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Abolishing the Use of the Felony-Murder Rule When the Defendant Is a Teenager

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ABOLISHING THE USE OF THE FELONY-MURDER RULE WHEN THE DEFENDANT IS A TEENAGER

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I. INTRODUCTION

In several recent, highly publicized murder cases involving pre-teens and teenagers, prosecutors have used the felony-murder rule to ensure conviction of these young defendants.[1] The felony-murder rule makes it easier

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1. Nathaniel Brazill, age thirteen; Lionel Tate, age twelve; Jonathan Miller, age fifteen; Jon R. Morgan, age fourteen. Jon Morgan was tried and convicted in adult court for the murder of his grandparents, Keith and Lila Cearlocks. People v. Morgan, 718 N.E.2d 206 (Ill. App. Ct. 1999). The jury was instructed that Jon could be convicted of both knowing/intentional murder and felony-murder. *Id.* at 210. The predicate felonies were aggravated battery and discharge of a firearm. *Id.* at 211. On appeal, the court found that it was an error to instruct the jury that Morgan could be convicted under felony-murder theory because the

for prosecutors to gain convictions because it relieves them of the often onerous burden of proving that the teenage defendant intended to kill the victim. Instead, prosecutors need only prove that the defendant intended to commit the underlying predicate felony, and need not offer any proof that death was an intended or even a foreseeable consequence.

An examination of the history of the felony-murder rule, the tension between the felony-murder rule and the common law infancy defense, and the policies underlying each rule demonstrates that the felony-murder rule was never intended to be applied to children under the age of fourteen. First, the common law doctrine of incapacity is more firmly rooted in history than the felony-murder rule and predates the felony-murder rule by centuries. Moreover, criminal capacity is a necessary prerequisite to criminal *mens rea*. Before one can apply the felony-murder rule, which dispenses with the *mens rea* requirement of murder, courts must first find that the child-defendant is capable of forming criminal intent. The infancy defense is based on the presumption that a child-defendant between the ages of seven and fourteen is incapable of forming criminal intent. When these two common law creations clash, as they have in several recent cases, the infancy defense should supersede the felony-murder rule.

Longstanding developmental psychological[2] research into the cognitive capacity of teenagers also buttresses the argument that the felony-murder rule should not be applied to children under fourteen, and perhaps not to older adolescents either.[3] This research reveals that many pre-adolescents and adolescents[4] are not competent to stand trial, i.e., incapable of understanding the legal proceedings against them, and unable to meaningfully assist in their own defense.[5] More recent social science research suggests that juveniles, particularly those under age fifteen, as a class, make decisions differently than adults, and are more susceptible to influence, more impulsive, less risk-adverse, and less capable of seeing the long-term consequences of their actions.[6] Finally, emerging research from the field of neuro-

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predicate felonies did not involve conduct with a felonious purpose other than the killing itself. *Id.* at 212.

2. Developmental psychology is "the scientific study of changes in physical, intellectual, emotional, and social development over the life cycle." Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 VA. J. SOC. POL'Y & L. 389, 391 (1999).

3. *Id.* at 401–04.

4. Pre-adolescents are those children under the age of twelve; adolescents are those between the ages of twelve and seventeen; those ages eighteen to twenty-four are often called young adults. *See generally id.*

5. *Id.*

6. *See id.*

science, using MRIs and other technologies which scan the brain, suggests that differences in the organic structure and function of the teenage brain extend these disabilities in impulse control and decision-making into the late teens and early twenties.[7]

This article will begin with case studies of juveniles charged with first-degree murder under the felony-murder doctrine. Next, the article will review the historical underpinnings of the felony-murder rule and the common law defense of infancy, and argue that as an historical matter, the felony-murder rule was never intended to apply to juvenile offenders under the age of fourteen. In addition, we will argue that none of the philosophical justifications for the felony-murder rule make strong sense when applied to these juveniles and older adolescents. In Part IV, we will review the recent social science and brain development research which supports limiting the felony-murder rule to adult defendants. In the concluding section, we will suggest some policy changes that could reduce the impact the felony-murder rule has on teenage defendants.

II. CASE STUDIES

A. *Lionel Tate*

Six-year-old Tiffany Eunick died on July 28, 1999, after playing much of the day with twelve-year-old Lionel Tate, a 166-pound-boy who claimed that he had been practicing professional wrestling moves on the girl as they played in his Pembroke Park, Florida home.[8] The medical examiner's findings did not support Lionel's claims that he and Tiffany were involved in innocuous roughhousing.[9] Lionel's story that he had picked up Tiffany in a bear hug while they were playing tag and accidentally hit her head on a coffee table did not square with the evidence of her extensive injuries, including head trauma, lacerations to her liver, and several broken ribs.[10] Broward County prosecutors brought Lionel's case before a grand jury on August 11, 1999, seeking charges of murder in adult court.[11] Since Lionel was originally charged with an open count of murder, the grand jury could have returned with an indictment for first or second-degree murder, or decided that

7. *See* Paul Thompson, Editorial, *Brain Research Shows a Child Is Not an Adult*, SUN-SENTINEL (Ft. Lauderdale), May 25, 2001, at 31A, *available at* 2001 WL 2680069.

8. Jodie Needle, *Boy Charged with Murder in Death of Playmate, 6*, SUN-SENTINEL (Ft. Lauderdale), Aug. 12, 1999, at 1B, *available at* 1999 WL 20275653.

9. *Id.*

10. *Id.*

11. *Id.*

there was not sufficient evidence to indict.[12] After listening to medical testimony and other witnesses, the grand jury indicted Lionel for first-degree murder, making him among the youngest children in the country to face such charges in adult court.[13] Under Florida's statutory scheme, if Lionel were convicted of first-degree murder, the judge would have no choice but to sentence him to life in prison without the possibility of parole.[14]

On February 15, 2000, Broward County prosecutors reportedly offered to let Lionel plead guilty to second-degree murder in exchange for a sentence of three years in a juvenile center, one year of house arrest, ten years of psychological testing and counseling, and 1,000 hours of community service.[15] However, Lionel, his mother, and his attorney, Jim Lewis, rejected the offer.[16] The case took a bizarre twist when Lewis announced that he planned to argue that his client was imitating the moves he had learned from watching professional wrestlers on television.[17] When Lewis sought to subpoena several pro-wrestling stars to testify at trial, including The Rock, Sting, and Hulk Hogan, the move prompted a backlash from attorneys representing the wrestlers.[18] Lionel's defense is an "'I saw it on tv so I go free' excuse," exclaimed Jerry McDevitt, a Pittsburgh attorney who represents Dwayne "The Rock" Johnson.[19] He "is a 12-year old punk who didn't learn that you don't beat up little girls."[20] The World Wrestling Entertainment, the largest organization of professional wrestling promotions, sued Lewis for libel.[21]

It was not until a hearing on May 4, 2000, on the issue of whether the use of the wrestling defense was acceptable that Ken Padowitz, Assistant State Attorney, first argued that Lionel committed aggravated child abuse and was guilty of felony-murder.[22] Prior to that day, Padowitz had argued

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12. *Id.*

13. Needle, *supra* note 8.

14. FLA. STAT. § 775.082 (1) (2003).

15. Paula McMahon, *Prosecutor Favors Lighter Sentence Leniency Pleas Ahead in Conviction of Tate*, SUN-SENTINEL (Ft. Lauderdale), Jan. 27, 2001, at 1A, *available at* 2001 WL 2655604.

16. *Id.*

17. *Id.*

18. Paula McMahon, *Judge Excuses Wrestlers from Testifying in Slaying Defense Says Suspect Was Mimicking Pros*, SUN-SENTINEL (Ft. Lauderdale), Apr. 12, 2000, at 1A, *available at* 2000 WL 5652142.

19. *See id.*

20. *Id.*

21. Brad Bennett, *Attorney Second-Guesses Strategy*, MIAMI HERALD, Jan. 26, 2001, at 8A, *available at* 2001 WL 11643548.

22. *See* Paula McMahon, *Boy Re-enacts Final Moments of Girl's Life 6-Year-Old Died After Suffering Severe Injuries Prosecution Says Videotape Tainted*, SUN-SENTINEL (Ft. Lauderdale), May 5, 2000, at 1B, *available at* 2000 WL 5657578 [hereinafter McMahon I].

that Lionel had intentionally killed Tiffany Eunick.[23] Two weeks before the trial was to begin, on January 5, 2001, prosecutors again offered Lionel the same plea deal.[24] He rejected it a second time.[25] It was a decision that Lionel, his mother, and his attorney would come to regret. After deliberating just over three hours, jurors returned a verdict convicting the boy of first-degree felony-murder.[26] Under Florida law, the judge had no choice but to sentence Lionel to a term of life without the possibility of parole.[27] The prosecution used aggravated child abuse as the predicate offense for the felony-murder conviction of Lionel Tate,[28] a questionable move given that Lionel was too young to be tried as an adult for aggravated child abuse. In Florida, aggravated child abuse is a specific intent crime.[29] In convicting Lionel, the jury concluded that he had intended to abuse Tiffany and that the abuse resulted in her death.[30] Tate's case seems to be an instance where the

23. *See id.*

24. *Teen Rejects Deal*, SUN-SENTINEL (Ft. Lauderdale), Jan. 6, 2001, at 3B, *available at* 2001 WL 2652031.

25. *Id.* Can a twelve or thirteen-year-old child like Lionel Tate be expected to appreciate the consequences of pleading guilty to murder in adult court? Can he or she truly understand the jeopardy faced by rejecting a plea? Can a present-oriented, impulsive adolescent possibly fathom a sentence of life without the possibility of parole? These are just a few of the questions of "adjudicative competence" posed by the Lionel Tate case and others. Such questions, which raise concerns about the fundamental fairness of trying children as adults, were ignored by policymakers in their rush to pass punitive laws. The answers to these and other questions have been studied by the Research Network on Adolescent Development, an initiative funded by the John D. and Catherine T. MacArthur Foundation, and the results were recently published. *See* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333–63 (2003) (finding juveniles aged fifteen and younger were less likely to recognize the risks inherent in different choices and less likely to think about the long-term consequences of their choices, indicating that, compared to adults, juvenile offenders are probably not competent to stand trial in a criminal proceeding).

26. Paula McMahon, *Boy Convicted in Girl's Death, Verdict: First Degree Murder*, SUN-SENTINEL (Ft. Lauderdale), Jan. 26, 2001, at 1A, *available at* 2001 WL 2655383 [hereinafter McMahon II]. It is possible that a sentence of life without parole for a twelve-year-old convicted of felony-murder may be unconstitutionally "cruel and unusual" punishment under state constitutional law. *See* People v. Dillon, 668 P.2d 697, 727 (Cal. 1983) (holding that application of felony-murder rule to seventeen-year-old defendant is unconstitutional). Although, as a matter of federal constitutional law, that argument is unlikely to prevail in light of the United States Supreme Court's decision in *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (upholding California's application of three strikes law in a case involving two consecutive twenty-five to life sentences for petty theft).

27. *See* § 775.082 (1).

28. McMahon I, *supra* note 22.

29. *See* § 827.03(2).

