD.

[57] Mass. Gen. Laws ch. 119, § 74 (2013); *see also Walczak*, 463 Mass. at 827.

[58] *See Walczak*, 463 Mass. at 827.

[59] U.S. Const. amend. VIII.

[60] Roper v. Simmons, 543 U.S. 551, 561 (2005) (quoting Trop v. Dulles, 356 U.S. 86, 100–101 (1958) (plurality opinion)).

[61] Graham v. Florida, 560 U.S. 48, 59–60 (2010).

[62] *Id.* at 59 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)).

[63] Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller*, 61 Emory L.J. 1445, 1473 (2012); *see also* Ewing v. California, 538 U.S. 11, 30–31 (2003) (holding that sentencing an individual to 25 years to life in prison for stealing three golf clubs under California's three strikes law was proportionate under the Eighth Amendment due to the defendant's long criminal history of non-violent crimes and the state's interest in deterrence and incapacitation); Solem v. Helm, 463 U.S. 277, 296–97, 303 (1983) (determining that a sentence of life without parole for a defendant who wrote a fraudulent check of $100 and had several previous non-violent felonies was disproportionate); Rummel v. Estelle, 445 U.S. 263, 280–81, 285 (1980) (concluding that a life sentence was proportionate when the defendant had been convicted of two prior felonies and was convicted of a third and there was a significant possibility that the defendant would be paroled).

specific classes of defendants.[64] Traditionally, the Court has applied the categorical ban in cases involving the death penalty. For instance, in *Atkins v. Virginia*, it held that the death penalty was unconstitutional for individuals with diminished mental capacity,[65] and in *Coker v. Georgia*, it determined that the death penalty was an unconstitutional sentence for persons convicted of rape.[66] The Court has also begun to apply the categorical ban analysis to juvenile sentencing, including non-death penalty cases.[67]

In recent decades, the Court has done an about face with respect to the juvenile death penalty. In 1989, *Stanford v. Kentucky* held that capital punishment is a permissible sentence for juveniles who commit murder at ages 16 or 17.[68] In 2005, the Court revisited the constitutionality of the juvenile death sentence in its landmark case, *Roper v. Simmons*.[69] *Roper* was a five to four decision, with a majority of the Court agreeing that juvenile sentencing is fundamentally different from adult sentencing and determining that the Eighth Amendment prohibits juvenile capital punishment.[70]

The *Roper* defendant, Christopher Simmons, was 17 when he and a friend planned and carried out the murder of Shirley Crook, drowning her in a river.[71] As required by Missouri law Simmons was tried as an adult since he was 17 when he committed the crime.[72] Accepting the jury's recommendation, a judge sentenced him to death.[73] After the Supreme Court categorically banned the death penalty for mentally retarded individuals in *Atkins*,[74] Simmons filed for post-conviction relief in the state court system, and the Supreme Court of Missouri set aside his capital sentence.[75]

In evaluating whether sentencing a juvenile criminal to death is constitutional, the Supreme Court applied the two-prong framework for Eighth

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[64] Graham v. Florida, 560 U.S. 48, 60–61 (2010). The Court further differentiates between the two types of categorical bans. For the first type of categorical ban, the Court considers the nature of the offense. *See, e.g.,* Kennedy v. Louisiana, 554 U.S. 407, 412–13 (2008) (determining that the Eighth Amendment categorically bans the death penalty for a rape of a child that was not intended to result in death); Enmund v. Florida, 458 U.S. 782, 797 (1982) (holding that the Eighth Amendment prohibits the death penalty for an individual who aids and abets in a felony that results in a murder if the individual did not "kill, attempt to kill, or intend that a killing take place or that lethal force [ ] be employed"). For the second type of categorical ban, the Court considers the offender's characteristics. *See, e.g.,* Roper v. Simmons, 543 U.S. 551, 578–79 (2005) (deciding that the Eighth Amendment categorically prohibits the death sentence as applied to juveniles); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (concluding that sentencing mentally challenged individuals to capital punishment violates the Eighth Amendment).

[65] 536 U.S. at 321.

[66] 433 U.S. 584, 597 (1977).

[67] *Roper*, 543 U.S. at 573–74; *see also Graham*, 560 U.S. at 80.

[68] Stanford v. Kentucky, 492 U.S. 361, 380 (1989) *abrogated by Roper*, 543 U.S. 551.

[69] 543 U.S. 551.

[70] *Id.* at 578–79.

[71] *Id.* at 556–57.

[72] *Id.* at 557–58.

[73] *Id.* at 558.

[74] 536 U.S. at 318–19.

[75] *Roper*, 543 U.S. at 559–60.

Amendment cases categorically banning a punishment: it first examined the national consensus for juvenile capital punishment and then evaluated whether the death sentence was appropriate for juveniles under the Court's independent judgment.[76] For the national consensus prong, the Court determined that the "objective indicia" of 30 states banning the juvenile death penalty (12 banning the death penalty entirely; 18 banning it for juveniles), along with evidence that states permitting juvenile capital punishment use it infrequently, indicated that society believed juveniles are "categorically less culpable than the average criminal."[77] For the independent judgment prong, the Court relied on social science research, which demonstrates juveniles are more prone to reckless and impulsive behavior than adults, more susceptible to peer pressure, and still developing their character; thus, the Court concluded that both retribution and deterrence fail to justify capital punishment for juveniles.[78] The majority opinion also acknowledged strong international consensus against the juvenile death penalty.[79] The *Roper* Court ultimately held that sentencing juveniles under 18 to death categorically violates the Eighth Amendment.[80]

