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**Equal Sentences for Unequal Participation:  
Should the Eighth Amendment Allow All Juvenile  
Murder Accomplices to Receive Life Without  
Parole?**

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## Articles

BRIAN R. GALLINI\*

### Equal Sentences for Unequal Participation: Should the Eighth Amendment Allow All Juvenile Murder Accomplices to Receive Life Without Parole?

“**T**he bare fact that a sentence is within the maximum which the legislature has prescribed does not prevent it from violating the constitutional provision forbidding the imposition of cruel and unusual punishments.”<sup>1</sup>

The Eighth Amendment of the U.S. Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>2</sup> Although initially construed narrowly to prohibit only barbarous

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<sup>1</sup> *Barber v. Gladden*, 309 P.2d 192, 196 (Or. 1957), *cert. denied*, 359 U.S. 948 (1959).

<sup>2</sup> U.S. CONST. AMEND. VIII. Initially, the Eighth Amendment did not apply to the states. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947) (plurality). In *Robinson v. California*, however, the Court held that the Eighth Amendment applies to the states through the Fourteenth Amendment. 370 U.S. 660, 667 (1962).

forms of punishment such as torture,<sup>3</sup> the Eighth Amendment now prohibits sentences that are either contrary to the evolving standards of decency in our maturing society,<sup>4</sup> or disproportionate to the commission of a defendant's underlying offense.<sup>5</sup> Although, at first blush, the Amendment's development suggests that it serves to limit a state's power to punish, a cursory review of pertinent Supreme Court decisions reveals that the Eighth Amendment poses a low constitutional hurdle.<sup>6</sup>

Thus, the task of determining what comprises cruel and unusual punishment pursuant to the Eighth Amendment remains formidable.<sup>7</sup> The Supreme Court's vacillation on key punishment issues, like the constitutionality of imposing the

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<sup>3</sup> *Wilkerson v. Utah*, 99 U.S. 130, 135 (1879).

<sup>4</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>5</sup> *Ewing v. California*, 538 U.S. 11, 23–24 (2003).

<sup>6</sup> *See, e.g., id.* at 30–31 (upholding a twenty-five-year-to-life sentence imposed pursuant to a California recidivist statute for felony grand theft (i.e., stealing three golf clubs worth approximately \$1200)); *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (upholding two consecutive twenty-five-year-to-life sentences under a California recidivist statute for two counts of petty theft); *Harmelin v. Michigan*, 501 U.S. 957, 995–96 (1991) (holding that a sentence of life without parole for possession of 672 grams of cocaine did not violate the Eighth Amendment); *Resweber*, 329 U.S. at 464 (holding that it was not “cruel and unusual” to force petitioner to undergo execution of second death warrant after administration of first failed as a result of a mechanical accident); *Graham v. West Virginia*, 224 U.S. 616, 631 (1912) (affirming life sentence for a horse thief pursuant to a West Virginia recidivist statute and noting that petitioner could not “maintain[] that cruel and unusual punishment has been inflicted”).

<sup>7</sup> *See infra* note 100; *see also, e.g., Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (holding that cuffing an inmate to a hitching post for longer than necessary to restore order violates the Eighth Amendment); *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002) (holding that it is “cruel and unusual” to execute the mentally retarded); *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986) (finding it unconstitutional to execute an insane defendant); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that the death penalty is disproportional to the crime of rape); *Robinson*, 370 U.S. at 667 (holding that a ninety-day sentence was excessive for narcotics addiction); *Trop*, 356 U.S. at 101 (holding that denationalization as a punishment is barred by the Eighth Amendment); *Weems v. United States*, 217 U.S. 349, 381–82 (1910) (holding that punishment of fifteen years jailed in irons at hard and painful labor for the crime of falsifying records was excessive); *In re Medley*, 134 U.S. 160, 171 (1890) (“[T]he solitary confinement to which the prisoner was subjected . . . was an additional punishment of the most important and painful character, and is, therefore forbidden by . . . the Constitution of the United States.”); *see also* *Faulkner v. State*, 445 P.2d 815, 822 (Alaska 1968) (reversing thirty-six-year sentence imposed upon defendant convicted of passing checks with insufficient funds).

death penalty on both mentally retarded and juvenile offenders, has further confused the meaning of the Eighth Amendment's already imprecise language.<sup>8</sup> No critique of the Eighth Amendment's application to juveniles would be complete without recognizing that states are perhaps equally to blame for the confusion. It took nearly three decades for a majority of states to determine the permissibility of sentencing a juvenile killer to prison for life without parole.<sup>9</sup>