30. *See* McMahon II, *supra* note 26.

prosecution used felony-murder as a means to ease its burden of proof yet still get a first-degree murder conviction.

On appeal, Lionel Tate challenged his conviction on several grounds, including that the felony-murder rule should not apply to children, who at common law, were protected by the infancy defense, and that it was "cruel and unusual" punishment to sentence a twelve-year-old convicted of felony murder to life without the possibility of parole.[31] On December 10, 2003, after this article had been finished, the Florida Court of Appeals reversed Tate's conviction, holding that the trial court had erred when it failed to hold a post-trial hearing to determine if Tate was competent before sentencing Tate.[32]

Although the Florida Court of Appeals reversed Tate's conviction, it neither rejected nor directly resolved the issues raised by this article. With regard to the propriety of applying the felony-murder doctrine to a twelve-year-old, the Court held that the legislature had supplanted the common law infancy defense when it created laws allowing for juveniles to be prosecuted as adults.[33] Twelve-year-olds in Florida, at least those eligible to be tried as adults, are no longer presumed to be incapable of forming criminal intent.[34] The court also held that a life without parole sentence for a twelve-year-old child convicted of first-degree murder is not "cruel or unusual punishment" under the Florida Constitution or "cruel and unusual punishment" under the Eighth Amendment to the United States Constitution.[35] The court declined to address the specific question of whether life without parole for a twelve-year-old convicted of felony murder was unconstitutional, finding that the jury returned a "general verdict" of first degree murder.[36]

Lionel Tate's case was quickly resolved once the case was remanded to the trial court after the victorious appeal. Prosecutors offered Tate the same

31. Professor Drizin wrote parts of two amicus briefs filed before the Florida Court of Appeals in the Tate case. Copies of both of these briefs are available on-line on the website of the Juvenile Law Center at http://www.jlc.org/.

32. Tate v. Florida, 864 So. 2d 44, 44 (Fla. 4th Dist. Ct. App. 2003).

33. *Id.* at 53.

34. *Id.*

35. *Id.* at 54.

36. *Id.* at 54–55. At the time of Tate's conviction, Article I, Section 17, of the Florida Constitution prohibited "cruel or unusual punishment." The constitution was later amended in 2002 to prohibit "cruel and unusual punishment," mirroring the language of the Eighth Amendment to the United States Constitution. In 1999, the Supreme Court of Florida, in *Brennan v. State*, 754 So. 2d 1 (1999), ruled that the death penalty was unconstitutional when applied to sixteen-year-olds because such a punishment was "unusual" in the history of Florida. As both the attorneys for Tate and amicus argued in Tate's appeal, a life without parole sentence for a twelve-year-old was not only unusual in Florida but unprecedented in both Florida and the entire United States.

plea bargain that they had offered him on the eve of his earlier trial. This time Tate accepted the deal. Because he had already served nearly three years in prison, Tate was eligible for release. On January 29, 2004, Tate pleaded guilty to second degree murder and was released. He was fitted with an electronic bracelet which he will have to wear for one year while under house arrest, will remain on probation for ten years, is required to perform 1,000 hours of community service, and will receive regular psychological counseling.[37]

B. *Nathaniel Brazill*

On May 26, 2000, the last day of school at Lake Worth Middle School, an assistant principal sent thirteen-year-old Nathaniel Brazill home for throwing water balloons.[38] Less than two hours later, just minutes before students were to go home for the summer, Brazill returned to the school with a small gun he had stolen from the residence of a family friend.[39] When thirty-five-year-old Barry Grunow, a language-arts teacher, refused to allow Brazill into his classroom to speak to two students, Brazill pulled out the gun and shot Grunow in the head.[40] These events were dramatically captured on a school video camera.[41] After firing the single shot, Brazill turned to leave the school and pointed the weapon at another teacher who had come out of his classroom.[42] Nathaniel left the school and was just blocks from the scene when he surrendered to a police officer.[43] He saw a police patrol car, raised his arms and kneeled.[44] He told the officer, "I shot somebody," and that he had a gun in his pocket.[45] Back at the police station, Brazill was interrogated by police officers and readily admitted shooting Mr. Grunow.[46] In a telling moment caught on videotape when the cameras were still rolling and while

37. *See* Paula McMahon, *Tate Enters Guilty Plea. Both Sides in Case Say Judges Should Have More Discretion in Sentencing Juveniles*, SUN-SENTINEL (Ft. Lauderdale), Jan. 30, 2004 at 1B, *available at* 2004 WL 67630226.

38. *See* Mitch Lipka, *Teacher Slain; Student Charged; Boy, 13, Faces First-Degree Murder Count; Shooting Occurs on Last Day of School*, SUN-SENTINEL (Ft. Lauderdale), May 27, 2000, at 1A, *available at* 2000 WL 22175569.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Lipka, *supra* note 38.

44. *Id.*

45. *Id.*

46. *See id.*

the officers were out of the room, Brazill put his head in his hands and cried, "What was I thinking?"[47]

Prosecutors brought the case before a special grand jury, seeking charges of first-degree murder.[48] State Attorney Barry Krischer vowed to try Nathaniel as an adult from the beginning, wanting the young boy to serve "adult time for an adult crime."[49] As Krischer saw it, "juvenile court was never designed for 13-year-olds that pick up a gun and kill a teacher in cold blood."[50] At a meeting with spiritual and political leaders, just days after the shooting, Krischer stated that he did not feel he could try Nathaniel as a juvenile given the evidence of premeditation.[51] Krischer felt he had little choice but to try Nathaniel as an adult because the evidence warranted a first-degree murder indictment.[52] From the very beginning, in Krischer's mind, Nathaniel was guilty of "cold-blooded" or premeditated murder.[53] Charges of felony-murder were never discussed by Krischer or other prosecutors early on in the case. Instead, they insisted that Brazill intended to kill Grunow.[54]

Before the grand jury issued the indictment, Nathaniel's parents implored prosecutors to try their son as a juvenile rather than an adult.[55] "We're not saying he shouldn't be punished for what he's done," said Nathaniel's father, "[b]ut as a child, not an adult."[56] On June 12, 2000, after hearing testimony and watching a video surveillance tape of the incident, twenty-one grand jurors indicted Brazill on first-degree murder and aggravated assault.[57] Days later, Nathaniel's attorneys formally entered a not

47. Susan Spencer-Wendel, *Brazill's Fate in Jury's Hands; Closing Arguments Take Nearly All Day*, PALM BEACH POST, May 15, 2001, at 1A, *available at* 2001 WL 18209138.

48. *See* Nicole Sterghos Brochu, *Boy Will Be Tried as Adult in Slaying; a Grand Jury Indicted the 13-Year-Old Student in Death of Teacher in Lake; Worth*, SUN-SENTINEL (Ft. Lauderdale), June 13, 2000, at 1A, *available at* 2000 WL 22179009.

49. *Id.*

50. *Nightline*: *Crime and Punishment, Should Children Who Commit Crimes Be Tried as Adults* (ABC television broadcast, May 31, 2000), LEXIS-NEXIS, Newsgroup File, Beyond Two Years [hereinafter *Nightline*].

51. *See* Nancy L. Othon, *Clerics, Political Leaders Fail to Sway Prosecutor*, SUN-SENTINEL (Ft. Lauderdale), June 9, 2000, at 22A, *available at* 2000 WL 22178191.

52. *See id.*

53. *See Nightline*, *supra* note 50.

54. *See id.*

55. *See* Mel Melendez, *Spare Child Adult Penalty, Dad Implores Father in Teacher Slaying Case Calls for Punishment*, SUN-SENTINEL (Ft. Lauderdale), Jun. 2, 2000, at 1A, *available at* 2000 WL 22176796.

56. *Id.*

57. Brochu, *supra* note 48.

guilty plea for their client, claiming that the shooting was an accident and that he did not intend to kill Barry Grunow.[58]

The consequences of trying Nathaniel as an adult were severe. If convicted as an adult, he would face life in prison without parole.[59] Nathaniel would spend the years, up to his eighteenth birthday, in a juvenile branch of the adult prison system.[60] Upon reaching age eighteen, he would be transferred to an adult prison where he would remain without hope of parole. [61] However, if Nathaniel was tried as a juvenile, he would spend his time in a juvenile detention center focusing on therapy and rehabilitation.[62] He would be released on or before his twenty-first birthday.[63]

The actions of Nathaniel Brazill shocked family, friends, and even school officials. The thirteen-year-old boy was an honor student at Lake Worth Middle School.[64] Teachers, including Barry Grunow, had recommended Nathaniel for the position of peer counselor for the following school year to help his classmates resolve their problems.[65] One neighbor recalled how Nathaniel would play the flute outside his mother's home. School officials noted that the boy had perfect attendance.[66] In addition, police were unable to find any evidence that Brazil had planned the school shooting in advance.[67]

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58. *Slaying Suspect Pleads Not Guilty*, SUN-SENTINEL (Ft. Lauderdale), June 20, 2000, at 3B, *available at* 2000 WL 22180292; *see* Jon Burnstein, *Grunow's Widow at Hearing She Sat Near Parents of Boy Facing Trial*, SUN-SENTINEL (Ft. Lauderdale), Aug. 25, 2000, at 5B, *available at* 2000 WL 22192927.

59. Spencer-Wendel, *supra* note 47.

60. Prior to the Tate case, juveniles convicted as adults for murder served their sentences in adult prisons. *See* Brochu, *supra* note 48. The outcry following the Tate verdict led the Florida General Assembly to change the law, enabling teenager defendants to start their prison sentences in juvenile facilities. Amazingly, in the Brazill case, Palm Beach County State Attorney Barry Kricher did not even know that Brazill would be serving time in adult prison when he pressed for the indictment. *See Nightline*, *supra* note 50. In an interview with Ted Koppel on ABC's *Nightline*, Krischer insisted that "there is no facility in the state of Florida that mixes fifteen-year-olds with adult population." *Id.*; *see also* William Raspberry, *Rush to Judgment*, WASH. POST, June 15, 2000, at A33, *available at* 2000 WL 19614572.

61. *Adults, Children, Crime, Punishment*, CHI. TRIB., June 16, 2000, 2000 WL 3675627.

62. *Id.*

63. *Boy Charged in Teacher's Slaying Protestor's Decry 13-year-old's Indictment as an Adult*, CHI. TRIB., June 13, 2000, *available at* 2000 WL 3674090.

64. Deborah Sharp, *Honor Student Might Be Tried for Murder as Adult 13-Year-Old Could Face Life in Prison in Slaying of Teacher at Florida School*, USA TODAY, May 30, 2000, at 6A, *available at* 2000 WL 5779538.

65. *Id.*

66. *Id.*

67. Jon Nordheimer, *Seventh-Grade Boy Held in Killing of a Teacher*, N.Y. TIMES, May 27, 2000, at A8, *available at* 2000 WL 21821469.