Justices O'Connor and Scalia wrote separate dissents to the *Roper* decision. Both dissents emphatically criticized the majority's analysis of the national consensus regarding the juvenile death penalty. Justice O'Connor distinguished *Roper* from *Atkins,* focusing on the wave of national support in favor of abolishing the death penalty for mentally challenged individuals before *Atkins*. She observed that before the *Atkins* decision "there was significant evidence of *opposition* to the execution of the mentally retarded, but there was virtually no countervailing evidence of affirmative legislative *support* for this practice."[81] In comparison, before *Roper*, seven states had statutes explicitly permitting the death penalty for individuals ages 16 or 17, and two states had affirmatively enacted statutes setting the minimum age for the death penalty at 16 in the time period between *Stanford* and *Roper*.[82] Justice Scalia, joined by then-Chief Justice Rehnquist and Justice Thomas, similarly criticized the majority analysis of the national consensus, noting that of the 38 states that permitted the death penalty less than half prohibited application of the death penalty to juveniles, and asserting that national consensus is usually viewed over a longer period of time.[83] Justice Scalia's dissent went on to criticize the majority for usurping the role of the legislatures by apply-

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[76] *Id.* at 564.
[77] *Id.* at 564–67 (quoting *Atkins*, 536 U.S. at 316).
[78] *Id.* at 569–71.
[79] *Id.* at 575–78.
[80] *Id.* at 578–79.
[81] *Id.* at 594–98 (O'Connor, J., Dissenting).
[82] *Id.*
[83] *Id.* at 609–11 (Scalia, J., Dissenting).

ing its own moral judgment, which included reliance on international authorities.[84]

The next Supreme Court case addressing juvenile punishment — this time life without parole for non-homicide offenses — was decided in 2010. *Graham v. Florida* involved then-16-year-old Graham who, along with three other individuals, tried to rob a restaurant.[85] Graham was arrested, charged as an adult, and subsequently pled guilty to armed burglary with assault or battery and attempted armed robbery.[86] The trial court did not decide whether Graham was guilty of both charges and instead sentenced him to two concurrent terms of three years of probation, with the first 12 months of probation served at a county jail.[87] Six months after he left jail, officers apprehended Graham, now 17, after he had completed one armed robbery and was attempting another.[88] This time, the trial court found Graham guilty of the earlier two charges and sentenced him to life imprisonment for armed burglary and another 15 years for attempted armed robbery.[89] Because Florida did not offer parole, the sentence was effectively life without parole unless Graham received executive clemency.[90]

The Court held that since *Graham* involved a group of offenders facing a specific type of sentence — juveniles sentenced to life without parole for non-homicide offenses — it was appropriate to use the two-prong categorical approach even though the offenders did not face the death penalty.[91] In evaluating the "objective indicia of national consensus," the Court found the fact that 37 states permitted life without parole sentences for such offenders "incomplete and unavailing."[92] Instead, the Court focused on actual sentencing practices and determined that there were at most 123 juveniles in the United States who had been sentenced to life without parole for non-homicide offenses and that Florida courts had sentenced 77 of those juveniles.[93] Accordingly, the Court found that the limited use of the sentence was consistent with the conclusion that national consensus weighed against the practice.[94] Moving on to its exercise of independent judgment, the Court found that scientific findings on juvenile cognitive capacity had not changed since *Roper*.[95] In its decision, the Court also observed that non-homicide crimes are less morally reprehensible than homicide, that sentencing a juvenile to life without parole is especially severe, and that such a sentence fails to

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[84] *Id.* at 616–18, 622–23.
[85] 560 U.S. 48, 53 (2010).
[86] *Id.* at 53–54.
[87] *Id.* at 54.
[88] *Id.*
[89] *Id.* at 55–57.
[90] *Id.* at 57.
[91] *Id.* at 61–62.
[92] *Id.* at 62.
[93] *See id.* at 64–66.
[94] *See id.*
[95] *Id.* at 68.

serve the penological goals of incapacitation, retribution, deterrence, and rehabilitation.[96] Therefore, the Court concluded that sentencing juveniles to life without parole for non-homicide offenses violates the Eighth Amendment.[97]

Chief Justice Roberts concurred, but rejected the Court's new categorical ban.[98] Instead, he argued for a case-by-case approach.[99] The Chief Justice's approach would involve evaluating juvenile sentences with two existing doctrines: the narrow proportionality review and the jurisprudence establishing that juveniles are generally less culpable than adults.[100] Then the Court would decide on the facts whether the sentence violated the Eighth Amendment.[101] Chief Justice Roberts ultimately concluded that Graham's youth, lack of a criminal record, and difficult past combined with the fact that his sentence was more severe than those of other defendants who committed similar crimes meant that his sentence was grossly disproportional in violation of the Eighth Amendment.[102]

Following *Graham*, *Miller v. Alabama* addressed whether statutorily-mandated life sentences without parole for juvenile offenders violated the Eighth Amendment. When Miller was 14 years old, after an afternoon of drinking and smoking marijuana, he and a friend beat an individual and then set his house on fire, which resulted in the victim's death.[103] Miller was charged with murder in connection with arson under a felony murder theory.[104] Miller's companion case, *Jackson v. State,* also involved a 14-year-old who was charged with felony murder after one of his friends shot a cashier during the course of a robbery.[105] Both Miller and Jackson were found guilty, and both were sentenced, as mandated by statute, to life without parole.[106]

The *Miller* Court departed from the purely categorical analysis used in *Roper* and *Graham*. Instead, it drew on principles from two lines of cases. The first line of cases "categorical[ly] bans [ ] sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty."[107] The second line of cases prohibits the mandatory application of the death penalty and requires sentencing judges to consider

