

# COMMENTS

## DISMANTLING THE FELONY-MURDER RULE: JUVENILE DETERRENCE AND RETRIBUTION POST-*ROPER V. SIMMONS*

ERIN H. FLYNN<sup>†</sup>

### INTRODUCTION

Juvenile offenders<sup>1</sup> no longer have a place on death row.<sup>2</sup> On March 1, 2005, the United States Supreme Court categorically abolished the juvenile death penalty, holding that the sentencing to death of an individual who was under the age of eighteen at the time of his offense violated both the Eighth and Fourteenth Amendments of the United States Constitution.<sup>3</sup> To distinguish between the culpability of

---

<sup>†</sup> J.D. Candidate, 2008, University of Pennsylvania Law School; B.A., 2002, Yale University. I would like to thank the Board, Senior Editors, and Associate Editors of the *University of Pennsylvania Law Review* for their careful editing and thoughtful suggestions. Also, special thanks to my family and friends for their constant support and encouragement. All errors are my own.

<sup>1</sup> In this Comment, the term “juvenile offenders” refers to children and teenagers who, despite their age at the time of their actions, have been tried and sentenced as adults in criminal court. Many of these “juvenile offenders” are inevitably adults by the time they are convicted, sentenced, and imprisoned. I use the term generally—it is not synonymous with the special “youthful offender” and “juvenile offender” designations that individual states sometimes use. See Simon I. Singer et al., *The Reproduction of Juvenile Justice in Criminal Court: A Case Study of New York’s Juvenile Offender Law*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT* 353, 353-75 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (tracing New York’s legislative attempts to deal with juveniles in the adult court setting).

<sup>2</sup> *Roper v. Simmons*, 543 U.S. 551 (2005), spared Christopher Simmons’s life and the lives of over seventy other juvenile offenders. See Linda Greenhouse, *Supreme Court, 5-4, Forbids Execution in Juvenile Crime*, N.Y. TIMES, Mar. 2, 2005, at A1 (reporting that the Court’s decision would bar execution of seventy-two people on death row); David G. Savage, *Supreme Court Bans Execution of Juveniles*, L.A. TIMES, Mar. 2, 2005, at A1 (noting the Court’s opinion that even a cold-blooded juvenile criminal such as Simmons did not deserve to be executed).

<sup>3</sup> *Roper*, 543 U.S. at 575, overruled *Stanford v. Kentucky*, 492 U.S. 361 (1989), which held that the death penalty could be imposed on offenders who were between sixteen and eighteen years of age at the time of their offense. In this Comment, “juvenile” refers to youths under the age of eighteen at the time of their offenses. “Juvenile death

a child and an adult, the Court in *Roper v. Simmons*<sup>4</sup> relied on a growing national consensus against the juvenile death penalty, social science and neurodevelopmental research, and international legal standards.<sup>5</sup> Recognizing that developmental differences contribute to culpability, the Court differentiated between juveniles and adults based solely on chronological age and categorically safeguarded any juvenile convicted of a state or federal crime from a court's or legislature's<sup>6</sup> imposition of a death penalty sentence.<sup>7</sup>

*Roper v. Simmons* removed juvenile execution from the variety of sentences available to prosecutors and courts, but its broader implications for the juvenile justice system and juvenile sentencing schemes have yet to be realized. Although the Court, in fashioning its argument, relied on international standards and compacts that prohibited the juvenile death penalty, it conceded that juveniles could still be sentenced to life without the possibility of parole (LWOP)—a sentence that these same compacts denounced.<sup>8</sup> The Court affirmed the

penalty" refers to the sentence of death imposed on a defendant who was under eighteen at the time of his offense. "Juvenile life without parole" and "juvenile LWOP" refer to a defendant who has been tried as an adult in adult criminal court and sentenced to life in prison without possibility of parole, although under eighteen at the time of his offense.

<sup>4</sup> *Roper* broke with Supreme Court precedent that had allowed for the imposition of juvenile death sentences on persons who were sixteen and seventeen years of age at the time of their offense. *Stanford*, 492 U.S. at 380. Of course, the *Roper* decision, which was decided by a slim margin of 5-4, was not without vehement opposition: Justice Scalia actually read portions of his dissent from the bench on the day the case was orally announced. See Edward Lazarus, *Roper v. Simmons: Insights from the Perspective of Justice Blackmun's Former Law Clerk*, 82 DENV. U. L. REV. 723, 723-24 (2005).

<sup>5</sup> See *Roper*, 543 U.S. at 578.

<sup>6</sup> In this Comment, a legislature's imposition of the juvenile death penalty refers to mandatory sentencing schemes that give judges no discretion to allow for mitigating factors when sentencing a defendant.

<sup>7</sup> Recent case law holding that the Eighth and Fourteenth Amendments bar the execution of mentally retarded persons formed the basis for the Court's reasoning in *Roper*. See *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) ("Because of [mentally retarded persons'] impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability."), *abrogating Penry v. Lynaugh*, 492 U.S. 302 (1989).

<sup>8</sup> See AMNESTY INT'L & HUMAN RIGHTS WATCH, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* 5 (2005) [hereinafter HUMAN RIGHTS WATCH] (noting that the UN Convention on the Rights of the Child forbids "life imprisonment without possibility of release" for "offenses committed by persons below eighteen years of age"). As may be obvious from our federal and state

Missouri Supreme Court decision, which resentenced Simmons to “life imprisonment without eligibility for probation, parole, or release except by act of the Governor.”<sup>9</sup> In doing so, the Court implied that it did not view such a sentence as cruel and unusual punishment under the Eighth and Fourteenth Amendments. Thus, in its decision to abolish the juvenile death penalty, the Court seemed to approve the use of LWOP sentences against juvenile offenders.<sup>10</sup>

*Roper*'s legacy is questionable. What do the Court's broad findings, but rather limited holding, mean for the numerous post-*Roper* youth that encounter the criminal justice system?<sup>11</sup> Despite the magnitude of its effect on states' treatments of juveniles, *Roper* was warmly received.<sup>12</sup> The Court's reasoning, however, does not appear to have

sentencing schemes, which previously allowed juvenile death penalties and presently allow juvenile LWOP sentences, when the United States ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992, it did not fully agree to the protections offered children. See International Covenant on Civil and Political Rights, U.S. Reservations ¶ 5, June 8, 1992, 999 U.N.T.S. 171 [hereinafter ICCPR, U.S. Reservations] (reserving the right to treat juveniles as adults with respect to the criminal justice system and military service). In fact, the United States' limiting reservation to its ratification of the ICCPR stated that “the United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of article 10 and paragraph 4 of article 14.” HUMAN RIGHTS WATCH, *supra*, at 97 (emphasis added) (quoting ICCPR, U.S. Reservations ¶ 5).

<sup>9</sup> *Roper*, 543 U.S. at 560 (quoting State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 413 (Mo. 2003) (en banc)).

<sup>10</sup> The Court, however, did so with some qualification, stating that “life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.” *Id.* at 572.

<sup>11</sup> See DAVID L. MYERS, BOYS AMONG MEN: TRYING AND SENTENCING JUVENILES AS ADULTS 4, 6-7, 129 (2005) (discussing predictions that the U.S. juvenile population will increase for the foreseeable future and the likely effects of the increase).

<sup>12</sup> *Atkins v. Virginia* held the execution of mentally retarded persons to be constitutionally impermissible and may have primed the country for the *Roper* decision. 536 U.S. 304 (2002). In addition, eight states submitted an amicus curiae brief supporting the abolition of the juvenile death penalty. See Brief of New York et al. as Amici Curiae in Support of Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-0633), 2004 WL 1636449 (urging on behalf of New York, Iowa, Kansas, Maryland, Minnesota, New Mexico, Oregon, and West Virginia that a consensus had developed against execution of juveniles). Other amici supporting Simmons included the American Bar, Psychological, Medical, and Psychiatric Associations, the European Union, foreign leaders, diplomats, and former President Jimmy Carter, as well as countless human rights organizations, defender associations, juvenile advocates, and religious groups. See Brief Amicus Curiae of the American Bar Ass'n in Support of the Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-0633), 2004 WL 1617399; Brief for the American Psychological Ass'n and the Missouri Psychological Ass'n as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-0633), 2004 WL 1636447; Brief of Amici Curiae former U.S. Diplomats Morton Abramowitz et al. in Support of Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-0633), 2004

had ripple effects. States' treatment of juvenile offenders remains largely unaltered. Children deemed to be serious juvenile offenders are still thrust into adult courts and are subjected to adult sentencing schemes. *Roper's* reasoning raises questions as to why these children are treated differently than their juvenile court peers.<sup>13</sup> Some increased level of supervision or incapacitation may be necessary for more violent juvenile offenders, but *Roper* begs the question of whether unreformable, "superpredator"<sup>14</sup> children really exist.<sup>15</sup>

Although arguments exist for abolishing juvenile LWOP sentences as cruel and unusual punishment that violates the Eighth and Fourteenth Amendments,<sup>16</sup> I will not focus here on constitutional argu-

WL 1636448; Brief of Amici Curiae President James Earl Carter, Jr., et al., *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-0633), 2004 WL 1636446. *But see* Tom Parker, Op-Ed., *Alabama Justices Surrender to Judicial Activism*, BIRMINGHAM NEWS, Jan. 1, 2006, at 4B (expressing an Alabama Supreme Court Judge's opinion that the Alabama courts should continue to impose juvenile death sentences because the *Roper* opinion was an unconstitutional act of judicial activism by the Court). Some scholars have criticized *Roper's* constitutional analysis. *See infra* note 36 (citing two law review articles that question, for example, the persuasiveness of the opinion's international comparisons).