The .25 caliber Raven Arms pistol that Nathaniel Brazill used to shoot Barry Grunow belonged to a man characterized as Brazill's surrogate grandfather, Elmore McCray.[68] Just days before the shooting, Brazill spent the night at the man's home, took the unloaded gun and ammunition from a tin cookie box in McCray's desk, loaded it, engaged the safety, and hid it in his overnight bag.[69] On the day of the shooting, Brazill took the gun from his clothes drawer in his room and returned to the school with it.[70]

Nathaniel Brazill's contention that he did not intend to shoot Barry Grunow was unwavering.[71] Videotapes of Brazill's interrogation and confession show that Brazill consistently maintained that the shooting was an accident.[72] This led defense attorney Robert Udell to recommend to the boy and his family that they reject the plea deal offered by the state about two weeks before the trial.[73] Under the offer, Brazill would serve twenty-five years in prison with a possibility of parole after serving twenty-one years.[74] He could have been released by the age of thirty-five.[75] The family agreed that rejecting the offer was in Nathaniel's best interests.[76]

Nathaniel Brazill's trial began on May 2, 2001, a little less than one year after he shot Barry Grunow on the last day of seventh grade.[77] The defense made the decision to have Nathaniel testify on his behalf.[78] When questioned by prosecutors at trial, Nathaniel insisted that he had not meant to fire the gun, but that the shooting was an accident.[79] "I pulled the trigger, but

68. Nancy L. Othon, *Owner Hid Gun in Cookie Box "Gran' Says He Didn't Know It Was Missing–No Charges Filed Against McCray*, SUN-SENTINEL (Ft. Lauderdale), June 30, 2000, at 24A, *available at* 2000 WL 22182355 [hereinafter Othon I]; *See generally PrimeTime: Fatal Attraction; Hidden Camera Experiment Showing How Children and Teens are Irresistible (sic) Drawn to Guns, Even When They Should Know Better* (ABC television broadcast, Aug. 9, 2001) (showing that children are fascinated by guns and will play with them if they find them, even if warned just minutes before about the dangers of guns).

69. Othon I, *supra* note 68.

70. *Id.*

71. Jon Burstein, *Jury Must Decide Brazill's Intent in Teacher's Slaying*, SUN-SENTINEL (Ft. Lauderdale), April 29, 2001, at 1A, *available at* 2001 WL 2674507 [hereinafter *Jury Must Decide*].

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Jury Must Decide*, *supra* note 71.

77. Jon Burstein, *Jury Seated in Teen's Murder Case Opening Arguments Begin Today as Nathaniel Brazill Is Tried in the Death of a Lake Worth Teacher*, SUN-SENTINEL (Ft. Lauderdale), May 2, 2001, at 1B, *available at* 2001 WL 2675063.

78. *Jury Must Decide*, *supra* note 71.

79. *Teen on Trial: 'I Didn't Try' to Shoot Gun*, NEWSDAY, May 10, 2001, at A06, *available at* 2001 WL 9230836.

I didn't try to. That was an accident. Mr. Grunow was one of my friends," were the words spoken by Nathaniel at trial.[80] Although the teen showed little emotion during much of his testimony, when asked what Mr. Grunow did when he collapsed to the ground, Nathaniel replied, "What do you think he did?" and then began to cry.[81]

After less than a two-week trial, the two sides presented their closing arguments. The prosecution maintained that the killing was intentional, but added felony-murder to the list of possibilities, presumably to ensure a conviction.[82] So when Judge Wennet addressed the jury, his instructions for first-degree murder included both premeditated murder as well as felony-murder, as requested by the prosecution.[83] Prior to closing arguments, the prosecution had made no mention of felony-murder.[84] A conviction for felony-murder would have mandated the same life sentence for Brazill as a conviction for intentionally killing Grunow.[85] For felony-murder, the death of Grunow had to occur as a consequence of and while Brazill was engaged in the commission of a burglary.[86] Section 810.02 of the *Florida Statutes* states that burglary "means entering or remaining in a dwelling, [or] a structure . . . with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain."[87] On the charge of burglary, "proof of the entering of such structure . . . at any time stealthily and without consent of the owner . . . is prima facie evidence of entering with intent to commit an offense."[88] The main issue for the burglary charge was whether Lake Worth Middle School was open to the public at the time Brazill entered. If it was open to the public, Brazill would have a complete defense to the charge of burglary.[89] If it was

80. *Id.*

81. Jon Burstein, *Prosecutor: Show How You Held the Gun Brazill Contradicts Testimony, Says Some Witnesses Lied, Then Breaks Down Briefly*, SUN-SENTINEL (Ft. Lauderdale), May 10, 2001, at 1A, *available at* 2001 WL 2676788.

82. *See* Jon Burstein, *Brazill's Mother: He's Still a Child–Mom of Teacher's Killer Says Her Son, 14, Deserves Another Chance in Life*, SUN-SENTINEL (Ft. Lauderdale), May 24, 2001, at 1B, *available at* 2001 WL 2679781.

83. Jon Burstein, *Brazill Judge Grants Request of Prosecutors–Brazill Judge Grants Request of Prosecutors*, SUN-SENTINEL (Ft. Lauderdale), May 11, 2001, at 28A, *available at* 2001 WL 2676965 [hereinafter *Brazill Judge*].

84. Jeff Shields, *Felony Murder: A Thorny Legal Issue–Jurors Face Point of Law in Decision*, SUN-SENTINEL (FT. LAUDERDALE), May 15, 2001, at 13A, *available at* 2001 WL 2677716.

85. *Brazill Judge*, *supra* note 83.

86. *Id.*

87. FLA. STAT. § 810.02(1)(a) (2001).

88. § 810.07(1).

89. *Brazill Judge*, *supra* note 83.

not open to the public, then the jury had to find that Brazill intended to commit aggravated assault with a firearm for him to be guilty of burglary and therefore felony-murder.[90]

After fourteen hours of deliberation, the jury convicted Nathaniel Brazill of second-degree murder and aggravated assault with a firearm.[91] One juror "didn't think the evidence showed [Brazill] had intent to kill Mr. Grunow."[92] Another saw the boy's actions as characteristic of a teenager, not a cold-blooded killer.[93] According to the juror, the boy just did not see the consequences of his actions.[94]

Initially, there was speculation about the sentence that Brazill could receive, but Judge Wennet found that Florida law did not offer him any leeway in deciding Brazill's sentence.[95] Florida's "10-20-Life" gun violence law mandates that anyone convicted of killing someone with a gun be sentenced to no less than twenty-five years in prison.[96] Wennet did not agree with the defense that the law did not apply to children under sixteen.[97] Instead, the judge decided that since Brazill was tried as an adult, he had to be sentenced as one.[98] Prosecutor Marc Shiner asked for life without parole, stating,

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90. Jury Instructions at 4–6, Florida v. Brazill, No. 00-6385CF A02 (Fla. 2001).

91. Mitch Lipka & Stella M. Chavez, *Brazill Guilty, 14-Year-Old Convicted of Second-Degree Murder, Jurors Weren't Convinced of Intent to Kill, Jurors Initially Leaned 7-5 Toward First-Degree Verdict*, SUN-SENTINEL (Ft. Lauderdale), May 17, 2001, at 1A, *available at* 2001 WL 2678206. Even though the jury found Brazill guilty of aggravated assault with a firearm, that offense is not one of the specifically enumerated felonies for which a defendant can be guilty of felony-murder in Florida. *See* § 782.04(1)(a)(2)(a)(p).

92. Lipka & Chavez, *supra* note 91.

93. *Id.*

94. *Id.* One commentator, Paul Thompson, a neurologist at UCLA, believes that Brazill's verdict of second-degree murder is consistent with scientific research. Paul Thompson, Editorial, *Brain Research Shows a Child Is Not an Adult*, SUN-SENTINEL (Ft. Lauderdale), May 25, 2001, at 31A, *available at* 2001 WL 2680069. Thompson cites his own research that has revealed that the teenage brain is not equipped to deal with risky impulses, which may explain why Brazill claimed he made a mistake in shooting Grunow. *Id.* According to Thompson, the verdict is in line with scientific research in that Brazill's actions were not accidental but they were not completely thought-out either. *See also* Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 SUM. CRIM. JUST. 26 (2000) (adolescents often view the consequences of their actions as "accidental" when adults would have foreseen the consequences).

95. Jon Burstein & Shana Gruskin, *Judge Backs Off Life Term for Teen, Nathaniel Brazill Received 28 Years in Prison for Killing Barry Grunow*, ORLANDO SENTINEL, July 28, 2001, at C1, *available at* 2001 WL 9199512.

96. *Id.*

97. *Id.*

98. *Id.*

"[t]hat's the only way we can be sure [Brazill] won't hurt someone again."[99] On July 27, 2001, Judge Wennet sentenced Nathaniel Brazill to twenty-eight years in prison without parole.[100] Nathaniel Brazill is currently housed in a youthful offender prison, and he will remain there until he is at least eighteen, at which point he will enter the adult prison system.[101]

Although both the Brazill and Tate trials are over and both defendants have begun serving their sentences, the debate over whether either should ever have been in an adult courtroom still rages. After the verdict was announced, Governor Jeb Bush expressed his dismay that Brazill was tried as an adult. "There is a different standard for children," the Florida governor said. "There should be a sensitivity to the fact that a 14-year-old is not a little adult."[102] One juror also felt that the young boy's case should not have come before an adult court. "Knowing what I know now," said one juror, "I would say he should have been tried as a juvenile. He was a juvenile."[103] Although the debate still rages concerning the appropriateness of trying and sentencing teenagers as adults, there is little or no debate about the prosecutorial practice, as in the Tate and Brazill cases, of using the felony-murder doctrine to make it easier to convict juveniles as adults.[104] The use of the felony-murder rule in the Brazill case was a stretch. It is hard to imagine that thirteen-year-old Brazill thought his public school was "private property," especially during school hours. Nor is it likely that Florida legislators envisioned that the burglary statute would apply to Brazill's actions.[105]

A Florida appellate court affirmed Brazill's conviction and sentence, finding that the broad discretion accorded to the prosecutor under the Florida legal system to seek indictment for a felony or allow a case to go to juvenile court did not violate the Constitution.[106] Describing a prosecutor's discretion in deciding whether and how to prosecute as "absolute," the court noted the

99. Amanda Riddle, *Fourteen-year-old Boy in Florida Gets 28 Years in Prison for Killing His Teacher*, SAVANNAH MORNING NEWS, July, 28, 2001, http://www.savannahnow.com/stories/072801/LOCkillerap.shtml (last visited Apr. 8, 2004).

100. Glenda Cooper, *Florida Teen Gets 28 Years in Teacher's Shooting Death*, WASH. POST, July 28, 2001, at A03, *available at* 2001 WL 23183295.

101. Burstein & Gruskin, *supra* note 95.

102. *Boy is Guilty of Second-Degree Murder in the Shooting of a Teacher in Florida, 14-year-old Says He Meant Only to Scare Victim*, ST. LOUIS POST-DISPATCH, May 17, 2001, at A2, *available at* 2001 WL 4462045.

103. Lipka & Chavez, *supra* note 91.

104. An extensive review of newspaper articles and law review articles reveals that very little has been written about the appropriateness of applying the felony-murder doctrine to children.

105. *See* Steven A. Drizin, *Rule Should Not Apply to Children*, SUN-SENTINEL (Ft. Lauderdale), May 14, 2001, at 19A, *available at* 2001 WL 2677645.