The constitutional boundaries of juvenile life sentences nevertheless remain unclear. Despite litigants' logical expectations that courts would assign a lesser sentence to nonkilling juveniles, courts still impose identical sentences on juvenile offenders who had drastically different roles in the crimes for which they were convicted. Consider the juvenile defendant who aided and abetted in killing his father's shop employee by (1) helping the shooter enter the shop under false pretenses, (2) robbing the shop after the shooter killed the victim, and (3) manipulating the crime scene to make it appear that someone had forcibly entered the shop.<sup>10</sup> In contrast, consider the fourteen-year-old defendant who had a history of sexual and physical abuse and was forced by her boyfriend to lure a man into their house to rob him.<sup>11</sup> After doing so, she left

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<sup>8</sup> Compare *Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment."); *Atkins*, 536 U.S. at 321 ("[T]he Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." (quoting *Ford*, 477 U.S. at 405)), with *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) ("We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age."); *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) ("[W]e cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of [petitioner's] ability convicted of a capital offense simply by virtue of his or her mental retardation alone.").

<sup>9</sup> See *infra* Part II.C and accompanying discussion.

<sup>10</sup> *Dang v. State*, 154 S.W.3d 616, 617–18 (Tex. Crim. App. 2005) (subsequent history omitted).

<sup>11</sup> ACLU OF MICH., SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS 13 (2004), <http://www.aclumich.org/pubs/juvenilelifefers.pdf> [hereinafter SECOND CHANCES]. The defendant, Barbara Hernandez, and her abusive boyfriend, the principal, received the same life without parole sentence. *Id.*; cf. *Toomey v. Clark*, 876 F.2d 1433, 1435 (9th Cir. 1989) (pregnant sixteen-year-old received life in prison for helping her boyfriend lure a robbery victim, who the boyfriend unexpectedly shot). According to Hernandez's sister, the boyfriend "locked [Hernandez] up in a bedroom with no clothes, he

the room and her boyfriend stabbed the man to death.<sup>12</sup> Notwithstanding their varying participation in the victim's death, both juveniles received sentences of life without parole.

No court has addressed the federal constitutional significance, if any, of sentencing juvenile murder accomplices who play a minimal role in a murder to life in prison without parole. No precedent clarifies whether it is cruel and unusual to impose life in prison on juvenile offenders after a first-degree murder conviction imposed pursuant to either the felony-murder doctrine or accomplice/coconspirator theories of liability, despite their minimal involvement in the victim's death. To investigate these unanswered questions, Part I of this Article explores the imposition of life without parole sentences on juvenile nonkillers convicted of murder via either the felony-murder doctrine or accomplice liability.<sup>13</sup> Part I illustrates the problematic nature of imposing these sentences on less-culpable juvenile nonkillers convicted of first-degree murder by offering examples of defendants who received identical sentences yet played different roles in the victims' deaths. Part II outlines the evolution of the Supreme Court's interpretation of the Eighth Amendment's "cruel and unusual" clause before examining the Court's application of the clause to juveniles. Part II concludes by evaluating the application of the Supreme Court's Eighth Amendment jurisprudence to juvenile punishment in the lower courts.

Finally, Part III asserts that automatically sentencing juvenile nonkillers to life in prison without parole precludes lower courts from exercising judicial discretion in order to individualize juveniles' sentences. Part III then argues that the Supreme Court's Eighth Amendment jurisprudence provides no remedy because it is ill-equipped to handle a juvenile nonkiller's Eighth

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threw an ashtray at her, [and] he burned her with cigarettes." Karen Bouffard, *Group Aims to Set Abuse Victims Free; Clemency Petitions Ready for Inmates Who Murdered*, DETROIT NEWS, Oct. 24, 2005, at 1B.

<sup>12</sup> *Id.*; see Karen Bouffard & Jennifer Brooks, *Engler Won't Free 13 Battered Women; Abuse Wasn't Allowed as Defense at Their Trials*, DETROIT NEWS, Dec. 18, 2002, at 1A ("Hernandez left home to escape an abusive mother and stepfather. Her father was in prison for rape. Her stepfather routinely molested her.").

<sup>13</sup> At least two commentators more broadly examined whether the felony-murder rule should apply to juveniles at all. Steven A. Drizin & Allison McGowen Keegan, *Abolishing the Use of the Felony-Murder Rule When the Defendant Is a Teenager*, 28 NOVA L. REV. 507 (2004).

Amendment challenge to a sentence of life imprisonment without parole following a murder conviction given pursuant to felony murder or accomplice liability. Taken together, Part III contends, these deficiencies allow for further erosion of the ideals underlying juvenile punishment.