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[96] *Id.* at 69–74.
[97] *Id.* at 75.
[98] *Id.* at 89 (Roberts, J., concurring).
[99] *Id.* at 90.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 92–93.
[103] Miller v. Alabama, 132 S. Ct. 2455, 2462 (2012).
[104] *Id.* at 2463.
[105] *Id.* at 2461.
[106] *Id.* at 2461, 2463.
[107] *Id.* at 2463–64 (2012) (citing Graham v. Florida, 560 U.S. 48, 60–62; Kennedy v. Louisiana, 554 U.S. 407 (2008); Atkins v. Virginia, 536 U.S. 304 (2002)).

individual characteristics.[108] Applying the first line of cases, the Court held that the differences between juveniles and adults makes the penological justifications of punishment less applicable to juveniles and asserted that, after *Graham*, age must be considered before sentencing a juvenile to life without parole.[109] Next, borrowing language from *Graham*, the Court stated that life without parole "share[s] some characteristics with death sentences that are shared by no other sentences."[110] Accordingly, the second line of cases requiring that courts consider individual characteristics before capital punishment was applicable in *Miller*. The Court further asserted that the fact that juveniles have not reached their full cognitive capacity is one of the individual factors that courts must consider.[111] Thus, while the Court declined to address the application of a life sentence without parole to juveniles — so long as the individual characteristics of juveniles are considered — it nevertheless held that mandatory juvenile life without parole sentences violate the proportionality requirement of the Eighth Amendment.[112]

The Supreme Court has fully committed to the "commonsense" proposition that children are simply different,[113] and *Roper*, *Graham*, and *Miller* make it clear that juvenile development has a role to play in determining whether punishment is cruel and unusual under the Eighth Amendment. The Massachusetts SJC has gone one step further than the Supreme Court, banning even non-mandatory life without parole sentences for juvenile offenders.

B. Even discretionary juvenile life without parole sentences violate the Massachusetts Declaration of Rights.

In 2013, after the Supreme Court's decision in *Miller*, the SJC considered whether juvenile life without parole sentences are permissible when

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[108] *Id.* (citing Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion); Lockett v. Ohio, 438 U.S. 586 (1978)). In *Woodson*, the Court asserted that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense" and consequently held that a North Carolina statute establishing mandatory capital punishment violated the Eighth Amendment. Woodson v. N. Carolina, 428 U.S. 280, 304–05 (1976) (citation omitted). The *Lockett* Court determined that an Ohio statute that limited the number of mitigating factors that could be considered in a capital punishment case violated the Eighth Amendment because a court may "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense." *Lockett*, 438 U.S. at 604–09.

[109] *Miller*, 132 S. Ct. at 2465.

[110] *Id.* at 2466 (quoting Graham v. Florida, 560 U.S. 48, 69 (2010)).

[111] *Id.* at 2467–68.

[112] *Id.* at 2469.

[113] J.D.B. v. North Carolina, 564 U.S. 261, 272 (2011) ("Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children generally are less mature and responsible than adults, . . . that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them, . . . that they are more vulnerable or susceptible to . . . outside pressures than adults, . . . and so on.") (citations omitted) (internal quotation marks omitted).

reexamining Gregory Diatchenko's case. In 1981, when Diatchenko was 17, he stabbed Thomas Wharf multiple times, resulting in Wharf's death.[114] Diatchenko was convicted of first-degree murder and given a mandatory life without parole sentence as required by Massachusetts General Laws ("M.G.L.") ch. 265 § 2 at the time.[115] After *Miller*, Diatchenko filed a petition challenging the constitutionality of the Massachusetts mandatory sentencing scheme and seeking a declaration that sentencing juveniles to life without parole violates Article 26 of the Massachusetts Declaration of Rights ("Declaration of Rights"), one of the sections in the Massachusetts state constitution.[116] The SJC found that, while the *Miller* rule was new, because it dealt with the substantive issue of whether a court could constitutionally impose a punishment, it applied retroactively to cases on collateral review.[117] Applying the *Miller* rationale to M.G.L. ch. 265 § 2, the SJC found that since the statute mandated a life sentence without parole for a juvenile, it violated both the Eighth Amendment and the comparable provision in the Declarations of Rights, Article 26.[118]

The SJC recognized that the United States Constitution provides a floor, not a ceiling, for the rights to which individuals are entitled and determined that the Declaration of Rights required higher levels of protection for individual rights than the Constitution.[119] Since the Declaration of Rights contains a similar proportionality principle to the one inherent in the Eighth Amendment, the SJC determined that, given the undeveloped nature of the adolescent brain, it is impossible for judges to decide whether adolescents are so depraved as to warrant the severe sentence of life without parole, even when it is discretionarily issued.[120] Furthermore, adolescents' cognitive stage renders the incapacitation, retribution, and deterrence justifications of life without parole sentences null as juveniles are still maturing and therefore less likely to be affected by these penological justifications.[121] The SJC concluded that even discretionary sentences of life without parole for juveniles violate the Declaration of Rights.[122]

Based on social science research demonstrating the underdeveloped mental abilities of juveniles, Massachusetts should extend its protection of juvenile criminal defendants by categorically prohibiting the felony murder rule for juveniles under 18.

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[114] Diatchenko v. Dist. Attorney for Suffolk Dist., 466 Mass. 655, 656 (2013).
[115] *Id.*
[116] *Id.* at 657–58.
[117] *Id.* at 658, 666–67.
[118] *Id.* at 667; *see also* MASS. CONST. Pt. 1, art. XXVI ("No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.")
[119] *Id.* at 668–69.
[120] *Id.* at 669–70.
[121] *Id.* at 670–71.
[122] *Id.* at 671.