106. Brazill v. State, 845 So. 2d 282, 289 (Fla. 4th Dist. Ct. App. 2003).

requirement that children thirteen and under may be prosecuted in adult court only by indictment of a grand jury actually serves to protect children against abuses of prosecutorial discretion because it requires grand jurors to concur with prosecutorial charging decisions.[107] Accordingly, the court held that Florida's statutory scheme for prosecuting juveniles as adults did not violate Brazill's equal protection or due process rights, or the separation of powers.[108] Although the court was not faced with an attack on the prosecutor's decision to use the felony-murder rule to obtain a conviction against Brazill, its ringing endorsement of prosecutorial discretion does not bode well for such future challenges.

C. *Jonathan Miller*

Thirteen-year-old Josh Belluardo died on November 4, 1998, after spending nearly forty-eight hours in a coma.[109] The parents of the middle-schooler made the difficult choice of taking their brain dead son off of life support.[110] Josh ended up in the hospital after he was hit in the back of the head, kicked in the stomach, and hit in the face by fifteen-year-old Jonathan Miller.[111] On the afternoon of November 2, 1998, Josh spent the bus ride home from school being taunted and bullied by Jonathan.[112] He had pencils and paper wads thrown at him as the two rode home from their respective schools.[113] Josh was in the eighth grade at E.T. Booth Middle School and Jonathan was in high school.[114] When Josh got off the bus and began to walk toward his home in a quiet, middle-class town in Cherokee County, Georgia, Jonathan followed and laid the would be fatal blows on Josh.[115] Josh's sister ran to him and held him in her arms.[116] A neighbor raced over to help and saw that Josh was unresponsive and called the paramedics.[117] Jonathan ran

107. *Id.*
108. *Id.*
109. Mark Bixler & Glenn Hannigan, *Cherokee Residents Mourn Loss of Teen, Student Accused of Beating 13-Year-Old After School May Be Charged with Murder Today*, ATLANTA J. & CONST., Nov. 5, 1998, at F01, *available at* 1998 WL 3724745; *see* Mark Bixler, *Teen faces adult trial in death, 15-year-old suspect held without bail after comatose beating victim, 13, dies*, ATLANTA J. & CONST., Nov. 6, 1998, at 1C, *available at* 1998 WL 3724863 [hereinafter *Teen Faces Adult Trial*].
110. *Teen Faces Adult Trial*, *supra* note 109.
111. Bixler & Hannigan, *supra* note 109.
112. *See id.*
113. *Id.*; *Teen Faces Adult Trial*, *supra* note 109.
114. *Teen Faces Adult Trial*, *supra* note 109.
115. Bixler & Hannigan, *supra* note 109.
116. *Id.*
117. *Id.*

with a friend to his home a few yards from the incident.[118] Jonathan and Josh had been neighbors for years. Jonathan lived across a cul-de-sac from Josh.[119]

Initially, police charged Jonathan as a juvenile for aggravated battery.[120] Upon Josh's death, however, Jonathan was charged with murder, and Cherokee County prosecutors sought to transfer him from juvenile to adult court.[121] On November 5, 1998, Jonathan appeared before Superior Court Judge Frank C. Mills, III, and was formally charged with murder as an adult.[122] The judge ordered Jonathan held without bail, but Jonathan's lawyer, Michael B. Syrop, filed a motion asking that bond be set so that Jonathan could be out of custody until the case is resolved.[123] That issue was not immediately resolved.[124] In addition, the judge granted the lawyer's request that video cameras be removed from the courtroom because there had been threats on the teenager's life and this constituted a special situation under the Georgia law.[125]

From the beginning, classmates, their parents, and the media characterized Jonathan as a bully, saying that he called people "faggots," teased classmates, and was generally a mean-spirited person.[126] However, Jonathan's attorney disputed the description and said that his client "didn't come across to [him] as the demon he's being portrayed as."[127] In response to the incident, a Georgia state representative, Chuck Scheid, introduced a bill targeted at bullies.[128] The bill would require schools, both public and private, to post the law in their classrooms and require school officials to "notify police and the parents of all students involved in a complaint of bullying."[129] Representative Scheid believed that schools protect bullies and that their conduct often goes unmentioned to parents and police.[130]

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118. *Id.*
119. *Id.*
120. Bixler & Hannigan, *supra* note 109.
121. *Id.*
122. *Teen Faces Adult Trial*, *supra* note 109.
123. *Id.*
124. *See* Mark Bixler, *Teen's Case Highlights Issue of Bond for Murder Defendants*, ATLANTA J. & CONST., Dec. 10, 1998, at 9JQ, *available at* 1998 WL 3730954 [hereinafter *Teen's Case Highlights Issue*].
125. *See id.*
126. *Id.*
127. Bixler & Hannigan, *supra* note 109.
128. Mark Bixler, *E.T. Booth Focuses on Memorials*, ATLANTA J. & CONST., Nov. 19, 1998, at 12JH, *available at* 1998 WL 3727109.
129. *Id.*
130. *See id.*

Jonathan Miller's lawyer successfully argued that the fifteen-year-old should be released on bond while he awaited trial.[131] Judge C. Michael Roach set bond at $50,000 and placed a series of conditions on Jonathan while on bond, despite protests from the murder victim's family.[132] These conditions, stipulated to by Miller, were that he had to live at least fifteen miles from his neighborhood where the incident occurred, wear a monitoring device, and not contact any witnesses.[133]

On December 14, 1998, prosecutors proceeded to indict Miller for first-degree murder.[134] Unlike the prosecutors in the Tate and Brazill cases, the Georgia prosecutors used Georgia's felony-murder law from the outset to get a first-degree murder indictment from the grand jury.[135] The underlying felonies cited by the prosecution were aggravated assault and aggravated battery.[136] So, in Georgia, in order to obtain a first-degree murder conviction, prosecutors only needed to convince jurors that Jonathan was guilty of aggravated assault.[137] The indictment said that Miller committed aggravated assault when he hit Josh with his hands and feet "about the head and body."[138]

Only a few weeks after being released on bond and then indicted for first-degree felony murder, Judge C. Michael Roach ordered Jonathan Miller back to jail after the boy hosted a slumber party for several friends expected to testify against him.[139] The party was a direct violation of the bond agree-

131. *Teen's Case Highlights Issue*, *supra* note 124.

132. *Id.*

133. *Id.*

134. Mark Bixler, *Felony Murder Law Used in Cherokee Rule Allows Charge, Regardless of Intent*, ATLANTA J. & CONST., Dec. 16, 1998, at 2C, *available at* 1998 WL 3731847 [hereinafter *Felony Murder Law Used in Cherokee*].

135. *See id.*

136. *Id.* Although most states do not allow aggravated assault as the predicate felony, Georgia is an exception. In general, most states rely on some form of "independent felony" or "merger limitation" when employing the felony-murder rule. Under the limitation, felonious assault, voluntary manslaughter, and involuntary manslaughter are not eligible for use as the predicate felony. The rationale is that without this limitation, almost every felonious assault, voluntary manslaughter, or involuntary manslaughter could be turned into a felony-murder and the need for the distinction of a separate offense would be unnecessary.

137. *See* Bixler & Hannigan, *supra* note 109.

138. *Felony Murder Law Used in Cherokee*, supra note 134.

139. *Teen Back in Jail on Violation in Fatal Ga. Beating*, CHATTANOOGA TIMES FREE PRESS, Feb. 7, 1999, at B8.

ment.[140] Subsequently, a "flamboyant" Atlanta attorney, Bruce Harvey, joined the Jonathan Miller defense team.[141]

Jonathan Miller's trial date was set for April 26, 1999. On April 20, 1999, just days before the trial was to begin, two boys, Dylan Klebold, age seventeen, and Eric Harris, age eighteen, opened fire on classmates at Columbine High School in Littleton, Colorado. The two boys killed twelve students and a teacher and wounded over twenty before turning the guns on themselves.[142] In light of the events at Columbine, Miller's attorneys tried unsuccessfully to get the trial delayed citing public concern over school violence following the Columbine murders as potentially influencing the jury.[143] However, Judge Roach denied the request and began jury selection immediately.[144]

The jury selection for Miller's trial took longer than anticipated given the Columbine incident and intense media coverage of that case.[145] Defense attorneys continuously argued that Miller could not receive a fair trial in the Atlanta metro area because of the media's characterization of the beating and their client, and the media's attempt to link the case to the Columbine case.[146] However, these arguments fell on deaf ears.[147] The prosecution's witnesses were heard on May 5, 1999.[148] The defense maintained that Jonathan did not intend to kill Josh Belluardo, and that the teen was only guilty of involuntary manslaughter, not felony-murder as the prosecution claimed.[149] The prosecution continued to insist that Jonathan was guilty of aggravated assault or aggravated battery, and that under Georgia's felony-murder law, he should be

140. *Id.*

141. Mark Bixler, *Youth getting famed lawyer, Cherokee teenager accused in fatal beating will be represented by Bruce Harvey*, ATLANTA J. & CONST., Apr. 8, 1999, at 2D, *available at* 1999 WL 3761120.

142. *See* Angie Cannon et al., *Why? There were plenty of warnings, but no one stopped two twisted teens*, U.S. NEWS & WORLD REPORT, May 3, 1999, at 16; Nancy Gibbs, *In Sorrow and Disbelief*, TIME, May 3, 1999, at 20.

143. *Judge Rejects Delay of Bus Stop Beating Trial*, CHATTANOOGA TIMES FREE PRESS, Apr. 27, 1999, at B2.

144. *Id.*

145. Mark Bixler, *Youth Trial Moving Slower Than Normal*, ATLANTA J. & CONST., May 1, 1999, at F1, *available at* 1999 WL 3767365.

146. *See id.*

147. *Id.*

148. Mark Bixler, *Victim's Sister Testifies in Teen's Trial: There was no Response When Katie Belluardo Went to Help Her Brother After He Was Punched, She Says*, ATLANTA J. & CONST., May 6, 1999, at B1, *available at* 1999 WL 3768690 [hereinafter *Victim's Sister Testifies in Teen's Trial*].

149. *Id.*

convicted of first-degree murder.[150] Meanwhile, defense attorney Bruce Harvey argued that the attack was only a misdemeanor assault or battery, and that under Georgia law, Miller was guilty of involuntary manslaughter if he were found to have committed a misdemeanor that unintentionally leads to death.[151]

Jonathan Miller's trial lasted just three days.[152] The victim's sister took the stand and testified that she saw her brother on the grass outside their home, ran out to him, saw him gasp for air, and watched his face turn from red to purple to blue.[153] Others testified that Miller had taunted the victim often in the days preceding the attack.[154] Medical experts said that a torn artery in Josh's brain was the actual cause of the death.[155] The small tear in the artery allowed the brain cavity to fill with blood and leave the teenager brain dead.[156] After the prosecution finished presenting its case, the defense made the surprise announcement that it would not present any evidence or call any witnesses.[157]

After only six hours of deliberation, the jury found Jonathan Miller guilty of felony-murder, aggravated assault, and aggravated battery.[158] The conviction meant an automatic life sentence for the teenager with the possibility of parole after fourteen years.[159] However, the judge could decide to impose a longer sentence for the aggravated assault and battery charges.[160] Following the verdict, attorneys for Jonathan Miller vowed to appeal on the basis of Judge Roach's denial to delay the trial until after the panic over the Columbine shootings had died down.[161]

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150. *Id.*

151. *Id.* The "misdemeanor-manslaughter" rule permits conviction of involuntary manslaughter for an accidental homicide that occurs during the commission of an unlawful act not amounting to a felony (a dangerous misdemeanor) without the required showing that the defendant intentionally, knowingly, recklessly, or negligently caused the death. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.09, at 538 (3d ed. 2001).