<sup>13</sup> In juvenile courts, the focus is largely one of individual treatment and rehabilitation. Children are adjudicated delinquent rather than convicted, and outcomes are determined at disposition rather than at sentencing. The existence of juvenile courts illustrates our recognition of youths' development and children's amenability to treatment. *McKeiver v. Pennsylvania*, 403 U.S. 528, 539-40 (1971).

<sup>14</sup> *See MYERS, supra* note 11, at 7 (explaining the rise of the "superpredator" rhetoric). *See generally* PETER ELIKANN, SUPERPREDATORS: THE DEMONIZATION OF OUR CHILDREN BY THE LAW 1-20 (1999) (defining "superpredator" as a popular term used to refer to the dehumanizing of juveniles into amoral and dangerous creatures as a result of an increase in youth violence).

<sup>15</sup> At *Simmons's* sentencing, the Missouri prosecutor attempted to capitalize on the public fear of superpredator children in arguing for the death penalty. In response to defense counsel's argument that age was a mitigating factor, the prosecutor replied, "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary." *Roper*, 543 U.S. at 558.

<sup>16</sup> Federal courts have held that felony-murder LWOP sentences for juvenile offenders are not unconstitutional cruel and unusual punishment. *See, e.g., Harris v. Wright*, 93 F.3d 581, 584-85 (9th Cir. 1996) (holding that such sentences do not counter evolving standards of decency and are not disproportionate to the murder offense). Such arguments have, however, been raised in the post-*Roper* context. *See* Hillary J. Massey, Note, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After Roper*, 47 B.C. L. REV. 1083 (2006) (asserting that *Roper's* reasoning supports the premise that juvenile LWOP sentences violate the Eighth Amendment). Other authors advocate disallowing the sentences under a constitutionalized infancy defense. *See* Steven A. Drizin & Allison McGowen Keegan, *Abolishing the Use of the Felony-Murder Rule When the Defendant Is a Teenager*, 28 NOVA L. REV. 507, 541 (2004) (arguing that both the young age of juveniles and the nature of felony murder make an LWOP sentence overly draconian).

ments.<sup>17</sup> The Court's dicta in *Roper v. Simmons* seem to foreclose immediate Eighth Amendment challenges to juvenile LWOP sentences. Instead, this Comment seeks to show that the Court's recognition of three main differences between juveniles and adults<sup>18</sup> leaves open to principled attack one of the major doctrinal hooks for gaining adult court jurisdiction over juveniles, and one of the main factors in lengthy juvenile incarcerations and juvenile LWOP sentences: prosecutors' use of felony-murder charges.<sup>19</sup>

Part I briefly describes the Court's reasoning in *Roper*. Part II then reviews the diminished scope of juvenile court jurisdiction and the historical trend toward treating juveniles as adults. It explains how, in the absence of a constitutional right to be tried as a juvenile,<sup>20</sup> three mechanisms have been employed to bring juveniles into adult court.<sup>21</sup> Part III critically examines the felony-murder rule and the assumptions underlying the doctrine. Part IV provides a vignette that illustrates the interaction among felony-murder charges, waiver provisions, mandatory sentencing schemes, and juvenile LWOP sentences. Finally, Part V argues that, in light of the Court's reasoning in *Roper*, felony-murder charges should be categorically excluded as applied to ju-

---

<sup>17</sup> At the time *Roper* was decided, thirty states were not applying the death penalty to juvenile offenders, and only seven states had executed any juvenile offenders in the preceding thirty years. HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 239-40 (2006), available at <http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf>. Unlike *Roper's* ratification of states' independent movements and the growing national consensus against the juvenile death penalty, a similar climate has yet to emerge with respect to the imposition of juvenile LWOP sentences. And given the *Roper* Court's endorsement of *Simmons's* LWOP sentence and the lack of movement in state legislatures to denounce the rule, I will therefore refrain from making a constitutional argument under the Eighth Amendment because the argument seems unlikely to prevail in the current legislative and judicial climate. See *Atkins*, 536 U.S. at 311-12 (noting that legislation is an objective indicator of "evolving standards of decency" and "contemporary values"). Instead, I will seek to promote legislatures' post-*Roper* adoption of better youth crime policies.

<sup>18</sup> See *infra* text accompanying notes 28-34 (discussing the implications of the Court's differentiations between adults and children).

<sup>19</sup> See HUMAN RIGHTS WATCH, *supra* note 8, at 27 (referring to a survey suggesting that 26% of youth offenders sentenced to LWOP were charged with felony murder).

<sup>20</sup> Although the United States Supreme Court has held that due process is required in juvenile proceedings, see *In re Gault*, 387 U.S. 1 (1967), it has never held that there is a constitutional right to have one's case adjudicated in a juvenile court. Cf. FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 117 (1998) (noting that "the juvenile court is itself a statutory creation").

<sup>21</sup> See *infra* notes 42-50 and accompanying text (detailing the processes involved in judicial, prosecutorial, and legislative waivers).

veniles because they run afoul of *Roper's* findings and represent the antithesis of sound juvenile crime policy.

### I. THE ABOLITION OF THE JUVENILE DEATH PENALTY

In *Roper v. Simmons*, the Court addressed the fate of Christopher Simmons, a seventeen-year-old who had resolved to kill a woman by throwing her off of a bridge.<sup>22</sup> Despite the heinous nature of the act, Simmons's direct involvement in the murder, his enlistment of younger friends, and his late-minor age of seventeen, the Court still expanded the principles it first developed in *Thompson v. Oklahoma*<sup>23</sup> and held that imposition of the death penalty against any offender under the age of eighteen is unconstitutional.<sup>24</sup> The Court could have waited for and granted certiorari in a case with a more sympathetic defendant; it chose, however, to take Simmons's case—the gruesome crime, the defendant-instigator, the direct actor, and the older adolescent—and thereby signaled that its abolition of the juvenile death penalty was unqualified.

In *Thompson*, a case of a fifteen-year-old sentenced to death, the plurality supported the constitutionality of its holding by emphasizing “civilized standards of decency”; “the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European Community”;<sup>25</sup> and the rarity of imposing juvenile death penalties on offenders under the age of sixteen. The Court stressed that the lack of privileges and responsibilities afforded to juveniles “also explain[s] why their irresponsible conduct is not as morally reprehensible as that of an adult.”<sup>26</sup> In addition to juveniles' lesser culpability, the Court also noted their inability to be deterred by the harshest punish-

---

<sup>22</sup> The facts of the case are graphic. Simmons and another teen broke and entered the victim's home, covered her eyes and mouth with duct tape, bound her hands, put her in her minivan, and drove her to a state park. At the park, they covered her head with a towel, tied her hands and feet together with electrical wire, wrapped her face entirely in duct tape, and threw her from a bridge, drowning her. *Roper*, 543 U.S. at 556-57; see also Kim Bell, *Woman Thrown into River Alive*, ST. LOUIS POST-DISPATCH, Sept. 12, 1993, at 1D (providing a local account of the victim's death).

<sup>23</sup> See 487 U.S. 815, 838 (1988) (holding that the juvenile death penalty was impermissible when imposed upon offenders who were under the age of sixteen at the time of their offenses).

<sup>24</sup> *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005).

<sup>25</sup> *Thompson*, 487 U.S. at 830.

<sup>26</sup> *Id.* at 835.

ments, because youth fail to engage in “the kind of cost-benefit analysis that attaches any weight to the possibility of execution.”<sup>27</sup>

The Court’s reasoning in *Roper* reaffirms its recognition of adolescents’ evolving personhood. The Court acknowledged three main differences between adults and children as a basis for holding that the death penalty is a disproportionate punishment when applied to juveniles. The Court found that juveniles (1) “lack . . . maturity and [have] an underdeveloped sense of responsibility,” which results in “ill-considered actions and decisions”;<sup>28</sup> (2) are “more vulnerable or susceptible to negative influences and outside pressures”;<sup>29</sup> and (3) have characters that are “not as well formed as [those] of . . . adult[s]” and traits that are “more transitory, less fixed”<sup>30</sup> in nature.

The implication of the first difference, lack of maturity and an underdeveloped sense of responsibility, is that children are less likely to foresee the consequences of their actions and process the potential effects of their actions on others.<sup>31</sup> Because they fail to engage in such thought processes, children are more reckless than adults<sup>32</sup> and are also less likely to be deterred by punishment. The second difference, susceptibility to negative influences, recognizes that children are likely to engage in negative activities with their peers and, once involved in those activities, will have difficulty extricating themselves from a problematic situation.<sup>33</sup> The implication of the last difference, the transitory nature of juvenile character traits, is that children and adolescents have a greater propensity for rehabilitation than adults. Despite

---

<sup>27</sup> *Id.* at 837. *But see* Moin A. Yahya, *Deterring Roper’s Juveniles: Using a Law and Economics Approach To Show That the Logic of Roper Implies That Juveniles Require the Death Penalty More Than Adults*, 111 PENN. ST. L. REV. 53, 70 (2006) (arguing that juvenile “risk-lovers” should be subject to state-imposed sanctions that include juvenile execution).

<sup>28</sup> *Roper*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

<sup>29</sup> *Id.*; *see also* Roy Malone, *Separate Hells Draw Tears from Murder Suspect, 2 Men*, ST. LOUIS POST-DISPATCH, Dec. 20, 1993, at 6 (noting Simmons’s codefendant’s father’s tearful statement that his son had “got[ten] in with the wrong kids”).

<sup>30</sup> *Roper*, 543 U.S. at 570.

<sup>31</sup> *See* Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, CRIM. JUST., Summer 2000, at 26, 27 (noting that adolescents often view the consequences of their actions as “accidental,” whereas adults would have foreseen the consequences).