III. As Felony Murder is the Prototypical Juvenile Crime, Social Science Research Supports a Categorical Prohibition Against Applying the Felony Murder Rule to Juveniles

Social science research has demonstrated that felony murder, which is often unplanned and frequently involves more than one individual, plays directly into the cognitive vulnerabilities that make juveniles less culpable for their actions. In *Miller,* the Supreme Court noted crucial differences between adults and juveniles that change the application of the Eighth Amendment to juvenile sentences. One of those differences is juveniles' limited ability to fully understand the consequences of their actions, which makes them more likely to act impulsively or recklessly.[123] A second is that juveniles are more susceptible to peer pressure than adults.[124] As exemplified in two Massachusetts cases, *Commonwealth v. Donovan*[125] and *Commonwealth v. Rolon*,[126] these two differences explain why juveniles are more prone to, but less culpable for, felony murder.

A. Juveniles are more likely to take risks and less likely to understand the consequences of their actions than adults, and felony murder often results from such behavior.

Social science research shows that juveniles lack judgment: they are less able to comprehend the possible consequences of their actions and more prone to impulsive, risky behavior than adults. While adolescents and adults have similar cognitive abilities when it comes to *understanding* information, adolescents demonstrate considerably less *judgment* than adults;[127] that is, adolescents are more likely than adults to engage in behavior that "threaten[s] harm to their own and others' health, life, or welfare."[128] For example, adolescents are more likely than adults to drive after drinking, engage in unprotected sex, use illicit drugs, and participate in crimes such as burglary and vandalism.[129]

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[123] *See* Miller v. Alabama, 132 S. Ct. 2455, 2458 (2012); Graham v. Florida, 560 U.S. 48, 68–69 (2010); Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

[124] *Miller*, 132 S. Ct. at 2458; *Graham*, 560 U.S. at 78; *Roper* 543 U.S. at 569–70.

[125] 422 Mass. 349 (1996).

[126] 438 Mass. 808 (2003); *see also* Mass. Parole Bd., Decision in the Matter of Anthony Rolon 1 (Aug. 6, 2014), http://www.mass.gov/eopss/docs/pb/lifer-decisions/2014/rolonanthony8-6-14paroled.pdf, *archived at* https://perma.cc/6JKP-EAR3 [hereinafter Rolon Parole Decision] (determining that Rolon was eligible for parole under *Diatchenko* in part because of his youthful age of 17 at the time of the crime).

[127] Elizabeth S. Scott & Laurence Steinberg, Rethinking Juvenile Justice 36–37 (2008).

[128] Elizabeth S. Scott, N. Dickon Reppucci & Jennifer L. Woolard, *Evaluating Adolescent Decision Making in Legal Contexts*, 19 L. & Hum. Behav., 221, 227 (1995).

[129] Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339, 341–43 (1992).

The judgment gap between adolescents and adults likely stems from the fact that adolescents are simply less risk averse than adults. Studies show that, compared to adults, adolescents are more likely to engage in risky behavior, more likely to focus on possible positive rather than negative outcomes, and less likely to consider long term consequences.[130] For instance, in a study examining how adolescents and adults respond to a gambling simulation, researchers found that juveniles made more disadvantageous decisions than adults and that once participants started losing, adults tried to minimize negative consequences, whereas juveniles tried to maximize positive outcomes.[131] This indicates juveniles may be less able to account for possible negative outcomes.[132] Moreover, in a study comparing "intuitive" decision-making, which involves split second decisions made on a subconscious level, and "deliberative" decision-making, which involves time to reason through one's options, researchers found that "reward bias in risk intuition peaks just after [age 18]."[133] Thus, according to the above studies, juveniles are more likely than adults to fixate on possible positive outcomes and less likely to consider negative consequences when making spur-of-the-moment decisions.[134]

Another component of juvenile cognitive development that may facilitate risky behavior is the tendency of juveniles to be less future-oriented than adults. One study examining juveniles' capabilities to make good judgments found that juveniles lack psychosocial maturity, resulting in diminished responsibility because, among other things, juveniles are less future-oriented than adults.[135] Another study comparing how juveniles and adults react to immediate and delayed rewards involved asking participants questions such as whether they would rather receive $650 immediately or $1000 in 10 years.[136] The study found "a clear life-span developmental trend": juveniles are more likely to choose an immediate reward of lower value instead of

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[130] Scott, Reppucci & Woolard, *supra* note 128, at 230–32.

[131] Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEVELOPMENTAL PSYCHOL. 193, 204 (2010).

[132] *Id.* at 204–05.

[133] Elizabeth P. Shulman & Elizabeth Cauffman, *Deciding in the Dark: Age Differences in Intuitive Risk Judgments*, 50 DEVELOPMENTAL PSYCHOL. 167, 173 (2014).

[134] *See supra,* notes 128–132; *see also, e.g.,* Elizabeth P. Shulman & Elizabeth Cauffmann, *Reward-Biased Risk Appraisal and Its Relation to Juvenile Versus Adult Crime*, 37(6) L. & HUM. BEHAV. 412, 419 (2013) (finding that that "reward bias is more strongly associated with law-breaking behavior among adolescents than among adults"); B.J. Casey, Rebecca M. Jones & Todd A. Hare, *The Adolescent Brain*, HHS PUB. ACCESS, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2475802/, *archived at* https://perma.cc/U3ZP-STZW ("In sum, during adolescence, relative to childhood or adulthood, an immature ventral prefrontal cortex may not provide sufficient top-down control of robustly activated reward and affect processing regions . . . .").

[135] Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults*, 18 BEHAV. SCI. & L. 741, 759 (2000).