152. *Boy Convicted in Killing Cites Littleton in Appeal*, N.Y. TIMES, May 9, 1999, at 17.

153. *Victim's Sister Testifies in Teen's Trial*, *supra* note 148.

154. *Id.*

155. Mark Bixler, *Cherokee teen found guilty of murder*, ATLANTA J. & CONST., May 8, 1999, at A1, *available at* 1999 WL 3769128 [hereinafter *Cherokee teen found guilty*].

156. *Id.*

157. Mark Bixler, *Cherokee Bully Case Goes to Jury Teen-On-Teen Crime: 15-Year-Old Facing Felony Murder or Involuntary Manslaughter Sentence in Neighbor's Death*, ATLANTA J. & CONST., May 7, 1999, at D1, *available at* 1999 WL 3768950 [hereinafter *Cherokee bully case*].

158. *Cherokee Teen Found Guilty*, *supra* note 155.

159. *Id.*

160. *Id.*

161. *Boy Convicted in Killing Cites Littleton in Appeal*, *supra* note 152.

One juror said that the jury had no choice but to convict Miller.[162] According to the juror, Assistant District Attorney Rachelle L. Carnesale had proved the definitions of the charges against Miller, and the defense did little to rebut them when it failed to call any witnesses.[163] According to the juror, the most difficult part of the conviction was whether Miller was guilty of aggravated battery.[164] Under Georgia law, to be guilty of aggravated battery, the victim has to be deprived of the use of one of his body parts, in this case his brain.[165] The jury had trouble deciding whether Josh died instantaneously or not.[166] In the end, the jury decided that the young boy did not die instantly given the victim's sister's testimony that she found her brother gasping for air.[167]

Judge Roach sentenced Miller to life in prison on May 21, 1999.[168] The judge said that he had no choice because Georgia law required a life sentence for a felony-murder conviction.[169] If Jonathan had been convicted of involuntary manslaughter, as the defense argued, his sentence would have been one to ten years in prison.[170]

As in the Brazill case, some in the community argued that Miller should have been tried in juvenile court.[171] "They can try him as an adult, but the reality is he's a kid. . . . Life in prison to me is going way too far," said Rick McDevitt, president of the Georgia Alliance for Children.[172] Following the sentencing, Miller's attorneys said they would appeal the sentence because the punishment was cruel for a death that was unintended.[173] Months after

162. Ben Schmitt, *Cherokee Juror: Defense Didn't Give Us Much Choice*, FULTON COUNTY DAILY REPORT, May 11, 1999 *available at* .LEXIS, Nexis Library, Fulton File.

163. *Id.*

164. *Id.*

165. GA. CODE ANN. § 16-5-24(a) (2003).

166. *See generally* Patrick v. State, 274 S.E.2d 570 (Ga. 1981). If a victim dies instantaneously, the defendant cannot be subjected to aggravated battery. *Id.* at 572. On appeal, Miller's attorneys argued, among other things, that Josh Belluardo died instantaneously when he was hit, and therefore Jonathan could not have been guilty of aggravated battery. *See* Appellant's Brief in Support of His Appeal, Miller v. State, 571 S.E.2d 788 (Ga. 2002) (No. S02A0626); Appellant's Supplemental Brief in Support of His Appeal, Miller v. State, 571 S.E.2d 778 (Ga. 2002) (No. S02A0626).

167. Schmitt, *supra* note 162.

168. *Id.*

169. *Boy, 15, Gets Life in Bus Stop Killing*, CHATTANOOGA TIMES FREE PRESS, May 22, 1999, at B5.

170. Mark Bixler, *Teen Gets Life in Bus Stop Beating Death*, ATLANTA J. & CONST., May 22, 1999, at G1, *available at* 1999 WL 3772782.

171. *Id.*

172. *Id.*

173. *Appeal Planned of Life Sentence in Killing at Bus Stop*, CHATTANOOGA TIMES FREE PRESS, May 24, 1999, at B8.

being sentenced to life in prison, Jonathan Miller told reporters, "I'm not a murder – I shouldn't – I don't see myself as a murderer . . . I'm a good kid, but I just made a few mistakes in my life."[174]

On May 2, 2002, Jonathan Miller's lawyers asked the Supreme Court of Georgia to reverse the conviction and grant the boy a new trial.[175] Miller raised several issues relating to the felony-murder doctrine, including whether Georgia's statutory scheme for trying juveniles as adults, which gives original jurisdiction to the criminal court over all thirteen to seventeen-year-olds charged with murder, applies to felony-murder cases, and whether it is proper to use aggravated assault to win a felony-murder conviction when life is lost unintentionally.[176] On October 28, 2002, the Supreme Court of Georgia rejected all of Jonathan's arguments and affirmed his conviction and sentence.[177] Although he concurred in the judgment, Justice Benham felt compelled to write a separate opinion in which he questioned the result:

> 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.[178]

In the cases discussed above, most of the debate focused on the issue of whether the boys should have been tried as juveniles or adults.[179] In the Florida cases, there was little or no debate about the appropriateness of using the felony-murder rule to gain first-degree murder convictions against Brazill and Tate once these boys were prosecuted in adult court.[180] Although the use of the felony-murder rule was questioned by the lawyers in the *Miller* case, the attacks were premised on the propriety of using felony-murder as a

174. *They Called it Murder; Border Crossing* (CNN & TIME television broadcast, Sept. 19, 1999), *available at* LEXIS, News, CNN Transcripts.

175. D. Aileen Dodd, *Appeal Sought in Boy's '98 Punching Death*, ATLANTA J. & CONST., May 2, 2002, at D12, *available at* 2002 WL 3720956.

176. *See id.*; GA. CODE ANN. § 15-11-28(b)(2)(A)(i) (2001).

177. Miller v. State, 571 S.E.2d 788, 798 (Ga. 2002).

178. *Id.* at 798–99 (Benham, J., concurring).

179. *See id.*; Brazill v. State, 845 So. 2d 282 (Fla. 4th Dist. Ct. App. 2003).

180. *See supra* Part II.A–B.

predicate for transferring a juvenile to adult court, and the propriety of using aggravated assault or battery as a predicate for felony-murder, rather than a more broad-based attack on the appropriateness of using the felony-murder rule on teenage defendants. In the sections that follow, we will argue that the historical and doctrinal underpinnings of the felony-murder rule make little sense in the case of children and teenagers, and that old and new understandings of developmental differences between children and adults also make application of the felony-murder rule problematic in the cases involving child-defendants.

III. FELONY-MURDER RULE & TEENAGERS (HISTORY/SUMMARY/RATIONALE)

In cases like those of Lionel Tate, Nathaniel Brazill, and Jonathan Miller, the felony-murder rule imposes liability for murder when death results from actions taken during the commission or attempted commission of a felony. The rule applies in all situations—when the felon kills intentionally, recklessly, or accidentally. This rule allows prosecutors to charge a defendant with murder, even if the defendant did not intend to kill the victim. Prosecutors must only prove that the defendant intended to commit the underlying felony, and are not required to offer any separate proof of intent with regard to the death.

In response to criticism of the felony-murder rule, supporters of the rule offer deterrence, reaffirming the sanctity of human life, and easing the prosecutor's burden of proof as rationales for the rule.[181] The most commonly cited defense of the felony-murder rule is deterrence, the hope of preventing negligent and accidental killings during the commission of felonies.[182] The rule can also be viewed as reaffirming the sanctity of human life in that it reflects the view of society that a felony resulting in death is more serious than one that does not and, therefore, deserves greater punishment.[183]

Finally, although not an explicit justification for the rule, easing the prosecutor's burden of proof is often the result because prosecutors can convict on a lesser level of intent than that required for murder.[184] Although these are the primary justifications for the rule, one commentator views them as mere pretenses. To LaFave, the most likely rationale behind the felony-murder rule is perhaps more retributive in nature: "that the defendant, because he is committing a felony, is by hypothesis a bad person, so that we

181. DRESSLER, *supra* note 151, § 31.01, at 516–19.
182. *Id.*
183. *Id.* § 31.01, at 517.
184. *See id.* § 31.01, at 518.

should not worry too much about the difference between the bad results he intends and the bad results he brings about."[185]

The felony-murder rule is a much-condemned doctrine. In 1834, His Majesty's Commission on Criminal Law found the felony-murder rule "'totally incongruous with the general principles of our jurisprudence.'"[186] "Principled argument in favor of the felony-murder doctrine is hard to find."[187] In addition, the "ancient rule . . . has been bombarded by intense criticism and constitutional attack."[188] Moreover, "[c]riticism of the rule constitutes a lexicon of everything that scholars and jurists can find wrong with a legal doctrine."[189] Such criticism led England to abolish the felony-murder rule by statute in 1957.[190] In the United States, although few states have abolished the felony-murder rule, others have limited its scope, but by and large the felony-murder rule still thrives in most jurisdictions.[191]

The felony-murder rule, which is codified in several states, cannot be traced to one clear source. In some instances, scholars have traced the first formal statement of the rule to Lord Dacre's Case, 1558.[192] In Lord Dacre's Case, Lord Dacre and some companions were hunting in a park, an unlawful act, and agreed to kill anyone who might resist them.[193] One member of the hunting party killed a gamekeeper who confronted him.[194] Although not present during the confrontation, Lord Dacre and all the members of the party were convicted of murder and hanged.[195] Although accepted by many as an example of the felony-murder rule, some legal scholars believe the case is an early example of placing liability on the companions on a theory of constructive presence, or because the group had earlier agreed to the crime

185. WAYNE R. LAFAVE, CRIMINAL LAW § 7.5, at 682 (3d ed. 2000).

186. People v. Aaron, 299 N.W.2d 304, 319 (Mich. 1980).

187. MODEL PENAL CODE § 210.2 cmt. at 37 (Proposed Official Draft 1962).

188. State v. Maldonado, 645 A.2d 1165, 1171 (N.J. 1994) (citing *Aaron*, 299 N.W.2d at 327–29).

189. Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine of Constitutional Crossroads*, 70 CORNELL L. REV. 446 (1985).

190. *See id.* at n.12.

191. *See* HAW. REV. STAT. § 701 (1993); KY. REV. STAT. ANN. § 507.020 (Michie 1999); *Aaron,* 299 N.W.2d at 321 (interpreting a Michigan statute where the rule is no longer recognized by statute). While in New Mexico, the state supreme court has effectively obliterated the rule by imposing a *mens rea* requirement for felony-murder. *See* State v. Ortega, 817 P.2d 1196, 1204 (N.M. 1991).

192. *See* Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50, 58 (1956).

193. *Aaron*, 299 N.W.2d at 307.