<sup>32</sup> *See Roper*, 543 U.S. at 569 (“[A]dolescents are overrepresented statistically in virtually every category of reckless behavior.” (internal quotation marks omitted)).

<sup>33</sup> *Id.* (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003) (arguing that adolescents, “as legal minors . . . , lack the freedom that adults have to extricate themselves from a criminogenic setting”).

any actions to the contrary, they have not yet developed an “irretrievably depraved character.”<sup>34</sup>

In expanding the principles first enunciated in *Thompson* and reaching its holding that the juvenile death penalty is constitutionally impermissible cruel and unusual punishment, the *Roper* Court departed from legal precedent and largely supported its decision with both international norms denouncing harsh juvenile sentences and scientific findings addressing juveniles’ developing characters.<sup>35</sup> Although some scholars have focused on *Roper*’s significance for constitutional analysis,<sup>36</sup> *Roper* is important for other reasons. A narrow reading of *Roper* limits the case merely to abolishing the juvenile death penalty. A broader reading of the case, however, should alter juvenile crime policy as a whole.

The *Roper* Court recognized juveniles’ lesser culpability, their inability to anticipate the consequences of their actions, and their potential for change. These findings directly impact juvenile deterrence and retribution. Given the Court’s findings about adolescent culpability and development, the next sections present the inconsistencies between current juvenile crime policy and the *Roper* findings, and address the plight of post-*Roper* youth who kill. More specifically, this Comment argues against the continued use of juvenile felony-murder charges—which can subject juveniles to the harshest sentences still permitted by the *Roper* Court—in a post-*Roper* landscape. First, however, I explain how juveniles end up being tried in adult courts, in which they are subjected to harsh penalties.

---

<sup>34</sup> See *Roper*, 543 U.S. at 570. The Court had commented earlier on the characteristics of youth. See *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (finding that juveniles’ susceptibility to immature and irresponsible behavior makes their actions less “morally reprehensible [than those] of an adult”); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (“[Youth] is a time and condition of life when a person may be most susceptible to influence and to psychological damage.”).

<sup>35</sup> See *supra* notes 25-34 and accompanying text. But cf. Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 907 (2005) (tracing the Court’s use of international law over the past 216 years and concluding that “[r]eferences to foreign sources . . . have been somewhat commonplace”).

<sup>36</sup> See, e.g., Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63 (2007) (arguing against international consensus as persuasive authority in Eighth Amendment jurisprudence); Roger P. Alford, *Roper v. Simmons and Our Constitution in International Equipose*, 53 UCLA L. REV. 1, 1-3 (2005) (analyzing “the use of comparative constitutionalism to interpret the Eighth Amendment”).



## II. THE RISE OF “ADULT CRIME, ADULT TIME” AND THE JUVENILE “SUPERPREDATOR”<sup>37</sup>

The nationwide existence of separate juvenile courts signifies a difference in our treatment of juveniles and adults.<sup>38</sup> Traditionally, juvenile courts were developed as a nonpunitive system that valued rehabilitation over retribution.<sup>39</sup> What, then, removes children from the realm of a nonpunitive system and thrusts them into the adult criminal system, potentially exposing them to long—and even life-time—prison sentences?

Both pre- and post-*Roper*, prosecutors, courts, advocates, and legislators have struggled to respond to serious juvenile crime.<sup>40</sup> Legislatures have responded to actual and perceived threats of youth violence by expanding juvenile transfer, or waiver, provisions.<sup>41</sup> Waiver provisions result in juveniles being tried as adults.<sup>42</sup> Three common

---

<sup>37</sup> See generally ELIKANN, *supra* note 14, at 10-11 (discussing the emergence of the juvenile “superpredator” rhetoric); MYERS, *supra* note 11, at 1-8 (discussing the “Adult Crime, Adult Time” mantra and superpredators); ZIMRING, *supra* note 20, at 49-50 (explaining the youth violence and superpredator rhetoric that incited public fear).

<sup>38</sup> Despite these differences, however, juvenile courts are not constitutionally required; rather, they have been regarded as creatures of legislative grace. See *supra* note 20 and accompanying text.

<sup>39</sup> See generally DAVID L. MYERS, EXCLUDING VIOLENT YOUTHS FROM JUVENILE COURT: THE EFFECTIVENESS OF LEGISLATIVE WAIVER 12-18 (2001) (tracing the development of juvenile courts).

<sup>40</sup> See Daphne Larkin, *Children Charged as Adults Walking Long, Hard Road*, THE BARRE MONTPELIER TIMES ARGUS, Dec. 31, 2006, available at <http://www.timesargus.com> (illustrating Vermont’s struggle with this question as recently as late-December 2006). The current population of imprisoned offenders serving juvenile LWOP sentences numbers 2225. HUMAN RIGHTS WATCH, *supra* note 8, at 1. Approximately twenty-six percent of those imprisoned on LWOP sentences were convicted of felony murder. *Id.* at 1-2. This estimate was published in 2005—current numbers are likely higher as juveniles have continued to receive LWOP sentences over the last two years. That there are over 2000 inmates nationwide who are serving LWOP sentences for acts they committed as minors, however, illustrates that, if nothing else, the United States has generally been tough on juvenile crime. This harsh treatment of juveniles seems incredibly stark when U.S. juvenile LWOP sentences are compared to those of foreign nations. Human Rights Watch obtained data from 154 countries, only three of which reported having inmates serving LWOP for crimes committed as children. *Id.* at 104-05. In these three countries—Israel, South Africa, and Tanzania—the combined number of juvenile LWOP inmates is less than a dozen individuals. *Id.* at 106.

<sup>41</sup> See *infra* notes 52-56 and accompanying text (providing statistics regarding the prevalence of youth prosecutions in adult courts); see also David S. Tanenhaus, *The Evolution of Transfer Out of the Juvenile Court*, in THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 1, at 13, 13-33 (providing a historical account of transfer laws).

<sup>42</sup> Juvenile court jurisdiction and court-mandated dispositional placements typically extend only until a child’s eighteenth or twenty-first birthday. Some states, how-

mechanisms through which juveniles are brought under an adult criminal court's jurisdiction include judicial waiver, prosecutorial waiver, and legislative waiver or "exclusion."<sup>43</sup> Under judicial waiver, a case is filed initially in the juvenile court; it may then be transferred to an adult court at the juvenile judge's discretion, either following a hearing<sup>44</sup> or as a legislative mandate, if the judge determines that the statutory requirements of a presumptive waiver are met.<sup>45</sup> Prosecutorial waiver, also known as direct file or concurrent jurisdiction,<sup>46</sup> gives prosecutors the choice to file charges in either juvenile or adult court depending on factors that include the child's age, the type of offense, and any history of court involvement.<sup>47</sup> Legislative exclusion, currently the most commonly used transfer mechanism,<sup>48</sup> statutorily removes the juvenile court's jurisdiction to hear certain offenses, thus mandating criminal court jurisdiction over certain defendants and certain crimes, which generally include violent felonies and felony murder.<sup>49</sup> Incidental to waiver provisions is the lowering of the mini-

---

ever, have set upper age limits of twenty-four years of age on some court-mandated placements. See SNYDER & SICKMUND, *supra* note 17, at 103 (reporting state upper age limits on dispositional placements in delinquency cases). Waiver provisions, however, remove juveniles from even these juvenile court sentencing schemes.

<sup>43</sup> See MYERS, *supra* note 11, at 40-47 (explaining different types of waiver provisions). Jurisdictional transfers occur under the presumption of an increased need for public safety against the offender. See SNYDER & SICKMUND, *supra* note 17, at 96-99 (explaining that a massive shift in states' responses to juveniles undertaken between 1992-1997 largely occurred in five areas of the law: transfer provisions, sentencing authority, confidentiality, victims' rights, and correctional programming).

<sup>44</sup> See *Kent v. United States*, 383 U.S. 541, 561 (1966) (holding that transfer hearings were required prior to a juvenile court waiving jurisdiction); see also Robert O. Dawson, *Judicial Waiver in Theory and Practice*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE*, *supra* note 1, at 45, 51-63 (listing common features of judicial waiver schemes post-*Kent*).

<sup>45</sup> See MYERS, *supra* note 11, at 42-43 (explaining discretionary and presumptive waivers, as well as allocations of the burden of proof).

<sup>46</sup> SNYDER & SICKMUND, *supra* note 17, at 110.

<sup>47</sup> See MYERS, *supra* note 11, at 43-44 (noting that prosecutorial waiver may be the most controversial of the three transfer mechanisms since it substitutes a prosecutor's judgment for a judge's discretion and eliminates the opportunity for a transfer hearing). As of 2004, approximately fifteen states allowed for prosecutorial discretion in filing charges either in juvenile or adult court. SNYDER & SICKMUND, *supra* note 17, at 113.

<sup>48</sup> See MYERS, *supra* note 11, at 45 ("Legislatures in 29 states currently have excluded certain offenses . . ."); SNYDER & SICKMUND, *supra* note 17, at 113; Drizin & Keegan, *supra* note 16, at 538-40 (noting that the trend away from judicial waiver—which allowed a juvenile court to waive jurisdiction—toward legislative exclusion has resulted in a "more rigid and less flexible" justice system).