[136] Leonard Green, Astrid F. Fry & Joel Myerson, *Discounting of Delayed Rewards: A Life-Span Comparison*, 5 PSYCHOL. SCI. 33, 34 (1994).

waiting for a more valuable reward in the future.[137] The researchers suggested that this propensity towards immediate rewards may result from "children's lack of experience with long delays."[138] Similarly, when making a medical decision, adolescents are significantly less likely than adults to state that their decision making process included considering long term consequences.[139] The lack of future orientation dovetails with the high rate of reward bias in adolescents[140] to create the perfect storm for accidental crimes like felony murder. Adolescents are less future-oriented than adults, but, to the extent that they do think about the future, they are more likely to overestimate the possibility of a good outcome.

In response to the research showing that adolescents are less likely to consider future negative outcomes, proponents of the felony murder rule may argue that the rule will deter murder by forcing juveniles to consider all possible consequences of their actions.[141] However, this argument fails to hold water as the felony murder rule is a form of strict liability: it only applies when the intent to commit murder is lacking.[142] Because the rule relies on an intent vacuum, its deterrence value is questionable at best.[143]

Joe Donovan's case[144] highlights how poor judgment, lack of risk aversion, and lack of future orientation makes adolescents especially susceptible to felony murder situations. Intending to commit a robbery, Donovan and two friends got into a fight with two strangers.[145] At the time, Donovan was 17; one of his friends was 15 and one was an adult.[146] Donovan threw the first punch, but then, to Donovan's surprise, his 15-year-old friend stabbed one of the individuals, resulting in his death, and his other friend stole a wallet.[147] A court found Donovan participated in a robbery joint venture, convicted him of felony murder, and sentenced him to life without parole.[148] In comparison, the 15-year-old who stabbed the individual was tried in juvenile court, sentenced to 20 years, and released after 11.[149] The adult pleaded

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[137] *Id.* at 35.

[138] *Id.* at 36.

[139] Bonnie L. Halpern-Felsher & Elizabeth Caufman, *Cost and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Developmental Psychol. 257, 265–66 (2001).

[140] Shulman & Cauffman, *supra* note 133, at 421–22.

[141] *See* Kevin Cole, *Killings During Crime: Toward A Discriminating Theory of Strict Liability*, 28 Am. Crim. L. Rev. 73, 78–79 (1990).

[142] *Id.*

[143] *Id.*

[144] Commonwealth v. Donovan, 422 Mass. 349 (1996).

[145] Maria Cramer, *3rd Man Convicted of Murder As Teen to Be Freed*, Boston Globe (Aug. 7, 2014), https://www.bostonglobe.com/metro/2014/08/07/state-parole-board-frees-third-man-who-was-sentenced-life-without-parole-for-murder-juvenile/TFYJTd8va72z7SFaVfBfbK/story.html, *archived at* https://perma.cc/3YUS-H623.

[146] *Id.*

[147] *Donovan*, 422 Mass. at 351.

[148] Mass. Parole Bd., Decision in the Matter of Joseph Donovan 1 (Aug. 7, 2014), http://www.mass.gov/eopss/docs/pb/lifer-decisions/2014/donovan-joseph-8-7-14-paroled.pdf, *archived at* https://perma.cc/2WMF-8JMS.

[149] *Id.* at 2 n.1.

guilty to manslaughter and testified against the juveniles.[150] He was sentenced to 12-20 years and served only 10.[151] Reflecting on how he has changed in an interview twenty-three years after the incident, Donovan said "[i]f you give yourself a couple of seconds to think about it, you don't react as quickly, it's easier to make decisions . . . instead of making a decision from an emotional place, you make one from an intellectual place."[152]

Donovan's case highlights the naked unfairness of applying the felony murder rule to juveniles. It is certainly true that he should not have been involved in the attempted robbery at all and that he is culpable for throwing the first punch. However, at the time, Donovan seemed to lack the judgment to avoid the situation, and he was unaware that his friend would lash out and kill someone. Even Donovan's failure to plead out indicates a poor evaluation of the possible outcomes of his situation. The felony murder rule took advantage of his adolescent cognitive shortcomings, resulting in a conviction and sentence that did not accurately reflect his blameworthiness.

B. Juveniles are more susceptible to peer pressure than adults, and felony murder often applies to joint criminal ventures.

In contrast to most situations in which adolescents are *less* risk averse than adults, adolescents are *more* risk averse than adults in situations that could involve a risk of social ostracism.[153] Exacerbating the problem, as David Matza has shown, adolescents often have a "shared misunderstanding" of the criminal behavior of other adolescents.[154] While they themselves may not endorse delinquency, adolescents tend to think that other juveniles do.[155] A number of other studies have endorsed this finding.[156] For instance, in a study conducted in a university setting, college students overestimated how much other students binge drink and endorse binge drinking.[157] Fur-

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[150] *Id.*

[151] *Id.*

[152] Deborah Becker, *Paroled after Life Sentence for Juvenile Crime, Joe Donovan Works Toward His Release*, WBUR NEWS (June 9, 2015), http://www.wbur.org/news/2015/06/09/parole-joe-donovan-mit-murder, *archived at* https://perma.cc/3N7J-L4YB.

[153] *See* David Elkind, *Egocentrism in Adolescence*, 38 CHILD DEV. 1025, 1030–32 (1967).

[154] DAVID MATZA, DELINQUENCY AND DRIFT 57 (1964).

[155] *Id.*

[156] *See* Jacob T.N. Young & Frank Weerman, *Delinquency as a Consequence of Misperception: Overestimation of Friends' Delinquent Behavior and Mechanisms of Social Influence,* 60 SOC. PROBS., 334, 337 (2013) (citing Tamar Breznitz, *Juvenile Delinquents' Perceptions of Own and Others' Commitment to Delinquency*, 12 J. RES. CRIME & DELINQ. 124 (1975); M.D. Buffalo & Joseph W. Rodgers, *Behavioral Norms, Moral Norms, and Attachment: Problems of Deviance and Conformity*, 19 SOC. PROBS. 101 (1971); Mark Warr & Mark Stafford, *The Influence of Delinquent Peers: What They Think or What They Do?*, 29 CRIMINOLOGY 851 (1991)).