194. *Id.* at 308.

195. *Id.*

and therefore had a shared *mens rea*.[196] Nevertheless, the case is the most often cited source of the felony-murder rule, although some scholars cite later sources such as Edward Coke, 1644,[197] or Sir Michael Foster, 1762, as promulgating the rule that a killing during a felony would automatically become a murder.[198] By 1769, the felony-murder rule was simply stated by William Blackstone: one who caused a death in the commission or attempted commission of any felony is guilty of murder.[199] In any case, the felony-murder rule can be traced back to the 1700s. As far back as the history of the rule can be traced, so can one trace condemnation of it.

A much criticized rule when applied to adults, the felony-murder rule is even more problematic when applied to children under the age of fourteen. Under the common law, such children are presumed to be incapable of forming criminal intent.[200] The common law infancy defense can be stated as "children under the age of seven are conclusively presumed to be without criminal capacity, those who have reached the age of fourteen are treated as fully responsible, while as to those between the ages of seven and fourteen there is a rebuttable presumption of criminal incapacity."[201] The infancy defense reflects the law's "unwillingness to punish those thought to be incapable of forming criminal intent."[202] According to one scholar, "[t]he infancy defense was an essential component of the common law limitation of punishment to the blameworthy."[203]

This common law "infancy defense" dates back to the tenth century, when it was established by statute that no one under the age of fifteen could be subjected to capital punishment unless he attempted to escape or refused to give himself up.[204] "[B]y the beginning of the fourteenth century, it was established that children under the age of seven were without criminal capacity."[205] By 1338, children over the age of seven were presumed to lack the capacity to commit a crime, however this could be rebutted by proof of mal-

196. *See* People v. Aaron, 299 N.W.2d 304, 308 (Mich. 1980).

197. *See* James W. Hilliard, *Felony Murder in Illinois—The "Agency Theory" vs. the "Proximate Cause Theory": The Debate Continues*, 25 S. ILL. U. L.J. 331, 332 (2001).

198. 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).

199. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 200–01 (1769).

200. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 4.11, at 398 (2d ed. 1986); *see* ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 938 (3d ed. 1982).

201. LAFAVE & SCOTT, *supra* note 200.

202. *In re* Devon T., 584 A.2d 1287, 1290 (Md. Ct. Spec. App. 1991).

203. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 507 (1984).

204. LAFAVE, *supra* note 185, § 4.11, at 424–25.

205. *Id.* § 4.11, at 425.

ice.[206] It was firmly established by the seventeenth century that the presumption of incapacity operated until a child was fourteen years old.[207] Before the state could gain a conviction against a child, it had the burden of overcoming the presumption of incapacity.[208]

With the emergence of the juvenile court system it seemed that the infancy defense would become unnecessary. The juvenile court system acted as *parens patriae*, and the state became the punisher, substituting itself for the parents. The need to establish moral blameworthiness and, hence, the defense that it does not exist vanished.[209] Indeed, many courts, citing the non-adversarial and non-punitive purposes of the juvenile courts, held that the infancy defense was unavailable to children tried in juvenile court.[210] However, the juvenile justice system has undergone considerable change over time and is becoming much more like a penal court. This trend, first noted by the United States Supreme Court in *In re* Gault[211] and *In re* Winship,[212] has only accelerated in the last decade as more and more juveniles are being tried in adult courtrooms.[213] In short, the infancy defense was once very important in protecting the child who faced criminal prosecution. However, the defense became less important in the early years of the juvenile

206. *Id.*

207. *Id.*

208. *See id.* According to LaFave, the prosecutor's burden was a heavy one, sometimes stated to be "beyond a reasonable doubt" and sometimes "clear and convincing evidence." LAFAVE, *supra* note 185, § 4.11, at 425.

209. *See Devon T.*, 584 A.2d at 1291. Some have argued that *In re Gault* and *In re Winship*, by bestowing upon juvenile defendants almost all of the same due process rights as adults, may have laid the foundation for the recent increase in laws permitting adult prosecution of juveniles. *See, e.g.*, HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 89 (1999), *available at* http://ncjrs.org/html/ojjdp/nationalreport99/toc.html. *See generally* Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J. L. ETHICS & PUB. POL'Y 323, 361–71 (1991). If juveniles are capable of exercising these "rights" as adults, or so the argument goes, then they should be held accountable as adults when convicted. *Id.*

210. *See, e.g.*, State v. D.H., 340 So. 2d 1163, 1166 (Fla. 1976); *In re* Davis, 299 A.2d 856, 860 (Md. Ct. Spec. App. 1973); *In re* Robert M., 441 N.Y.S.2d 860, 863 (Fam. Ct. 1981).

211. 387 U.S. 1 (1967).

212. 397 U.S. 358 (1969).

213. A 1998 Department of Justice study showed that almost 200,000 children under the age of eighteen are prosecuted in criminal court each year. *See* MACOLM C. YOUNG & JENNI GAINSBOROUGH, THE SENTENCING PROJECT, PROSECUTING JUVENILES IN ADULT COURT: AN ASSESSMENT OF TRENDS AND CONSEQUENCES 5 (2000), *available at* http://www.sentencing project.org/pubs/2079.pdf. In addition, between 1992 and 1997, forty-seven states passed laws to make it easier to prosecute children as adult. *See* Snyder & Sickmund, *supra* note 209.

justice system; only recently has it gained relevance again as more and more juveniles are tried as adults.

A closer look at the justifications for the doctrine of incapacity and the felony-murder rule confirms that the felony-murder rule was not intended to be applied to children under the age of fourteen. The early common law infancy defense was based upon an unwillingness to punish those thought to be incapable of forming criminal intent, and not of an age where the threat of punishment would serve as a deterrent.[214] The felony-murder rule, in contrast, was justified as a deterrent for negligent and accidental killings during the commission of a felony,[215] or as means to punish those who do bad things generally.[216]

In light of the presumption that children under age fourteen are incapable of forming criminal intent, the deterrence rationale makes no sense if applied to children. As for punishing those who do bad things, the juvenile justice system was designed to deal with the special needs of child defendants while still punishing them. Applying the felony-murder rule to children under the age of fourteen also produces unfair and nonsensical outcomes. By relieving prosecutors of the burden of rebutting the presumption of incapacity through proof of premeditation or malice, courts essentially would be permitting murder convictions of child-defendants who are presumed incapable of forming criminal intent. It is inconsistent with common law to make it easier for prosecutors to obtain a murder conviction in the case of youthful defendants, when the objective of the presumption of incapacity is just the opposite—to make it harder to prove intent when the defendant is a child.

Finally, the doctrine of incapacity must surely trump the felony-murder rule since "capacity" is a necessary foundation for the formation of "intent" in the culpability, or *mens rea*, context of a felony.

> Put simply, *mens rea* is the state of mind required to commit a blameworthy act. The concept of legal responsibility, or the capacity to have a culpable state of mind, overlaps, in part, with *mens rea*. Unless an accused has the capacity to be culpable, it is impossible for him to maintain the specific mental state, or *mens rea*, required for commission of a criminal offense. Legal responsibility may also be viewed as a fundamental pre-requisite to the existence of *mens rea*. The *mens rea* inquiry focuses on whether the accused, when assumed capable of complying with the law's

214. LAFAVE, *supra* note 185, § 7.5, at 425.
215. *See* DRESSLER, *supra* note 151.
216. *See* LAFAVE, *supra* note 185, § 7.5, at 671.

> command, possessed the specific state of mind required to consider an act blameworthy. Legal responsibility focuses instead on the question of whether the accused's deficiencies of judgment distinguish him from others in society such that we do not expect him to comply with the law ... Legal responsibility and *mens rea* also differ in terms of the time frame in which the court analyzes the problem of culpability. The *mens rea* inquiry focuses on the time period in which the harmful act was committed. Proof of the capacity to be legally responsible for one's acts focuses on the life experience of the individual. By widening the time frame, legal responsibility differences allow the court to explore a broader range of behavior that might exculpate the accused.[217]

In other words, capacity is the prerequisite for *mens rea*. In order for prosecutors to prove *mens rea*, they must first prove that the defendant was capable of forming criminal intent. But, especially when dealing with a child, this inquiry is much broader in scope than a traditional *mens rea* analysis and necessarily involves consideration of developmental factors which bear on a child's ability to form intent—factors which are incompatible with the felony-murder rule. It is to these developmental factors in which we now turn.

IV. PSYCHOSOCIAL RESEARCH & BRAIN RESEARCH

Courts applying the infancy defense typically focus on the child's capacity to understand the nature and consequences of his acts, and the ability to distinguish right from wrong.[218] Given current understandings about the moral development of children and psychosocial literature on the competence and decision-making of teens, courts exploring the infancy defense must also inquire into the degree of impulse control that the youth is capable of exercising.[219] Recent research showing that adolescent brains are less developed than adult brains in the very areas of the brain that govern impulse control and judgment—the prefrontal lobes—provides added weight to the need for courts to factor impulse control into the traditional infancy analysis.[220]

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217. Walkover, *supra* note 203, at 537–38 (emphasis added).

218. *See id.* at 512.

219. *Id.* at 560; *see* Robert E. Shepherd, Jr., *Juvenile Justice: Rebirth of the Infancy Defense*, 12 CRIM. JUST. 45, 46 (1997).

220. *See, e.g.*, 3 HANDBOOK OF CHILD AND ADOLESCENT PSYCHIATRY 15, 37 (Lois T. Flaherty & Richard M. Sarles eds., 1997).

Although research on the development of the teenage brain in comparison to the adult brain is still in its infancy, recent studies have focused on the cognitive and psychosocial factors of adolescent development. Early studies concentrated on decision-making and cognitive aspects of development, and looked at teenagers' ability to reason, comprehend, "and appreciate decisions as adults would."[221] These studies were initiated in response to the legal changes surrounding medical decision-making and informed consent by young people.[222] Therefore, the findings, although helpful, do not answer all questions regarding teenage development. Instead, the studies show that teenagers, especially from age fifteen on, are not that much different than adults.[223] However, criticism of the early studies reveals methodological flaws such as small, unrepresentative samples of mostly white, middle class subjects.[224] A study of *Miranda* waivers by Thomas Grisso supports the contention that teenagers over fifteen are capable of understanding their *Miranda* rights as well as adults.[225] However, Grisso stressed that the understanding of *Miranda* rights is only consistent when the teenagers and adults are of comparably average intelligence.[226] When compared to adults with a similarly low I.Q., teenagers with a lower intelligence did not possess an equivalent understanding of their rights.[227]

Youth advocates used the cognitive similarities of adults and older teenagers professed by these studies to support an expansion of adolescent autonomy in the medical context for teenagers, especially to consent to abortion.[228] However, these studies were used years later to attack the juvenile justice system and argue in support of teenagers being tried as adults in criminal courts.[229] The argument was that if teenagers could make autonomous healthcare decisions, then they were equally capable of being tried as adults and making legal decisions.[230] The juvenile justice system was based on the idea that juveniles were less competent or culpable than adults and a finding that their decision-making capabilities are equal to adults undermines the very laws and system meant to protect these differences.