<sup>49</sup> See MYERS, *supra* note 11, at 45 (discussing the most commonly excluded crimes); see also HUMAN RIGHTS WATCH, *supra* note 8, at 27 ("Almost 93 percent of the youth sentenced to life without parole were convicted of homicide."). See generally

mum age for adult court jurisdiction, wherein legislatures redefine "adult" under substantive criminal laws and thus allow criminal courts to exercise jurisdiction over even the youngest of children.<sup>50</sup>

Modern juvenile transfer provisions have gained acceptance and momentum since their first appearance in the mid- to late 1980s.<sup>51</sup> More extensive and rigid waiver provisions resulted from apocalyptic predictions of juvenile superpredators that would descend upon the streets of America as the teenage population increased.<sup>52</sup> Research and public opinion polls have revealed that although the public generally supports the transfer of juveniles to adult court, it does not favor giving juveniles full adult sentences, placing them in adult correctional facilities, or abandoning rehabilitative goals.<sup>53</sup> Although the

---

Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE*, *supra* note 1, at 83, 83-129 (analyzing legislative exclusion and concluding that most of these laws "do not provide either a jurisprudentially satisfactory or principled legal answer to the question of which youths states would prosecute as adults").

<sup>50</sup> Pennsylvania, for example, has no statutory minimum age requirement for the adult prosecution of a child who has committed murder. In fact, the juvenile court is excluded from exercising jurisdiction over any child who has committed murder. The minimum age for any prosecution, however, is ten years. See generally Nat'l Ctr. for Juvenile Justice, Pennsylvania, <http://www.ncjj.org/stateprofiles> (select "Pennsylvania" from "State Profiles" drop-down menu) (last visited Feb. 15, 2008) (providing current Pennsylvania transfer provisions). This exclusion means that any ten-year-old child who is charged with murder must first be charged as an adult. The child then bears the burden of convincing the adult court to grant a reverse waiver, which enables the court to transfer a child's case to the juvenile court. See MYERS, *supra* note 11, at 45-46 (explaining reverse waiver and blended sentencing). Legislative exclusion can thus seem counterintuitive or illogical for serious child offenders. Absent any reverse waiver, a ten-year-old child, who has only just become eligible for any sort of juvenile or criminal prosecution, is automatically subject to adult prosecution—and potentially, a lengthy sentence—if the offense is murder.

<sup>51</sup> See MYERS, *supra* note 11, at 39-40, 95-97 (explaining that the emergence of modern transfer mechanisms coincided with increases in serious juvenile offenses, weapons use, and public concern over increasingly violent youth).

<sup>52</sup> See MYERS, *supra* note 39, at 19-21 (explaining the effect of social science studies on public policy). As social scientists predicted sharp rises in the juvenile population, they posited that increased youth violence would follow. Between 1992 and 1995, forty-seven states and the District of Columbia prepared for a surge in remorseless, violent offenders by strengthening their juvenile and criminal codes. *Id.* at 20-21; see also *id.* at 26-27 (noting that during this period, "41 states passed laws seeking to ease the transfer of juveniles to adult court . . . [and] over 30 states either established or expanded their legislative waiver laws"). See generally ZIMRING, *supra* note 20, at 3-16 (comparing the legislative responses of the 1990s to predicted increases in youth violence to those of the 1970s).

<sup>53</sup> See MYERS, *supra* note 11, at 9-10, 127.

use of judicial waivers has remained relatively constant,<sup>54</sup> most legislatures have continued to expand their waiver provisions.<sup>55</sup>

Prosecutorial waiver and legislative exclusion account for the majority of juvenile transfers and generally apply to enumerated felonies, which include felony murder. The prevalence of waiver provisions means that children and teens charged with felony murder will most often enter the justice system through adult criminal courts. These children then bear the burden of convincing a court to invoke a reverse waiver, which allows their case to be transferred to a juvenile court, despite the seriousness of the charges that have been filed.<sup>56</sup>

Children charged with and convicted of felony murder have participated in felony-level offenses that have resulted in death. These children pose a significant challenge for the justice system<sup>57</sup>—they may not have intended to take a life, but did all the same. Absent a reverse waiver, however, *Roper's* findings still persist in the adult court-

<sup>54</sup> See *id.* at 47-48 (noting that judicial waiver of juveniles has remained roughly consistent, applying to only about one percent of juveniles or approximately 7500 youth nationwide, and is responsible for at most ten percent of the youths in adult court); cf. SNYDER & SICKMUND, *supra* note 17, at 113 (“In Florida, which has [broad prosecutorial discretion], prosecutors sent more than 2,000 youth to criminal court in fiscal year 2001. In comparison, juvenile court judges nationwide waived fewer than 6,000 cases to criminal court in 2000.”).

<sup>55</sup> See MYERS, *supra* note 11, at 48, 54, 97 (positing that about 200,000 youth are prosecuted in adult courts each year and that approximately 15,000 youth under the age of eighteen are incarcerated in adult prisons on any given day); see also ZIMRING, *supra* note 20, at 73 (explaining how the superpredator rhetoric dehumanizes youngsters and thwarts a public backlash to harsh legislative policies). For a state-by-state breakdown of how juveniles enter criminal courts, see SNYDER & SICKMUND, *supra* note 17, at 111 tbl. (tabulating states’ differing approaches to imposing “adult sanctions on offenders of juvenile age”).

<sup>56</sup> See *supra* notes 43, 48, and accompanying text. For reverse waiver, a juvenile is normally required to show that rehabilitation can best be achieved in a juvenile setting and that public safety will not be compromised by the transfer of the case to the juvenile court. Twenty-five states have reverse waiver provisions. SNYDER & SICKMUND, *supra* note 17, at 116.

<sup>57</sup> See ZIMRING, *supra* note 20, at 131 (explaining that “the combination of high levels of personal culpability and the worst-case outcome puts maximum pressure on the legal system to generate extensive punishment” and that homicides act as “difficult but important tests of the general principles that are supposed to be in play throughout the system”). The sentence ultimately imposed in a felony-murder case will depend upon the discretion provided to the judiciary under the state’s sentencing scheme and its classification of felony murder as murder or a graded murder offense, such as first- or second-degree murder. See *infra* Parts III-V (examining the rationale for the felony-murder doctrine and discussing its implications and limits since *Roper*).

room.<sup>58</sup> The Court's findings are based on offenders' chronological ages, not legal ages.<sup>59</sup> As a result, legally redefining children as adults by subjecting them to adult court jurisdiction does not undermine *Roper's* reasoning.<sup>60</sup> The Court's acknowledgement of differences between juveniles and adults was not restricted to defendants sentenced to the death penalty. Rather, *Roper* sought to correct the classification of children as "among the worst offenders."<sup>61</sup> Regardless of the reasons for prosecuting juveniles in adult court, *Roper* applies because its findings as to juvenile culpability, deterrence, retribution, and rehabilitation extend to the most harshly treated juveniles.<sup>62</sup>

Juvenile transfer undeniably shapes a case's outcome, and thus, a child's life. Studies show that conviction rates for youth are similar in adult and juvenile courts, but that for violent offenders, corresponding sentences are harsher and lengthier in the adult system than in the juvenile system.<sup>63</sup> Juveniles incarcerated in adult facilities are also at a higher risk of violent attacks, sexual assaults, and suicide than their peers placed in juvenile facilities.<sup>64</sup> Because of their lengthy prison stays, juveniles serving harsh sentences face an increased risk of

---

<sup>58</sup> *Roper* was decided in the context of a juvenile, Simmons, who was legislatively redefined and tried as an adult in criminal court. 542 U.S. 551, 557 (2005).

<sup>59</sup> See *supra* notes 22-28 and accompanying text.

<sup>60</sup> See Ellen Marrus & Irene Merker Rosenberg, *After Roper v. Simmons: Keeping Kids Out of Adult Criminal Court*, 42 SAN DIEGO L. REV. 1151, 1162 (2005) (explaining that Texas could not avoid the *Roper* decision just because seventeen-year-olds were (and still are) considered adults in the state); see also ZIMRING, *supra* note 20, at 132 (describing as "magical thinking" the attempt to change the characteristics of a defendant by simply changing the location of a hearing).

<sup>61</sup> *Roper*, 543 U.S. at 569.

<sup>62</sup> For both adult and juvenile offenders pre-*Roper*, the Eighth Amendment barred imposition of the death penalty in cases of felony-murder convictions where the defendant did not kill, attempt to kill, or intend to kill. *Enmund v. Florida*, 458 U.S. 782, 797 (1982). Although *Roper* instituted a blanket prohibition on the juvenile death penalty, harsh LWOP sentences nonetheless persist. The result is ironic: juveniles convicted of felony murder are effectively deemed as culpable as their peers who have committed murder, as both groups are now likely to serve juvenile LWOP sentences.

<sup>63</sup> See MYERS, *supra* note 11, at 75-84 (providing data from these studies and noting the difficulties of conducting them because of transfer "selection bias"). For an example of how sentencing differs in the adult and juvenile courts, see Brad Lendon, *Town Torn over 'Confession' by Accused Killer Arsonist*, 10, CNN.COM, Oct. 1, 2007, <http://www.cnn.com/2007/US/law/10/01/arson.child> (comparing the eleven years that a ten-year-old boy might spend in juvenile custody if convicted on murder counts with the life imprisonment he could face if labeled as a serious youthful offender).

<sup>64</sup> Feld, *supra* note 49, at 119; see also Donna Bishop & Charles Frazier, *Consequences of Transfer*, in THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 1, at 227, 248-64 (comparing the experiences of youth in juvenile placements and adult prisons).

victimization. One way of avoiding these negative effects is by challenging the validity of the mechanisms that result in juvenile transfers to adult court and the imposition of adult sentences. The *Roper* findings allow for a further critique of one of criminal law's most criticized rules—the felony-murder doctrine.