[157] *Id.* (citing Martin J. Bourgeois & Ann Bowen, *Self-Organization of Alcohol-Related Attitudes and Beliefs in a Campus Housing Complex: An Initial Investigation*, 20 HEALTH PSYCHOL. 434 (2001); Matthew P. Martens et al., *Perceived Alcohol Use Among Friends and Alcohol Consumption Among College Athletes,* 20 PSYCHOL. ADDICTIVE BEHAV. 178 (2006); Clayton Neighbors et al., *Being Controlled By Normative Influences: Self-Determination as a*

thermore, as Young and Weerman have found, overestimation of friends' delinquency is a strong predictor of whether a juvenile herself will engage in criminal behavior within a year.[158] The finding that delinquent peers are a key predictor for juvenile criminal behavior has been replicated in many other studies.[159] As adolescents become adults, they become less susceptible to peer pressure and less likely to engage in risky behavior.[160]

Additionally, most crimes committed by adolescents take place in group settings, adding to the risk that juveniles will conform to delinquent behavior due to a misplaced concern about fitting in. Adolescents are far more likely than adults to participate in group crime.[161] As Zimring notes, over half of violent crimes committed by individuals under the age of 16 involve multiple offenders.[162] Likewise, about 51% of the homicides committed by juveniles involve multiple offenders; in comparison, only 23% of adult homicides involve multiple offenders.[163]

Adding to the peer pressure problem, antisocial behavior, such as aggressiveness, gains popularity during adolescence. Mid-adolescence is marked by decreased dependency on parental influence and increased dependency on peer influence.[164] Researchers have found that "tough" boys tend to be one of the popular cliques in school,[165] and that, during adolescence, girls are more attracted to aggressive boys.[166] Antisocial and aggressive children tend to group together, perhaps magnifying the peer influence to engage in criminal behavior for some children.[167] Additionally, conformity to peers occurs even more often when antisocial behavior is involved.[168] According to these studies adolescents are especially likely to participate in delinquent behavior based on misguided calculations about fitting in with the cool kids.

Moderator Of a Normative Feedback Alcohol Intervention, 25 HEALTH PSYCHOL. 571 (2006); Rob Turrisi et al., *Examination Of the Mediational Influences Of Peer Norms, Environmental Influences, and Parent Communications on Heavy Drinking In Athletes And Nonathletes,* 21 PSYCHOL. ADDICTIVE BEHAV. 253 (2007).

[158] *Id.* at 349.

[159] Michael Shader, *Risk Factors for Delinquency: An Overview*, U.S. DEP'T OF JUSTICE 6, https://www.ncjrs.gov/pdffiles1/ojjdp/frd030127.pdf, *archived at* https://perma.cc/49DU-2J4J.

[160] Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 632 (2005).

[161] FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 29 (1998).

[162] *Id.*

[163] *Id.* at 152.

[164] Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence,* 57 CHILD DEV. 841, 848 (1986).

[165] Phillip C. Rodkin et al., *Heterogeneity of Popular Boys: Antisocial and Prosocial Configurations*, 36 DEVELOPMENTAL PSYCHOL. 14, 19, 21–22 (2000).

[166] William M. Bukowski et al., *Variations in Patterns of Attraction to Same- and Other-Sex Peers During Early Adolescence*, 36 DEVELOPMENTAL PSYCHOL. 147, 152 (2000).

[167] *See* Rodkin, *supra* note 165, at 21–22.

[168] Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEVELOPMENTAL PSYCHOL. 608, 615 (1979).

Anthony Rolon's[169] case exemplifies how adolescent involvement in group crime and susceptibility to peer pressure makes the felony murder rule inappropriate as applied to juveniles. Rolon was born in Philadelphia, but he lived with an aunt because his mother was addicted to crack cocaine.[170] Rolon's father lived in New Bedford, MA; his father also had a history of addiction.[171] At age 14, Rolon moved to New Bedford to live with his father after his father said that he was drug free, which Rolon quickly learned was not true.[172] In New Bedford, Rolon dropped out of school and began working as his father's partner selling drugs.[173]

When Rolon was 17, he was at a party and got into an argument with Robert Botelho.[174] Botelho pulled out a gun and repeatedly pointed it at Rolon.[175] Later that night, Rolon, along with a group of 15 to 20 other young men, returned to fight Botelho and his friends.[176] Remembering that night, Rolon said "I was still angry. Everyone said, 'we have to go fight him.' They were egging me on."[177] During the fight, Rolon stabbed Botelho either two or three times.[178] In describing the incident, Rolon said "[Botelho] was getting the best of me . . . . I stabbed him, pushed him away, and ran. . . . I didn't choose the location of where to stab him, I was just trying to get the upper hand."[179]

Instead of being convicted for murder based on his own mens rea, Rolon was convicted on a felony murder-joint venture theory because some of his friends entered an apartment and committed burglary during the interaction.[180] He was sentenced to life without parole.[181] In comparison, Rolon's co-defendants, some of whom were adults and some of whom were juveniles, had sentences ranging from three to fifteen years.[182] Rolon's story illustrates how the felony murder rule plays off of juvenile cognitive traits. In sync with the social science research, it involved juvenile participation in a group crime,[183] high susceptibility to peer influence,[184] and conformity to peer pressure to engage in anti-social behavior.[185]

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[169] Commonwealth v. Rolon, 438 Mass. 808 (2003); *see also* Rolon Parole Decision, *supra* note 126, at 1.
[170] Rolon Parole Decision, *supra* note 126, at 6.
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.* at 2–3.
[175] *Id.* at 3.
[176] *Id.*
[177] *Id.* at 7.
[178] *Id.*
[179] *Id.*
[180] Commonwealth v. Rolon, 438 Mass. 808, 817–19 (2003).
[181] Rolon Parole Decision, *supra* note 126, at 1.
[182] *Id.*
[183] *See* ZIMRING, *supra* note 161, at 152.
[184] *See* Steinberg & Silverberg, *supra* note 164, at 848.
[185] *See* Berndt, *supra* note 168, at 615.