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221. Elizabeth Cauffman et al., *Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability*, 18 QUINNIPIAC L. REV. 403, 406 (1999).

222. *See id.*

223. *Id.*

224. *See id.* at 407.

225. *See* Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980).

226. *See id.* at 1164–65.

227. *See id.*

228. *See* Cauffman et al., *supra* note 221, at 408.

229. *Id.* at 408–09.

230. *Id.*

Researchers point to non-cognitive or psychosocial aspects of adolescent development to rebut the argument that teenagers and adults are not different.[231] Some of these psychosocial aspects include responsibility, which includes self-reliance, clarity of identity, and healthy autonomy; perspective, which relates to the ability to see the complexity of the situation and place it in a larger context; and temperance, or the ability to limit impulses and see the overall situation prior to acting.[232] According to Steinberg and Cauffman, early research shows that adolescents do differ from adults in many aspects of responsibility, perspective, and temperance, although more research is necessary.[233] Other researchers examined similar aspects of psychosocial development, and all hypothesize that the development of different psychosocial aspects could impact how cognitive capacities are employed in real-world situations.[234]

By early adolescence, most children have reached "conventional" moral reasoning.[235] At this stage, the adolescent's moral reasoning is based on how others will judge his or her behavior.[236] Elementary age children who have reached this level focus on pleasing their parents and other adults, while junior high school students are more concerned with the opinions of their peers.[237] However, most adolescents are only capable of reasoning at this level in hypothetical situations, and their actual behavior often does not reflect their reasoning ability.[238]

By late adolescence or early adulthood, some individuals shift to "post-conventional" moral reasoning.[239] At this level, reasoning switches from being concerned with social approval to more important principles like fair-

231. *See generally* Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1763, 1768 (1995); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 9–14 (1997); Elizabeth S. Scott et al., *Evaluating Adolescent Decision-Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221 (1995); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision-Making*, 20 LAW & HUM. BEHAV. 249 (1996).

232. *See* Cauffman & Steinberg I, *supra* note 231, at 1764–65.

233. *See id.* at 1788.

234. *See* Cauffman et al., *supra* note 221, at 412.

235. ABA, KIDS ARE DIFFERENT: HOW KNOWLEDGE OF ADOLESCENT DEVELOPMENT THEORY CAN AID DECISION-MAKING IN COURT 27 (Lourdes M. Rosado ed., 2000), *available at* http://www.abanet.org/crimjust/juvjus/macarthur.html [hereinafter KIDS ARE DIFFERENT].

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

ness and justice.[240] However, this level of moral reasoning is rare, even in adults, and most adolescents follow only "conventional" moral reasoning.[241]

In addition, research on the moral development of children shows that although children may be able to distinguish right and wrong, they may not behave in a way consistent with that understanding.[242] Also, the development of moral judgment results from the "interaction of impulse with the response of key externalities, such as parental approval or disapproval."[243]

From a developmental perspective, it is grossly unfair to apply the felony-murder rule to pre-teens like Lionel Tate and Nathaniel Brazil. Such children, lacking the foresight and judgment of fully competent adults, are prone to make decisions without careful deliberation, and do not fully understand the consequences of their actions. Studies in both neuroscience and psychology demonstrate that children do not have the same capacity to control their behavior or make rational decisions as adults.[244]

V. POLICY RECOMMENDATIONS

In light of the historical and doctrinal arguments against the use of the felony-murder rule in cases involving children, there appears to be no good reason for retaining the felony-murder rule in cases involving children and teenagers. However, the felony-murder rule is deeply entrenched in the American legal system and has proven to be resistant to calls for its abolition for centuries. For this reason, we have proposed a number of solutions to limit the scope of the felony-murder rule in cases of children and teenagers. These limits are divided into three categories: 1) the use of the felony-murder rule against children tried in adult and juvenile court; 2) the use of the felony-murder rule as a basis for transferring children and teenagers to the adult court; and 3) the use of the felony-murder rule as mitigation in sentencing juvenile offenders in adult court.

A. *Limiting the Use of the Felony-Murder Rule in Juvenile and Criminal Court Cases*

First, we believe that there should be an absolute ban on the felony-murder doctrine for child defendants under the age of fourteen in adult and

240. KIDS ARE DIFFERENT, *supra* note 235, at 27.
241. *Id.* at 28.
242. *See* Walkover, *supra* note 203, at 542.
243. *Id.* at 542–43.
244. *See id.* at 542; Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26, 27 (2000).

juvenile court systems.[245] As argued above, at common law, such children were presumed to be unable to form the criminal intent necessary to prove the underlying felony. Even if the State can rebut the presumption of incapacity, none of the traditional justifications of the rule make sense in the context of children under the age of fourteen.

The least compelling justification of all is probably the one that explains the longevity of the felony-murder rule: it eases the prosecution's burden of proving intent in murder cases. It is the least compelling because it is debatable as to whether we should ease the prosecution's burden for a crime that can carry the death penalty or life without possibility of parole, and especially debatable when child defendants are involved. As the Lionel Tate case demonstrates, children under fourteen now face similar draconian penalties if tried and convicted as adults. Because youth has historically been a mitigating factor in punishment, we should make it harder, not easier, to impose such sentences on youthful defendants.

For children ages fourteen to seventeen, we propose a presumptive ban on using the felony-murder rule. Children in this age range can probably form the criminal intent of the underlying felony but they still do not have the same capacity to control their behavior as adults, and often are less capable of foreseeing the consequences of their actions. Their brains are still developing in the pre-frontal cortex, the very area which governs deliberation, judgment, and impulse control, and the part of the brain which is arguably the seat of *mens rea*. In addition, some of these children, especially fourteen-year-olds and older teens who are mentally limited, may not be competent to stand trial.[246] In order to charge fourteen to seventeen-year-olds with

245. Most courts have held that the common law presumption of incapacity does not apply in juvenile court proceedings. *See* LAFAVE, *supra* note 185, § 7.5, at 427–28. The reason for this rule has been that the infancy defense is unnecessary in light of the juvenile court's rehabilitative and non-punitive purposes. *See id.* § 7.5, at 428. This rule continues to be the prevailing rule despite the fact that the modern juvenile court is far more punitive than its predecessors. *See* Shepherd, *supra* note 219, at 46 (applying the felony-murder rule, which has the effect of making it easier to convict and punish juveniles, in a "rehabilitative" juvenile court makes little sense).

246. For the most recent study, see Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003), *available at* http://www.childrensrights.org/Policy/policy_resources_juvenile_juveniles_competence.htm. *See also* 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); Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, *in* YOUTH ON TRIAL 87 (Thomas Grisso et al. eds., 2000). *See generally* Thomas Grisso, *What We Know About Youths' Capacities as Trial Defendants*, *in* YOUTH ON TRIAL 146–52 (Thomas Grisso et al. eds., 2000); Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Mak-*

felony-murder, prosecutors should bear a heavy burden. They should be required to prove by "clear and convincing" evidence that the defendant is a fit subject for application of the felony-murder rule. This burden can be met by evidence that the defendant was capable of forming the criminal intent of the underlying felony; that the alleged offense was committed in an aggressive or violent manner; that death or great bodily harm is a natural and probable consequence of the defendant's actions; and that the defendant's actions are the proximate and legal cause of the victim's death.[247]

The above-mentioned rules seek to constrain the application of the felony-murder rule to children and teenagers who are tried in the adult court. In other words, they seek to impose restrictions on the ability of prosecutors to charge children and teenagers in adult court with first-degree murder under a felony-murder theory. We also believe that judges, prosecutors, and legislators should be constrained from using the felony-murder rule as a basis for transferring children and teenagers to the adult court in the first instance. Under such a rule, prosecutors could no longer seek an indictment for murder based strictly upon a felony-murder theory in order to prosecute a juvenile in adult and legislators should carve out an exception for felony-murder when drafting statutes that require that cases involving juveniles charged with murder must originate in the criminal, rather than the juvenile court.

B. *Limiting the Use of the Felony-Murder Rule to Transfer Cases to the Adult Court*

In the 1990s, in response to an alarming increase in juvenile violence, many states enacted tough transfer laws.[248] Using the sound bite "adult time

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ing of Delinquent Youths, *in* YOUTH ON TRIAL 33 (Thomas Grisso et al. eds., 2000). To ensure that child-defendants who clearly lack the capacity to be tried as adults are not wrongfully sent to the criminal courts, all children should engage in competency hearings prior to any transfer decision. Informal research revealed that only one state, Virginia, requires a hearing on a youth's competence to stand trial before waiver to criminal court. *See* VA. CODE ANN. § 16.1-269.1 (Michie 2003). Arkansas requires a transfer hearing but competence is only one factor in a list of many that is considered by the judge in determining whether to transfer. *See* ARK. CODE ANN. § 9-27-318(g) (Michie 2002).

247. *See generally* LAFAVE, *supra* note 185, § 7.5, at 671–72. These circumstances track the ways in which courts have sought to limit the felony-murder rule to mitigate its harshness. *See id.*

248. In the decade from 1984 to 1994, the number of murders committed by youth nearly tripled from 823 to 2320. The overall serious violent crime rate (including homicide, rape, robbery, and aggravated assault) among youths aged twelve to seventeen also soared — from twenty-nine offenses per 1000 youth in 1986 to fifty-two in 1993. *See* RICHARD A. MENDEL, LESS HYPE, MORE HELP: REDUCING JUVENILE CRIME, WHAT WORKS -- WHAT DOESN'T, Am. Youth Policy Forum, 30–31 (2000). As Frank Zimring has demonstrated:

for adult crime" as their mantra, critics of the juvenile court pushed for laws to make it easier to prosecute juveniles as adults.[249] Their successful efforts produced a legal response to serious and violent juvenile crime, which flushed pre-teens, first-time offenders, and even non-violent offenders into an adult criminal court system that had all but abandoned the concept of rehabilitation. As a result of harsh mandatory minimum sentencing policies, the abolition of parole, and "truth-in sentencing laws," which required convicted defendants to serve most or all of their prison terms, criminal court judges could no longer use youthfulness to mitigate sentences.

These new transfer laws differed from past practices. Historically, transfers had been reserved for older teens who were recidivists or who had committed especially heinous crimes. Since the United States Supreme Court's 1966 decision in *Kent v. United States*,[250] judicial waiver had been the most common approach to transferring juveniles to criminal court.[251] The *Kent* decision enumerated a list of substantive factors to guide judges in making transfer decisions, and many states simply adopted these standards in

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> [T]he most important reason for the sharp escalation in homicide [among offenders 13 to 17] was an escalating volume of fatal attacks with firearms ... That homicide increases are only gun cases has two important implications. First, it would require only a small number of attacks to change the death statistics during the 1985 to 1992 period. Because gunshot wounds are deadly, a relatively small number of woundings can produce a relatively large number of killings .... The second implication of the guns-only pattern is that the hardware used in many attacks seems to be the major explanation for the expanding rate rather than any basic change in the youth population involved in the assaults.

FRANKLIN ZIMRING, AMERICAN YOUTH VIOLENCE 35–36 (1998). For the best introduction to the theory and practice of transfer, see JEFFREY FAGEN & FRANKLIN ZIMRING, THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT (2000). *See generally* Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, 83–135 (2000), for a history of the statutory exclusion of specific offenses, including murder.