### III. THE FELONY-MURDER DOCTRINE AND ITS RATIONALE

The felony-murder rule is a form of strict liability in the criminal context. The doctrine reflects the pinnacle of inconsistency between an actor's culpability and his subsequent punishment. As I will explain in Part V, this inconsistency is particularly blatant in the juvenile context. In this Part, however, I will briefly explain the doctrine and outline the basic arguments against its continued use in criminal prosecutions.

Felony murder operates as a charge separate from any other felony charges, and criminalizes the acts that result in death during the commission of a felony crime.<sup>65</sup> The doctrine allows a defendant to be found guilty of murder if someone dies in the course of an attempted commission or completion of any felony.<sup>66</sup> Unlike other homicide crimes, the felony-murder rule does not carry an independent mens rea requirement.<sup>67</sup> For example, in a kidnapping gone awry that resulted in death, a prosecutor only needs to prove the elements of a kidnapping and the fact of a resulting death for a felony-murder conviction. No intent to murder is necessary to sustain a felony-murder conviction, which may carry the consequences of a first- or second-degree murder charge.<sup>68</sup> In its simplest form, the doctrine amounts to strict liability for death during a felony for both direct actors and accomplices.<sup>69</sup>

---

<sup>65</sup> See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.06, at 515 (3d ed. 2001) (providing a basic overview of the rule); WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 14.5, at 444 (2d ed. 2003) (same).

<sup>66</sup> DRESSLER, *supra* note 65, § 31.06[A], at 515.

<sup>67</sup> In other words, a prosecutor does not need to show that a defendant intentionally, recklessly, negligently, or even accidentally killed. *Id.*; Drizin & Keegan, *supra* note 16, at 527.

<sup>68</sup> See DRESSLER, *supra* note 65, § 31.06[A], at 515 (explaining that a conviction of graded murder offenses may depend on whether a felony is enumerated or unspecified).

<sup>69</sup> *Id.* For an example of an accomplice charged with felony murder, see Stacey T.'s case, discussed in Part IV, *infra*.

Like many criminal law doctrines, the felony-murder rule has two theoretical underpinnings: deterrence and retribution.<sup>70</sup> In principle, the felony-murder rule deters both the careless commission of crimes and the underlying crimes themselves.<sup>71</sup> The deterrence justification for the rule assumes that if a criminal is aware that he will be subject to severe punishment for any death he causes during the commission of a felony, then he will either be more careful in completing his crime or he will altogether abandon his criminal pursuit. With respect to punishment, the rule employs a harm-based view of retribution:<sup>72</sup> if death occurs during the commission of a felony, then the individual is punished for the harm he causes even where it is beyond any harm he intends. This heightened retribution signifies the social value placed upon human life—where a person ends a life, he is regarded as a “bad person,”<sup>73</sup> and thus encounters severe punishment for his unacceptable social harm.<sup>74</sup> Despite scholarly attacks that the rule’s deterrence and retribution justifications fail,<sup>75</sup> the rule persists in virtually all American jurisdictions.<sup>76</sup>

---

<sup>70</sup> DRESSLER, *supra* note 65, § 31.06[B], at 516-19; Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 74-78 (1991).

<sup>71</sup> See Cole, *supra* note 70, at 78-79 (highlighting the dual deterrent function of the rule). *Contra* DRESSLER, *supra* note 65, § 31.06[B][2], at 516 n.119 (arguing that the “rule is not intended to deter the underlying felony”).

<sup>72</sup> See Cole, *supra* note 70, at 74-76 (distinguishing “intent-based” and “harm-based” retribution).

<sup>73</sup> Drizin & Keegan, *supra* note 16, at 527-28 (citing LAFAVE, *supra* note 65, § 7.5, at 682).

<sup>74</sup> See DRESSLER, *supra* note 65, § 31.06[B][3], at 517-18 (explaining that proponents justify the rule as “[r]eaffirming the sanctity of human life”); David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL’Y 359, 367-69 (1985) (defending the rule on the basis that it encapsulates condemnation and expiation); 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, 1472-79 (1994) (explaining a divergence between public and scholarly perceptions of fault, whereby the public feels that it is acceptable to impose harmful and severe sanctions upon a person already stigmatized as a felon).

<sup>75</sup> See DRESSLER, *supra* note 65, § 31.06[B][2]-[3], at 516-18 (arguing that the rule cannot deter unintended and unforeseen deaths and that severe punishments depart from accepted rules of culpability).

<sup>76</sup> See *id.* § 31.06[A], at 515 n.110 (noting that only three states have rejected the rule and that a fourth state has imposed a mens rea requirement for felony-murder convictions); Crump & Crump, *supra* note 74, at 359 (“Scholarly denunciation has had little effect upon [the rule’s] retention.”). A result of the rule—and a likely reason for its continued prevalence—is easing the prosecutor’s burden of proving murder offenses. DRESSLER, *supra* note 65, § 31.06[B][5], at 519. Another argument is that the rule allows for a more efficient allocation of scarce resources. Crump & Crump, *supra* note 74, at 374.

With respect to deterrence, proponents of the rule argue that individuals are deterred from engaging in criminal conduct by the threat of punishment; the rule punishes those people that actively resist deterrence and instead favor risk and criminal conduct.<sup>77</sup> Proponents justify strict liability for felony murder, but not the criminal law generally, by asserting that no overdeterrence problem exists in the felony-murder context.<sup>78</sup> They also argue that the felony-murder rule operates to deter “triggering felonies by lottery.”<sup>79</sup>

Throughout its long history, the rule has always been met with opposition.<sup>80</sup> Critics argue, for example, that any deterrence justification fails. First, they argue that unintended, or even unforeseen, acts—here, the resulting death—cannot be deterred.<sup>81</sup> Second, they argue that no empirical evidence supports the deterrence justification for the doctrine.<sup>82</sup> Third, they argue that a felony-murder rule is unnecessary to deter underlying felonies because those felonies are deterred simply by increasing punishments for the intentional felony offenses.<sup>83</sup>

<sup>77</sup> See Cole, *supra* note 70, at 80, 90-92 (arguing that the rule properly punishes risk-preferring felons who disregard threatened sanctions).

<sup>78</sup> See *id.* at 102 (explaining that overdeterrence in the felony-murder context is not possible because the rule only operates against those who are already engaged in criminal conduct, and thus would not deter socially beneficial action). Other arguments for strict liability in the felony-murder context include heightened blameworthiness, the “long-sentence” phenomenon, the saliency of the felony-murder message, considerations of the defendant’s character, and the dangerousness of underlying activity. *Id.* at 99-106. But see Tomkovicz, *supra* note 74, at 1452-55 (arguing that strict liability in the criminal context is generally limited to public welfare or regulatory offenses where “the gains to society are thought great, and the costs to the individual are considered tolerable,” and where “alternative versions of an offense that otherwise requires mens rea” do not exist).

<sup>79</sup> See Cole, *supra* note 70, at 110 (explaining that underlying felonies can be deterred when individuals are subject to a “lottery” in which their punishment for identical offenses increases as a result of a chance death).

<sup>80</sup> The rule likely emerged in England in its current form in the 1700s and was stated by William Blackstone in 1769. Drizin & Keegan, *supra* note 16, at 529. Felony murder was finally abolished in England in 1957 after over one hundred years of criticism. *Id.* at 528.

<sup>81</sup> DRESSLER, *supra* note 65, § 31.06[B][2], at 516-17.

<sup>82</sup> See *id.* § 31.06[B][2], at 517 (noting that felony murders are rare and that no data capture whether any resulting deaths would go unpunished under normal murder charges requiring proof of mens rea); see also Tomkovicz, *supra* note 74, at 1457 (referring to the unsupported claim that the felony-murder rule saves lives as the “deterrence delusion”).

<sup>83</sup> DRESSLER, *supra* note 65, § 31.06[B][2], at 516 n.119. But see Crump & Crump, *supra* note 74, at 369-71 (supporting the deterrence justification for the rule).



Retributivists justify the rule on harm-based principles.<sup>84</sup> Critics argue, however, that the rule fails to capture a wrongdoer's culpability properly and that harm-based rules commingle punishment and compensation.<sup>85</sup> Critics object most fervently to the idea that a person who unintentionally or accidentally kills will be subject to society's harshest punishments, which are traditionally reserved for the most culpable offenders.<sup>86</sup>

Despite these criticisms of the deterrence and retribution justifications for the rule, the felony-murder doctrine remains a strong presence in the U.S. criminal justice system.<sup>87</sup> That the doctrine is faulty, however, becomes even more apparent in the juvenile context. The objective of this Part has been to explain the felony-murder doctrine and outline the basic arguments against its continued use. In light of the rule's prevalence, I will now turn to explaining how the rule's application to juveniles increases their likelihood of being convicted in adult court, which then subjects them to harsh, and often mandatory, adult sentences. After providing an illustration of the rule's ramifications when applied against juveniles in Part IV, Part V will demonstrate why public policy should exclude juvenile offenders from felony-murder prosecutions.

#### IV. JUVENILE "ADULTS" AND LIFE WITHOUT POSSIBILITY OF PAROLE SENTENCES

Children prosecuted and convicted in adult courts face the potential for severe sentences, the harshest of which is now life imprison-

---

<sup>84</sup> See *supra* notes 72-74 and accompanying text (explaining that the rule punishes the defendant for all harm caused, regardless of intent); see also Crump & Crump, *supra* note 74, at 362-63 (justifying the felony-murder rule on *actus reus* grounds).

<sup>85</sup> See H.L.A. HART, *Intention and Punishment, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 113, 130-31 (1968) (using the compensation-punishment analysis to criticize efforts to differentiate attempted and completed crimes).