C. Felony murder is the quintessential juvenile crime, capitalizing on the developmental vulnerabilities of adolescents.

When the evidence regarding juveniles' cognitive vulnerabilities — less risk aversion, less future orientation, and more sensitivity to peer pressure — is taken into account, it is no surprise that a high percentage of juvenile convictions involve the felony murder rule. Approximately one in five juvenile convictions involve felony murder.[186] Furthermore, 26% of the juveniles sentenced to life without parole are convicted of felony murder in which a co–participant committed murder during a robbery or burglary, without the knowledge or intent of the juvenile.[187] These statistics demonstrate that, regardless of culpability, juveniles tend to be sentenced harshly in felony murder cases.

Yet as Justice Breyer's *Miller* concurrence pointed out, juvenile sentences based on felony murder convictions rely on shaky foundations. In *Miller,* Justice Breyer noted that transferred intent is inadequate to sentence adults to the death penalty under the Eighth Amendment.[188] He went on to assert that the core of the felony murder doctrine is the expectation that individuals are able to foresee the possible negative consequences of their actions — an expectation that the social science evidence simply does not support for juveniles.[189] As Justice Breyer put it, "[T]he ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively."[190] And as the SJC asserted in *Diatchenko* " 'children are constitutionally different from adults for purposes of sentencing,' irrespective of the specific crimes that they have committed."[191] As the felony murder rule exploits juveniles' lack of cognitive ability, neither the rule's rationales nor the penological justifications for the rule apply to juveniles.

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[186] ZIMRING, *supra* note 161, at 152; *Until They Die A Natural Death: Youth Sentenced to Life Without Parole in Massachusetts*, CHILDREN'S LAW CTR. OF MASS., INC. 16 (Sept. 2009), http://www.clcm.org/UntilTheyDieaNaturalDeath9_09.pdf, *archived at* https://perma.cc/XZA4-TH8F.

[187] Amnesty International & Human Rights Watch, *The Rest of Their Lives, Life without Parole for Child Offenders in the United States*, HUMAN RIGHTS WATCH 1–2 (2005), https://www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf, *archived at* https://perma.cc/ML4S-SYN3. Note that the 26% figure applies to only a subset of felony murder: robberies or burglaries that resulted in someone's death. Thus, it is possible that felony murder convictions account for more than 26% of juveniles sentenced to life without parole.

[188] Miller v. Alabama, 132 S. Ct. 2455, 2476 (2012) (Breyer, J., concurring).

[189] *Id.*

[190] *Id.*

[191] Diatchenko v. Dist. Attorney for Suffolk Dist., 466 Mass. 655, 670 (2013) (quoting Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012)).

IV. Given the Diminished Cognitive Capacity of Juveniles Massachusetts Should No Longer Apply the Felony Murder Rule to Juveniles Under Age Eighteen.

A. Neither the rationale behind the felony murder rule nor penological justifications for the felony murder rule apply to juveniles.

The felony murder rule is justified by the straightforward and intuitively appealing idea that an actor's bad purpose, or criminal mens rea, for one crime results in the requisite culpability for a homicide that is an accidental result of the crime. As Guyora Binder puts it, there are two dimensions of culpability in felony murder: "the expected harm [or] the *cognitive* dimension of culpability, and the moral worth of the actor's ends [or] the *normative* dimensions of culpability."[192] In other words, the cognitive dimension of the culpability is related to the defendant's intent and the harm that he or she *expects* will occur, while the normative dimension of the culpability derives from what *actually* occurred.[193] Consequently, in a felony murder situation, the cognitive culpability, or mens rea, is at odds with the normative culpability, the death that occurs. However, while society may normatively and categorically condemn any homicide regardless of intent, the cognitive culpability of juveniles who commit felony murder is simply less than that of adults since juveniles are more likely to take risks, have worse judgment and less future orientation, and are more susceptible to peer pressure than adults.[194] Thus, the cognitive culpability rationale behind the felony murder rule does not apply to juveniles.

One might argue that the felony murder rule enables more severe sentencing for juveniles, and thus accomplishes the penological goals of deterrence and retribution.[195] But not only do the theoretical justifications behind the felony murder rule fail to hold up in the juvenile context, the penological justifications also fail to survive. Retribution is not served by doling out lengthy prison sentences to juveniles who commit felony murder; rather, the diminished responsibility of juvenile offenders means that retribution would require less severe sentences for juveniles than adults since they are less culpable.[196] Additionally, the deterrence goal is not met with long prison sentences in the juvenile context. Treating juveniles like adult offenders — in Massachusetts, sentencing them in adult court for a felony murder convic-

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[192] Guyora Binder, Felony Murder 9–10 (2012).
[193] *Id.*
[194] *See*, *supra* Sections III.A–III.B.
[195] Flynn, *supra* note 8, at 1063.
[196] *See* Zimring, *supra* note 161, at 146.

tion — has not been found to have any deterrent effect on juvenile crime.[197] Instead, juveniles who receive harsher sentences are found to be more likely to reoffend both more frequently and more quickly than those with shorter sentences, perhaps because of behaviors learned as they mature inside a prison environment.[198]

Potentially even more concerning, these findings also indicate that the higher sentences that may apply because of the felony murder rule are failing to rehabilitate juvenile offenders. In fact, research demonstrates that many juvenile offenders will simply "mature out" of criminal behavior.[199] This suggests that the best rehabilitation may be a wholesome environment rather than a prison. In sum, the rationale behind the felony murder rule and the penological justifications for the harsher sentencing both fail in the juvenile context.