249. MENDEL, *supra* note 248. It's hard to pinpoint who coined the phrase "adult time for adult crimes," but the phrase clearly permeated the political scene in the mid-1990s. In fact, virtually every major Republican gubernatorial candidate in the mid-1990s mouthed the words. *See, e.g.*, Laurence Hammack, *'Compassion' May Be Lost Gov. Allen Accepts Report That Proposes Tougher Penalties on Juvenile Offenders*, ROANOKE TIMES & WORLD NEWS, Oct. 6, 1995, at C1; Jon R. Sorensen, *Pataki Plan on Juvenile Offenders Includes Longer; Sentences in Adult Jails*, BUFFALO NEWS, Dec. 10, 1995, at 16A; *Governor Pete Wilson of California Sets State Agenda* (Transcript # 1777-10, Nat'l Pub. Radio Morning Ed., Jan. 9, 1996); Editorial, *The Young Killers: Adult Crimes Warrant Adult Time,* WORCESTER TELEGRAM & GAZETTE, June 10, 1996, at A6; Judy Putnam, *Engler Proposes 'Punks' Do 'Adult Time for Adult Crimes'*, GRAND RAPIDS PRESS, July 27, 1995, at C3. For a history of juvenile transfer laws, dating from the inception of the juvenile court, see David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide,* 92 J. CRIM. L. & CRIMINOLOGY 641, 699 (2002).

250. 383 U.S. 541 (1966).

251. *See id.* at 556.

their juvenile codes verbatim or with minor modifications.[252] The 1990s revolution in the transfer laws, however, differed from past efforts to try more children as adults in two significant ways: 1) the decision to transfer was less often a judicial decision; it was now increasingly the province of prosecutors or the legislatures; and 2) younger children could now be tried as adults for a wider array of offenses.[253]

Although judicial waivers used to make up the bulk of the children in adult court, today, prosecutorial and legislative waivers predominate. In 1997, for example, an estimated 8400 juveniles were waived from juvenile court to adult court by judges.[254] Because prosecutorial waivers and legislative waivers, however, are more difficult to track, it is currently not known how many total youths under eighteen years of age are prosecuted as adults each year, but at least one estimate places the number as high as 200,000.[255] A recent multi-jurisdictional study of adult courts in eighteen large urban counties revealed that eighty-five percent of all transfer decisions during a six-month period from January 1, 1998 to June 30, 1998 were made by prosecutors (45%) and/or legislatures (40%), instead of judges.[256]

The shift from a transfer regime in which judges made most of the decisions to one in which prosecutors and legislatures do the deciding necessarily means that the system has become more rigid and less flexible in deciding which juveniles stay in juvenile court and which are tried as adults. Legislative waivers are typically based on only two factors: the minor's age at the time of the offense and the nature of the alleged offense.[257] Prosecutorial

252. *Id.* at 566–67. These factors include the seriousness of the offense, prosecutorial merit, the sophistication and maturity of the child, the child's past history of delinquency, responses to prior juvenile court efforts at rehabilitation, and the ability of the juvenile court's dispositions to rehabilitate the child and protect the public. *Id.*

253. Twenty-three states now have at least one provision, typically governing children charged with murder or other violent felonies, which places no bottom age limit for juveniles to be transferred to criminal court. *See* SNYDER & SICKMUND, *supra* note 209, at 106.

254. EILEEN POE-YAMAGATA & MICHAEL A. JONES, BUILDING BLOCKS FOR YOUTHS, AND JUSTICE FOR SOME 2 (1998), *available at* http://www.buildingblocksforyouth.org/justice forsome.

255. *Id.* at 13; *see* SNYDER & SICKMUND, *supra* note 209, at 106. Not all of the estimated 200,000 youths under eighteen who are prosecuted as adults each year are "transfers." Many of these youths come from the thirteen states where the upper age limit for juvenile court jurisdiction is fifteen or sixteen, meaning that their cases originate in adult court and that they are considered "adults" as soon as they are arrested for a crime. *Id.*

256. JOLANTA JUSZKIEWICZ, BUILDING BLOCKS FOR YOUTHS, YOUTH CRIME/ADULT TIME: IS JUSTICE SERVED? (2001), http://www.buildingblocksforyouth.org/ycat/ycat. html.

257. BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 210 (1999).

waiver decisions are often based on three factors: 1) the minor's age; 2) the seriousness of the alleged offense; and 3) the minor's criminal history.[258] The minor's amenability to treatment, social and emotional age, family background, and mental and intellectual capacity are not often available at the time that prosecutors decide to seek a transfer.[259] Waiting to acquire such information is often a luxury most prosecutors believe they cannot afford, especially in cases in which a victim has died.

We agree that in many cases, the seriousness of the offense should be a significant factor in the transfer decision. Many felony-murders, however, are not among the most "serious offenses." The underlying crimes can be less serious but can still result in the unintentional or unforeseeable result of the victim's death. For this reason, we propose that children charged with felony-murder should not be eligible for legislative or prosecutorial waiver, unless the underlying felony could itself have led to a transfer to adult court. This is the rule which has been adopted in New York. For example, in *People v. Roper*,[260] the New York Court of Appeals overturned a juvenile defendant's conviction for felony-murder because the child-defendant could not have been tried for the underlying felony in adult court.[261] The court noted that murder in the first-degree requires "felonious intent," which in felony-murder cases comes from the underlying felony.[262] Since Roper could not be charged as an adult with the "felony" of robbery, he lacked the implied intent necessary for felony-murder.[263]

In judicial waiver hearings, which typically involve a weighing of factors relating to the seriousness of the offense, the minor's criminal history, and the minor's prospects for rehabilitation before reaching the age of majority, there should be a presumption against transferring juveniles to adult court on felony-murder charges; a presumption which can be overcome with evidence that the underlying felony was committed in an aggressive, violent, premeditated, or willful manner. At the very least, minors who are waived to adult court on felony-murder charges should be given the opportunity to have "reverse waiver" hearings, hearings in which criminal court judges have the ability to send juvenile defendants back to juvenile court, either for their trials or for sentencings. Such hearings act as a check against prosecutorial

258. *See* Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1006–07 (1995).
259. *See id.* at 1007–08.
260. 259 N.Y. 170 (1932).
261. *Id.* at 177.
262. *Id.*
263. *Id.*

overcharging and ensure that only the most culpable juveniles are eligible for adult prosecution.[264]

C. *Limiting the Death Penalty and Life Without Parole Sentences in Cases of Juvenile Felony-Murder*

Finally, we believe that felony-murder convictions of sixteen and seventeen-year-olds should be exempted from the death penalty in the twenty-two states[265] that permit it and children of all ages who are convicted of felony-murder should be exempted from the sentence of life without the possibility of parole. Such draconian sentences should be reserved for the most culpable offenders, and both the youth of juvenile defendants and the fact that they committed "felony-murder" should exempt them from this class of offenders.[266] When a reduced level of intent is used to convict, a reduced sentence should be handed down.

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264. Approximately twenty-four states have "reverse waiver" statutes. *See* SNYDER & SICKMUND, *supra* note 209. Such statutes are especially important in jurisdictions that rely extensively on legislative and prosecutorial waivers. In these jurisdictions, reverse waiver can act as a check against overcharging by prosecutors by allowing for an examination of the minor's role in the alleged offense, potential for rehabilitation, and other factors beyond the minor's age, and the seriousness of the charged offense. Reverse waiver statutes also mitigate the consequences of overly broad transfer statutes that sweep into criminal court accomplices, non-violent, first-time offenders, and defendants charged with felony-murder. *See* Tanenhaus & Drizin, *supra* note 249.

265. ABA JUVENILE JUSTICE SYS., CRIMINAL JUSTICE SECTION, FACTSHEET: THE JUVENILE DEATH PENALTY (2003), http://www.abanet.org/crimjust/juvjus/factsheet_general.pdf.

266. In *Atkins v. Virginia*, the United States Supreme Court ruled that the execution of the mentally retarded violates the "cruel and unusual punishment" clause of the United States Constitution. 536 U.S. 304, 321 (2002). Among the reasons cited for this decision was the majority of the Court's belief that the mentally retarded, because of their limited mental capacity, were less culpable than adult offenders of average intelligence. *Id.* In the wake of *Atkins*, the dissent of Justices Stevens, Ginsburg, and Breyer to the denial of certiorari in the case of Toronto Patterson, urged the full Court to revisit the issue of whether it is still constitutional to execute children over the age of fifteen. Patterson v. Texas, 536 U.S. 984 (2002) (Stevens, J., dissenting). Many of the same arguments for reduced culpability of the mentally retarded have already been argued in the cases of juveniles on death row. *See In re* Stanford, 537 U.S. 968 (2002) (Stevens, J., dissenting); Brief for Petitioner on Petition for Writ of Certiorari to the Texas Court of Criminal Appeal, Beazley v. Cockrell, 534 U.S. 945 (2001) (No. 00-10618), *available at* http://www.abanet.org/crimjust/juvjus/Beazleycert02.pdf; Brief for Petitioner on Petition for Writ of Certiorari to the Texas Court of Criminal Appeal, Patterson v. Cockrell, 536 U.S. 967 (2002) (No. 01-10028), *available at* http://www.abanet.org/crimjust/juvjus/supreme%20court%20petition.pdf.

VI. CONCLUSION

The cases which we have highlighted in this article—Lionel Tate, Nathaniel Brazill, and Jonathan Miller—highlight the unfairness of applying the felony-murder doctrine to cases involving children and adolescents, and illustrate the devastating consequences that result when the doctrine is used to secure murder convictions against youthful defendants in criminal court. In Lionel Tate's case, a boy who may not have been competent to stand trial for murder—he was unable to decide on his own whether to take a reasonable plea offer or roll the dice by going to trial—was convicted and sentenced to life in prison without parole. In Nathaniel Brazill's case, a boy whose emotions overcame his judgment and who, upon reflection, could not even understand what had caused him to kill his favorite teacher, was convicted and sentenced to twenty-eight years in prison. In Jonathan Miller's case, a boy who neither intended to kill his victim, nor could have foreseen that the boy would die from a punch to the head, was convicted and sentenced to life in prison. Applying the felony-murder rule in such cases borders on "cruel and unusual punishment" because the connection between culpability and punishment is severed in two ways. By allowing a defendant to be punished for a crime he did not intend to commit and for results he did not intend to cause, the rule takes a first cut at the connection between culpability and punishment. When the rule is applied to children and teenagers, the rule takes a second, and perhaps even deeper, cut—it denies the historical connection between youth, culpability, and punishment, a connection which is supported by developmental psychological research and more recent studies of the structure and function of the teenage brain.[267]

The felony-murder rule has proven to be extremely resistant to the many attacks which have been leveled against it throughout the ages. It continues not only to survive, but to thrive, in many jurisdictions throughout the United States. It should no longer be allowed to thrive in cases involving children and teenagers.

267. *See* Kim Taylor-Thompson, *States of Mind, States of Development,* 14 STAN. L. & POL'Y REV. 143 (2003) (arguing for a developmental analysis of mens rea concepts).