<sup>86</sup> See DRESSLER, *supra* note 65, § 31.06[B][3], at 517 (explaining that punishment should be based on culpability, not harm caused); see also Tomkovicz, *supra* note 74, at 1441 (noting that the rule may "result in gradation at a disproportionately severe level considering the established mental fault"). Some courts have expressed discomfort with the rule on this basis. See *infra* notes 130-132 and accompanying text.

<sup>87</sup> See Tomkovicz, *supra* note 74, at 1464-67 (attributing the rule's survival to law-and-order politics, limitations on its scope, and differences in the way scholars and the public perceive fault); *id.* at 1476 (arguing that "the public is less concerned about precision and exactitude in gauging proportionality" and feels differently about the "punishment that killers in felony-murder contexts deserve").

ment without possibility of parole.<sup>88</sup> Although it is difficult to know precisely how many children are successfully prosecuted in adult courts,<sup>89</sup> about 2225 juveniles were serving state or federal juvenile LWOP sentences as of 2004.<sup>90</sup> Of the 2225 juvenile LWOP inmates, an estimated sixteen percent—354 individuals—were imprisoned for crimes they committed before their sixteenth birthdays.<sup>91</sup> Approximately ninety-three percent of juvenile LWOP inmates were convicted of homicide charges, a category that includes felony murder.<sup>92</sup> An estimated one-quarter to one-half of juvenile LWOP sentences resulted from felony-murder convictions.<sup>93</sup> Law-and-order<sup>94</sup> youth crime policies and increased waiver provisions have thus left children vulnerable to incarceration under the lengthiest of sentences.

---

<sup>88</sup> *Roper* relied on a decline in the number of states permitting or imposing juvenile executions to find that a growing national consensus against the juvenile death penalty had emerged, ultimately to hold that the punishment had become cruel and unusual. See *Roper v. Simmons*, 543 U.S. 551, 564-68 (2005). In contrast to the rare imposition of juvenile death sentences, multiple states continue to impose juvenile LWOP sentences. See *State v. Craig*, 944 So. 2d 660, 662 (La. Ct. App. 2006) (holding post-*Roper* juvenile LWOP sentences constitutional); *Commonwealth v. Wilson*, 911 A.2d 942, 946 (Pa. Super. Ct. 2006) (holding that *Roper* “does not affect the imposition of a sentence of life imprisonment without parole”); see also *State v. Standard*, 569 S.E.2d 325, 329 (S.C. 2002) (upholding a juvenile LWOP sentence as constitutional); *State v. Jensen*, 579 N.W.2d 613, 624-25 (S.D. 1998) (same); *People v. Launsbury*, 551 N.W.2d 460, 463 (Mich. Ct. App. 1996) (same); *State v. Brown*, 825 P.2d 482, 489-90 (Idaho 1992) (same).

<sup>89</sup> Figures are available only for children prosecuted in adult court under a judicial waiver, rather than under a prosecutorial waiver or statutory exclusion. See HUMAN RIGHTS WATCH, *supra* note 8, at 25 (estimating the number of juvenile LWOP inmates based on limited data provided by state corrections departments of forty of the forty-two states allowing juvenile LWOP sentences).

<sup>90</sup> *Id.* States’ reliance on harsh juvenile sentences has generally increased: in 1990, “2,234 youth [were] convicted of murder in the United States, 2.9 percent of whom were sentenced to life without parole,” whereas in 2000 the number of youth murderers dropped to 1006, but 9.1 percent were sentenced to life without parole. *Id.* at 2, 31-33 figs.3-4 & tbl.4.

<sup>91</sup> *Id.* at 25, 26 tbl.2.

<sup>92</sup> *Id.* at 27 fig.2.

<sup>93</sup> *Id.* at 27-28 (noting that twenty-six percent of LWOP survey respondents self-reported sentences that resulted from felony murder convictions, thirty-three percent of twenty-four juvenile LWOP inmates investigated in Colorado in 2005 were incarcerated on felony murder convictions, and nearly fifty percent of 146 juvenile LWOP inmates surveyed by the ACLU in Michigan in 2004 received LWOP sentences as a result of “felony murder or for ‘aiding and abetting’ a murder in which another person pulled the trigger”).

<sup>94</sup> See Tomkovicz, *supra* note 74, at 1461-63 (explaining characteristics of a law-and-order landscape, including a preference for “tough, punitive approaches” to dealing with criminals).

The case of Stacey T.—a fourteen-year-old tried, convicted, and sentenced under Pennsylvania criminal laws<sup>95</sup>—is illustrative of legislative waivers that propel children into adult court, where they become subject to LWOP sentences because of the mandatory sentences attached to the charges on which they are convicted. Stacey agreed to participate in a scheme with two adult codefendants,<sup>96</sup> in which the group would rob, kidnap, and hold Stacey's sixteen-year-old friend Alexander Porter for ransom.<sup>97</sup> Stacey was involved in luring Porter to an apartment for a purported drug deal with the adult codefendants.<sup>98</sup> At the apartment, the group pretended that Stacey had bungled the deal. Stacey then allowed his codefendants to restrain him as a ruse to instill fear in Porter that they would do the same to him if he failed to provide the keys to his parents' separate homes.<sup>99</sup> After the defendants bound Porter and locked him in a vehicle trunk, they told him that Stacey had been killed, even though the boy had simply been released and told to go home.<sup>100</sup>

Over the next two days, Stacey's adult codefendants kept Porter locked in the vehicle's trunk and eventually shot and killed him in a park.<sup>101</sup> Stacey had agreed to participate in the robbery scheme, but murder was never discussed beforehand, and he was not present for the killing.<sup>102</sup> As a result of waiver provisions, he was charged in adult court and convicted of second-degree felony murder, robbery, kid-

---

<sup>95</sup> See HUMAN RIGHTS WATCH, *supra* note 8, at 29-30; see also Commonwealth v. Pelzer, 612 A.2d 407, 411 (Pa. 1992) (affirming the first-degree murder convictions and death penalty sentences imposed on Stacey's adult codefendants); Commonwealth v. Daniels, 612 A.2d 395, 405 (Pa. 1992) (same). Stacey, who is now thirty-two years old, remains incarcerated for events that transpired when he was fourteen. For more recent developments in Stacey's case, see Commonwealth v. Torrance, 876 A.2d 471, 471 tbl. (Pa. Super. Ct. 2005) (affirming the dismissal of Stacey's third postconviction relief petition), *appeal denied*, 881 A.2d 819, 819 tbl. (Pa. 2005); Letter Brief-PCRA Appeal at 1-2, *Torrance*, 876 A.2d 471 (No. 3659 EDA 2003), 2004 WL 2475964 (explaining the procedural history and postconviction relief petition).

<sup>96</sup> The adult codefendants were young adults, and one was Stacey's cousin. *Pelzer*, 612 A.2d at 411; HUMAN RIGHTS WATCH, *supra* note 8, at 30. It is common for juvenile murder offenses to include adult co-offenders—a little over one-third of offenses include an adult offender. See SNYDER & SICKMUND, *supra* note 17, at 65 fig. "[T]he vast majority (87%) of [these adult offenders are] under age 25." *Id.* at 66. Stacey's case, then, is somewhat characteristic of juvenile murder offenses.

<sup>97</sup> HUMAN RIGHTS WATCH, *supra* note 8, at 30.

<sup>98</sup> *Pelzer*, 612 A.2d at 411.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> HUMAN RIGHTS WATCH, *supra* note 8, at 30.

napping, criminal conspiracy, and two counts of burglary.<sup>103</sup> On the felony-murder conviction, he received a mandatory sentence of life without parole.<sup>104</sup> Even though Stacey was only fourteen years old and had no prior criminal history,<sup>105</sup> his case was automatically filed in adult court because of legislative waiver.<sup>106</sup> Tried in adult court, Stacey became subject to adult sentencing schemes; convicted of second-degree felony murder, he received the legislatively mandated sentence of life imprisonment.<sup>107</sup>

As Stacey T.'s case demonstrates, charging juveniles with high-level offenses that require no additional culpability determination has significant ramifications for sentencing. If convicted of a felony-murder charge, juveniles are often subject to corresponding mandatory sentencing laws that remove a judge's discretion to account for a juvenile offender's individual characteristics and his level of threat to public safety.<sup>108</sup>

Although the Supreme Court abolished the use of the juvenile death penalty nearly three years ago, legislators have yet to examine critically the use of felony-murder charges and their corresponding juvenile LWOP sentences in the post-*Roper* landscape.<sup>109</sup> Even those states that continue to value punishment over rehabilitation for serious juvenile offenders should consider the broader implications of *Roper* for juvenile prosecutions. The *Roper* Court's focus on culpability and character<sup>110</sup> severely undercuts the justifications for applying felony-murder rules to youth.

<sup>103</sup> Letter Brief-PCRA Appeal, *supra* note 95, at 1.

<sup>104</sup> *Id.*

<sup>105</sup> HUMAN RIGHTS WATCH, *supra* note 8, at 29.

<sup>106</sup> Act of July 9, 1976, P.L. 586, No. 142, § 2 (current version at 42 PA. CONS. STAT. ANN. § 6355(e) (2006)) (excluding murder offenses from the juvenile court's jurisdiction); *see also supra* notes 48-50 and accompanying text.

<sup>107</sup> *See* Letter Brief-PCRA Appeal, *supra* note 95, at 1.

<sup>108</sup> *See* HUMAN RIGHTS WATCH, *supra* note 8, at 37 (illustrating that "the eight states with the highest rates of sentencing youth to life without parole all make the sentence mandatory upon conviction for certain crimes"); *id.* at 90-92 (discussing the discomfort judges often express when forced to impose a mandatory sentence upon a juvenile). Twenty-seven states have mandatory LWOP statutes. *See id.* at tbl.6. Conversely, seven states—Alaska, Kansas, Kentucky, Maine, New Mexico, New York, and West Virginia—and the District of Columbia prohibit LWOP for youth. *Id.* at 2. Other states allow the sentence to be imposed at a judge's discretion. *See id.* at 38 tbl.6.