B. Massachusetts should continue its tradition of protecting individual rights by categorically banning the felony murder rule for juveniles in Massachusetts.

This is not the first time that Massachusetts has been at the forefront of protecting individual rights in criminal cases. As the SJC noted in *Diatchenko*, it has repeatedly determined that the rights of individual defendants under the Declaration of Rights exceed the rights granted by the U.S. Constitution.[200] The SJC has concluded that the Declaration of Rights prohibits capital punishment,[201] includes a broader right to be informed of one's right to an attorney than the Fifth and Sixth Amendment,[202] protects a greater right to privacy in traffic stops,[203] and gives defendants a broader confrontation right.[204]

Not only has the SJC interpreted the Declaration of Rights to require a higher floor for defendants' rights, the Massachusetts legislature's treatment of juveniles also supports creating a carve out for the felony murder rule for juveniles under 18. As discussed above, the SJC's decision in *Diatchenko* determined that a life without parole sentence is never permissible for a juvenile and that the ongoing cognitive development of juveniles means that they are categorically less culpable than adults. The SJC later reinforced its decision in *Diatchenko*, finding that defendants are entitled to counsel when they first apply for parole, that courts are permitted to pay expert fees for the

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[197] *See Does Treating Kids Like Adults Make a Difference*, PBS.ORG FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/kidslikeadults.html (last visited Mar. 20, 2016), *archived at* https://perma.cc/5EBA-T9W2.

[198] *See id.*

[199] Shulman & Cauffman, *supra* note 133, at 421–22.

[200] Diatchenko v. Dist. Attorney for Suffolk Dist., 466 Mass. 655, 668–69 (2013).

[201] Dist. Attorney for the Suffolk Dist. v. Watson, 381 Mass. 648, 650, 665 (1980).

[202] Commonwealth v. Mavredakis, 430 Mass. 848, 855–60 (2000).

[203] Commonwealth v. Gonsalves, 429 Mass. 658, 660–68 (1999).

[204] Commonwealth v. Amirault, 424 Mass. 618, 628–32 (1997).

initial parole hearing, and that parole board decisions are subject to limited judicial review.[205] Following suit, the Massachusetts Legislature enacted M.G.L. ch. 279 § 24 in 2014, which lays out a different sentencing regime for juveniles convicted of murder: a juvenile convicted of first degree felony murder is eligible for parole after 20-30 years; a juvenile convicted of first degree premeditated murder is eligible for parole after 25-30 years; and a juvenile convicted of first degree murder with cruel or atrocious conduct is eligible for parole after 30 years.[206]

Both the SJC and the Massachusetts Legislature have demonstrated a willingness to act based on evidence that juveniles are simply different from adults. Given that the rationale behind the felony murder rule and its possible penological justifications do not apply in the juvenile context, the Massachusetts Legislature should take the next logical step in acknowledging the cognitive limitations of adolescents by prohibiting application of the felony murder rule to individuals under age 18.

Conclusion

It is a "commonsense conclusion[ ]" [207] that children are simply different than adults. The Supreme Court has recognized that, given ongoing juvenile cognitive development, the Eighth Amendment prohibits sentencing juveniles to capital punishment, to life without parole for non-homicide offenses and to mandatory life without parole sentences. The SJC has gone one step further, prohibiting even discretionary life without parole sentences for juveniles. As the social science research shows that the felony murder rule plays into the very juvenile cognitive vulnerabilities identified in Supreme Court and Massachusetts jurisprudence — predisposition to risky behavior, lack of awareness about future consequences, and susceptibility to peer pressure — both the rationale behind the felony murder doctrine and potential penological justifications for it fail in the juvenile context. In line with the state's leadership on other defendant protections, the Massachusetts Legislature should also be the first to prohibit the felony murder rule for juveniles under 18.

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[205] *See also* Peter Schworn, *SJC Ruling Aids Juvenile Murderers Denied Parole*, Boston Globe (Mar. 23, 2015), https://www.bostonglobe.com/metro/2015/03/23/sjc-juvenile-murderers-seeking-parole-are-entitled-lawyers-experts-and-court-review/suDw0nROALsSUmHTDlP6OK/story.html, *archived at* https://perma.cc/44QE-UERH; *see generally* Diatchenko v. Dist. Attorney for Suffolk Dist., 471 Mass. 12 (2015).

[206] *See* Editorial, *Juveniles Convicted of 'Felony Murder" Should get Earlier Parole Hearings*, Boston Globe (June 24, 2014), https://www.bostonglobe.com/opinion/editorials/2014/06/23/juveniles-convicted-felony-murder-should-get-earlier-parole-hearings/9VC8NJTFSAPMhGdy7lEJuI/story.html; State House News Service, *Massachusetts Governor Deval Patrick Signs Bill Allowing for Parole for Juvenile Offenders*, MASSLIVE (July 25, 2014, 5:33 PM), http://www.masslive.com/politics/index.ssf/2014/07/massachusetts_gov_deval_patric_36.html, *archived at* https://perma.cc/2HYE-VDU5.

[207] J.D.B. v. N. Carolina, 564 U.S. 261, 272 (2011).