<sup>109</sup> Even pre-*Roper*, legislators largely had other concerns. *See* MYERS, *supra* note 11, at 10 (explaining that public attention was focused on war, terrorism, and homeland security rather than youth violence).

<sup>110</sup> *See supra* notes 28-34 and accompanying text.

V. DISMANTLING THE FELONY-MURDER DOCTRINE  
AFTER *ROPER V. SIMMONS*

As explained above, the felony-murder rule has found justification in the punishment theories of deterrence and retribution. Even proponents of the felony-murder rule, however, acknowledge that the rule must have limits and exceptions to ensure that it is applied only where its rationale is forwarded.<sup>111</sup> The felony-murder rule's justifications of deterrence and retribution fail in the juvenile context, as the doctrine neither deters youth crime nor achieves justice. But given that critics have raised similar arguments in the adult context and have been largely unsuccessful in eradicating the rule, why should this same criticism prevail with respect to juveniles?

As Stacey T.'s case demonstrates, felony-murder charges compel the justice system to treat juvenile offenders as adults. Subsequent felony-murder convictions often classify juveniles among the worst offenders and subject them to the second harshest punishment imposed upon adults, and the harshest punishment currently allowed against juveniles: life imprisonment without the possibility of parole. As applied to juvenile offenders, however, the rule acts as a conviction trap that subjects children to lengthy sentences without deterring similar conduct by their peers or properly achieving just deserts.<sup>112</sup>

*Roper's* findings as to the "[t]hree general differences between juveniles under 18 and adults"<sup>113</sup> informed the Court's decision to abolish the juvenile death penalty as constitutionally impermissible under the

---

<sup>111</sup> See Crump & Crump, *supra* note 74, at 377 ("The policy underlying the rule should influence legislatures and the judiciary in fashioning exceptions; conversely, the lack of a relationship between the supporting rationale and the limits may be a sign that the doctrine itself is flawed."). The felony-murder rule has been limited in scope by, for example, the merger principle, causation doctrines, agency theories, and dangerousness limitations. *Id.*

<sup>112</sup> I would further posit that felony-murder charges influence a judge's decision to grant a reverse waiver. Assume a fifteen-year-old, first-time juvenile offender kills during the commission of a robbery. Without a felony-murder rule, the prosecutor might only be able to charge the juvenile with felony robbery and manslaughter. Depending on the child's age, a reverse waiver to the juvenile court may still leave that court with enough jurisdictional time to place the juvenile in a secure setting while achieving rehabilitation. In this jurisdiction, however, a felony-murder charge may make the juvenile subject to an LWOP sentence. A judge will likely deny the petition for a reverse waiver where the difference between sentences available in juvenile court and adult court is significant—here, for example, six to nine years in juvenile court (depending on the upper age limits of the juvenile court's jurisdiction)—as compared with life imprisonment in adult court.

<sup>113</sup> *Roper*, 543 U.S. at 569.

Eighth and Fourteenth Amendments.<sup>114</sup> The Court's first finding—that juveniles have a “lack of maturity and an underdeveloped sense of responsibility,” which are “qualities [that] often result in impetuous and ill-considered actions and decisions”<sup>115</sup>—directly impacts deterrence. If juveniles rarely consider the immediate consequences of their actions, then they are even less likely to consider the unforeseen consequences of their actions and the increased punishment they will face should their criminal conduct go awry and result in death.

The Court's second finding—that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”<sup>116</sup>—also thwarts juvenile deterrence. Even if a juvenile did uncharacteristically consider the consequences of his actions, he might still feel compelled to engage in the behavior because of peer pressure.

Social science research and biological comparisons support the Court's determination that the mental processes of juveniles and adults differ. Studies have shown that juveniles' brains have not fully matured, which leaves juveniles plagued by immature thought processes and, as a result, an inability to thoughtfully plan or anticipate consequences, minimize risk and danger, or adapt or reason in unfamiliar or stressful situations.<sup>117</sup> Moreover, adolescents often experience feelings of having only one choice; their inexperience or inability to engage in rational thinking leaves them unable to consider multiple possibilities.<sup>118</sup> Social scientists further observe that “[d]uring the time these processes are developing, it doesn't make sense to ask the average adolescent to think or act like the average adult, because he or she can't—any more than a six-year-old child can learn calculus.”<sup>119</sup> Social science research is bolstered by neurodevelopmental findings that the last area of the brain to mature is the inferior frontal lobe—most specifically the prefrontal cortex<sup>120</sup>—which governs judgment, impulse control, and decision making.

---

<sup>114</sup> The Court also relied on a national consensus against the juvenile death penalty and international denunciation of the practice in reaching its holding. See *supra* note 88 and accompanying text.

<sup>115</sup> *Roper*, 543 U.S. at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)) (internal quotation marks omitted).

<sup>116</sup> *Id.*

<sup>117</sup> See Beyer, *supra* note 31, at 27-28 (reporting common perceptions of court-involved juveniles that reflect their immaturity and incomplete cognitive development).

<sup>118</sup> *Id.*

<sup>119</sup> Laurence Steinberg, *Juveniles on Trial*, CRIM. JUST., Fall 2003, at 20, 22.

<sup>120</sup> Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8177-78 (2004), available at <http://pnas.org/cgi/doi/10.1073/pnas.0402680101>; see also HUMAN RIGHTS

These findings pertain to normal children and adolescents; decision-making abilities among juvenile offenders who, as a class, "have a much higher rate of mental disorders than do adolescents in general"<sup>121</sup> may be even more impaired.

The Court's findings in *Roper*, coupled with the aforementioned social science and neurodevelopmental research, frustrate the felony-murder rule's underlying rationale.<sup>122</sup> Whatever minimal degree of deterrence the rule arguably generates in adults is lost on adolescents.<sup>123</sup> It is difficult to find justification for the felony-murder doctrine in the juvenile context. Its proponents generally argue that the rule deters the careless commission of a crime and potentially even the underlying felony. The rule will not deter teenagers, however, because teenagers fail to anticipate or plan a course of events or to minimize risks and danger.<sup>124</sup> Other proponents argue that the rule sends a clear message that any potential felon can understand: if you commit a crime and happen to kill someone, then you go down for murder.<sup>125</sup> Even if teenagers are subconsciously aware of this message, however, their tendency to misperceive risk and their inability to remove themselves from problematic situations will counteract any deterrent effect. If empirical evidence as to the rule's deterrent effects is lacking in the adult context,<sup>126</sup> then surely it is absent in the juvenile context.

The *Roper* findings may call into question the retribution justification for the felony-murder rule even more significantly. The Court has acknowledged that a child's culpability is categorically less than that of an adult. In *Roper*, the Court stated "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."<sup>127</sup> Harm-based retributiv-

---

WATCH, *supra* note 8, at 48 (identifying functions of the frontal lobe), Daniel R. Weinberger, *A Brain Too Young for Good Judgment*, N.Y. TIMES, Mar. 10, 2001, at A13 (noting that youth lack a mature prefrontal cortex).

<sup>121</sup> Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 33, 34 (Thomas Grisso & Robert G. Schwartz eds., 2000) (explaining that mental disorders and other psychosocial factors influence juveniles' decision-making processes).

<sup>122</sup> See *supra* notes 77-79 and accompanying text.

<sup>123</sup> See *supra* notes 31-32 and accompanying text.

<sup>124</sup> Beyer, *supra* note 31, at 27.

<sup>125</sup> Crump & Crump, *supra* note 74, at 371.

<sup>126</sup> See *supra* note 82 and accompanying text.

<sup>127</sup> *Roper v. Simmons*, 543 U.S. 551, 570 (2005); see also SNYDER & SICKMUND, *supra* note 17, at 71 (noting that the majority of juveniles do not continue to commit legal offenses as adults).

ists who support the felony-murder rule, however, seek to impose punishment for the results an offender caused without taking into account the offender's individual characteristics. In defending this perspective, they assert that "condemnation is the expression of solidarity with the victims of crime" and that the rule "is a useful doctrine because it reaffirms to the surviving family . . . the kinship the society as a whole feels with [it] by denouncing in the strongest language of the law the intentional crime that produced the death."<sup>128</sup> Although it is proper to denounce senseless death, this message conflicts with the Court's aforementioned findings as to juvenile culpability, especially when the message is accompanied by severe imprisonment sentences.

While the Court acknowledges children's developing character and lesser culpability, the effect of the felony-murder rule is to disregard the potential for change and to instead define a teen by his single act. For teens, the message is more complex: "We realize that you are still developing, but you were foolish and careless and killed someone; so now, you can go develop your character in jail." For child offenders who kill, their acts are most likely analogous to involuntary manslaughter, for which sentences normally range from one to ten years in prison;<sup>129</sup> on the other hand, felony-murder convictions may subject teens to juvenile LWOP sentences. Judges forced to apply the felony-murder doctrine note their discomfort with its resultant sentences:

While I concur in the majority opinion, I cannot help but believe that as we treat more and more children as adults and impose harsher and harsher punishment, the day will soon come when we look back on these cases as representing a regrettable era in our criminal justice system. As we were developing our juvenile justice system, we sought to treat children differently from adults because we recognized they had not developed the problem-solving skills of adults. We now lump certain children in the same category as adults and mete out harsh punishment to them, ignoring the differences between childhood and adulthood.<sup>130</sup>

Moreover, and especially in cases of accomplices or juveniles tried with conspiracy, research findings that juveniles "lack the freedom that adults have to extricate themselves from a criminogenic setting"<sup>131</sup>

<sup>128</sup> Crump & Crump, *supra* note 74, at 368.

<sup>129</sup> See Drizin & Keegan, *supra* note 16, at 525 (citing to a Georgia case in which a teen would have received one to ten years in prison if convicted of involuntary manslaughter, but instead received a mandatory life sentence for felony murder).

<sup>130</sup> *Id.* at 526 (quoting *Miller v. State*, 571 S.E.2d 788, 798-99 (Ga. 2002) (Benham, J., concurring)).

<sup>131</sup> Steinberg & Scott, *supra* note 33, at 1014.



should insulate juveniles from the imposition of harm-based retributive principles. In fact, the Supreme Court of Illinois affirmed a trial judge's decision in which he grappled with sentencing a fifteen-year-old defendant convicted of multiple-murder charges to natural life imprisonment, and instead ended up reducing the sentence to fifty years of imprisonment:

I have . . . been very concerned about what this meant, what this meant to [the defendant] as a 15-year-old child, what this meant to society at large, to be part of a society where a 15-year-old child on a theory of accountability only, passive accountability, would suffer a sentence of life in the Penitentiary without the possibility of parole. . . . I feel that it is clear that in my mind this is blatantly unfair and highly unconscionable, and let me state that I do not believe for a second that Mr. Miller is innocent of these charges. I believe he received a fair trial. I believe he was adequately represented. I believe he was proved guilty beyond a reasonable doubt, and I believe he should suffer harsh criminal consequences for acting as a look-out in this case, but to suggest that he ought to receive a sentence of life without the possibility of parole, I find . . . unconscionable. I am concerned that a person under the age of 18 under Illinois law can do everything that John Gacy did, can torture and abuse and murder over 30 people, and would be in the same boat as [the defendant] right now[,] looking at a sentence of a minimum and maximum of life without the possibility of parole.

I have a 15-year-old child who was passively acting as a look-out for other people, never picked up a gun, never had much more than—perhaps less than a minute—to contemplate what this entire incident is about, and he is in the same situation as a serial killer for sentencing purposes.<sup>132</sup>

This passage illustrates the tension between recognizing culpability differences between juveniles and adults and nonetheless subjecting them to the same sentencing schemes. Furthermore, any retributive justification is undermined by the fact that even where the public has supported trying juveniles as adults, they do not support imposing the same sanctions upon teens as they do adults.<sup>133</sup> Similarly, any incapacitation justification<sup>134</sup> for lengthy felony-murder sentences is undercut in the juvenile context because of youths' potential for rehabilitation.<sup>135</sup>

Consider again a hypothetical prosecution—for example, of boy *B*—a situation similar to Stacey T.'s case. *B*'s case is a typical example

---

<sup>132</sup> *People v. Miller*, 781 N.E.2d 300, 303 (Ill. 2002).

<sup>133</sup> See *supra* note 53 and accompanying text.

<sup>134</sup> See *Cole*, *supra* note 70, at 82, 93.

<sup>135</sup> See *supra* note 34 and accompanying text.

of both youth crime policy and teen behavior, as it involved both him and a few of his peers.<sup>136</sup> Specifically, *B* was involved in a scheme with an older teen and his cousin to rob his friend. He was not present for his friend's murder, which occurred two days after his last contact with the group, but he was still charged with felony murder and subjected to the adult court's jurisdiction under a mandatory legislative waiver provision.<sup>137</sup> Despite being only fourteen years old and having no prior court involvement, because of the seriousness of the charged offense, the adult court did not grant a reverse waiver that would allow *B* to be tried in juvenile court.<sup>138</sup> After trial, *B* was convicted of second-degree felony murder and received a mandatory sentence of life imprisonment without the possibility of parole.<sup>139</sup>

It is hard to see how *B*'s conviction provides support for the dual justifications for the felony-murder rule. *B*'s peers will not be deterred from socializing with relatives or peers, nor will *B*'s conviction deter them from engaging in criminal conduct if they perceive themselves as immune from the same outcome. Furthermore, it is difficult to argue that *B* received his just deserts. Is this fourteen-year-old first-time offender so immoral or such a threat to public safety that he deserves to be imprisoned for the rest of his life? Social science and neurodevelopmental research indicates that it might be developmentally proper to hold juveniles to diminished culpability standards when sentenced in adult court. Felony-murder rules represent the other extreme: despite juveniles' recognized immaturity and lesser culpability, they are subjected to hyper-retributive criminal sanctions.

The imposition of felony-murder rules on juveniles is an irrational legal response to youth crime and violence. Youth crime policy will

---

<sup>136</sup> See SNYDER & SICKMUND, *supra* note 17, at 65 ("Murders by juveniles in 2002 were less likely to be committed by a juvenile acting alone than in any year since at least 1980. . . . Between 1980 and 2002, the annual proportion of murders involving a juvenile offender acting alone gradually declined, from 66% in the 1980s, to 59% in the 1990s, to 55% in the years 2000 to 2002.")

<sup>137</sup> See 42 PA. CONS. STAT. ANN. § 6355(e) (2006) (excluding murder offenses from juvenile court jurisdiction in the absence of decertification proceedings).

<sup>138</sup> See 42 PA. CONS. STAT. ANN. § 6322 (2006) (codifying the decertification, or reverse waiver, process). The court record and Human Rights Watch report are unclear as to whether Stacey T. petitioned for anything akin to a decertification hearing, which was codified in 1995 and amended in 2000. This argument assumes a prosecution brought in 2006 that is similar in facts to Stacey T.'s case.

<sup>139</sup> See *Commonwealth v. Carter*, 855 A.2d 885, 892 (Pa. Super. Ct. 2004) (holding that it is not cruel and unusual punishment to impose a sentence of life imprisonment on a juvenile tried in adult court and convicted of felony murder).

inevitably involve both juvenile and adult courts.<sup>140</sup> Sound policy should not, however, abandon our understanding of youth and development simply because a teenager enters a criminal courtroom rather than a juvenile courtroom.<sup>141</sup> To proceed in such a way is to proceed by way of a legal fiction. Instead, sound juvenile crime policy, whether administered in a juvenile court or an adult court, should account for youths' lesser culpability and enable youth to develop and reform.<sup>142</sup> If these are the goals of sound policy—which the Court adopted (at least with respect to classification of children among the “worst offenders”) in *Roper*—then the felony-murder rule fails in two ways. First, as the above discussion demonstrates, the deterrence and retribution justifications for the rule fail as applied to juveniles. Second, the rigidity of the rule, which disregards culpability and character, fails as sound legal policy.

#### CONCLUSION

Three years after the *Roper* decision, its legacy remains uncertain. If courts, prosecutors, legislators, advocates, and the public take its findings as to juvenile culpability and character seriously, however, then *Roper* will be a landmark holding not only for its abolition of the juvenile death penalty but also for its ability to refocus youth crime policy. *Roper*'s reasoning centers on juvenile culpability and character; an expansion of its principles exposes an already-vulnerable felony-murder rule to even greater attacks. The felony-murder doctrine's justifications of deterrence and retribution fail in the juvenile context. The minimal degree of deterrence that the felony-murder rule offers is lost on adolescents, and its harsh, retributivist goals should not apply to juveniles where the Court has acknowledged that a child's culpability is categorically less than that of an adult.

---

<sup>140</sup> See ZIMRING, *supra* note 20, at 132 (recognizing that there are indeed situations of juvenile crime that call for a punitive response); Franklin E. Zimring & Jeffrey Fagan, *Transfer Policy and Law Reform*, in *THE CHANGING BORDERS OF JUVENILE JUSTICE*, *supra* note 1, at 407, 420 (noting that “the achievement of justice in transfer cases depends on the quality of justice in the criminal courts,” “substantive interdependence,” and the evolution of “explicit policies toward youths . . . in criminal courts, or the entire system is rendered arbitrary”).

<sup>141</sup> See ZIMRING, *supra* note 20, at 70 (noting that substantive policies should apply across court systems).

<sup>142</sup> See *id.* at 75 (citing “diminished responsibility” as a rationale for a particularized youth crime policy); *id.* at 81 (citing “room to reform” as another rationale for such a policy).

Adolescent killings undoubtedly present significant challenges for any justice system,<sup>143</sup> and applying felony-murder charges to juveniles only further complicates existing tensions. Not only does the doctrine completely contradict the *Roper* findings, it subjects juveniles to unnecessarily long prison sentences. Public policy that forbids prosecutors from charging juveniles with felony murder chips away at one of the major prosecutorial tools that results in juvenile LWOP sentences, which have been recognized internationally as disproportionate punishments that fail to reflect a child's moral culpability and criminal responsibility.<sup>144</sup> Forbidding the use of felony-murder charges also refocuses public and institutional attention on achieving a balance among juvenile culpability, rehabilitation, and retribution. A first step toward a better youth crime policy that values proportionality and the ability of juveniles' characters to develop and reform, then, is the categorical exclusion of the felony-murder rule as applied to juveniles.

---

<sup>143</sup> See *id.* at 131-156 (describing the acute tensions that surface in cases of adolescent homicide).

<sup>144</sup> See HUMAN RIGHTS WATCH, *supra* note 8, at 96; see also, e.g., *Naovarath v. State*, 779 P.2d 944, 948 (Nev. 1989) (holding that the imposition of a juvenile LWOP sentence on a thirteen-year-old seventh-grader was cruel and unusual punishment "given the undeniably lesser culpability of children . . . [and] their capacity for growth").