## I

### THE PROBLEM OF IMPOSING LIFE WITHOUT PAROLE SENTENCES ON JUVENILE NONKILLERS

As determinate sentencing systems grow, so do examples of sentences imposed without individualized consideration of the circumstances surrounding a defendant's participation in the crime. Murder prosecutions of juvenile nonkillers via accomplice liability or the felony-murder doctrine illustrate two examples of the sometimes inequitable results produced by harsh determinate sentences. Accordingly, Section A examines the unique problem of the felony-murder doctrine's application both to juvenile principals and accomplices. To help focus the issue outside the context of felony murder, Section B thereafter offers case studies at opposite ends of the participation spectrum.<sup>14</sup>

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<sup>14</sup> For an interesting compilation and discussion of juveniles serving life without parole sentences in the state of Michigan, see *SECOND CHANCES*, *supra* note 11.

### A. *The Unique Problem of Felony Murder*

#### 1. *Juvenile Principals Convicted of Felony Murder*<sup>15</sup>

The typical formulation of the felony-murder rule imposes first-degree murder liability upon a defendant who causes a death during the commission or attempted perpetration of an enumerated felony.<sup>16</sup> As a general rule, the Eighth Amendment permits sentencing of juvenile principals convicted of felony

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<sup>15</sup> The first, and perhaps most obvious, question is how juveniles end up in adult court. Various methods exist for transferring a juvenile into adult criminal court, including: (1) waiver; (2) direct file/statutory exclusion; and (3) once-an-adult-always-an-adult statutes. Enrico Pagnanelli, Note, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons*, 44 AM. CRIM. L. REV. 175, 181 (2007); Scott C. Zarzycki, Note, *A Current Look at Ohio's Juvenile Justice System on the 100th Anniversary of the Juvenile Court*, 47 CLEV. ST. L. REV. 627, 646 (1999). Regardless of the method for transferring a juvenile into adult criminal court, a juvenile's commission of felony murder has historically—and not surprisingly—always formed the basis for prosecution in adult court. *E.g.*, WIS. STAT. § 938.18(1)(a) (2007) (stating that a petition for waiver may be filed if the juvenile committed, *inter alia*, felony murder on or after the juvenile's fourteenth birthday); *see also In re Michael B.*, 650 A.2d 1251, 1256–59 (Conn. App. Ct. 1994) (affirming juvenile court's decision to transfer respondent to adult court following the juvenile court's finding of probable cause that respondent committed felony murder by shooting to death a mother, her son, and their family dog during a burglary at their home); *State v. Gribble*, 655 S.W.2d 196, 198 (Tenn. Ct. App. 1983) (“[A] juvenile is triable as an adult for the offense of ‘murder’ when the offense is ‘felony-murder’ regardless of whether he is triable as an adult for the underlying felony.”); *Snodgrass v. State*, 406 N.E.2d 641, 642 (Ind. 1980) (noting that felony murder is an offense that, when committed by a child, would serve to characterize the child as an adult). *But cf. People v. Smith*, 547 N.Y.S.2d 150, 153 (N.Y. App. Div. 1989) (holding that juvenile defendant may be convicted of felony murder only if the underlying felony constituted a felony for which the juvenile could have been held criminally responsible as an adult).

<sup>16</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.06, 556–71 (4th ed. 2006). The origins of the felony-murder rule are both “questionable,” *People v. Aaron*, 299 N.W.2d 304, 307 (Mich. 1980), and “obscure,” Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 764 (1999). The early felony-murder rule arose from scholarly writing, rather than the common law, and was rarely applied to cases. *See Guyora Binder, The Origins of the American Felony-Murder Rules*, 57 STAN. L. REV. 59, 64 (2004) (observing that the first true felony-murder rule did not appear until the nineteenth century in America). In fact, in early England, almost *all* felonies potentially were punishable by death. *Id.* Thus, it made little difference to a felony murderer whether he was executed for murder or the underlying felony. *Aaron*, 299 N.W.2d at 310–11. *Contra* Leonard Birdsong, *Felony Murder: A Historical Perspective by Which to Understand Today's Modern Felony Murder Rule Statutes*, 32 T. MARSHALL L. REV. 1, 13 (2006) (asserting that execution rates in England varied greatly and likely were not as widespread as commonly believed).

murder to life in prison without parole.<sup>17</sup> For example, one court imposed a life sentence without possibility of parole for a sixteen-year-old defendant who was convicted of first-degree felony murder after he shot an expectant mother following a car jacking;<sup>18</sup> another court imposed a sentence of life without parole *plus* sixty-two years on juvenile defendant who, at age sixteen, committed kidnapping, aggravated robbery, aggravated sexual battery, and felony murder.<sup>19</sup>

An instructive exception to this rule is *People v. Dillon*.<sup>20</sup> The defendant in *Dillon*, a seventeen-year-old high school student, was convicted following a jury trial of first-degree felony murder after he and several others attempted to steal marijuana from a marijuana farm, during which defendant panicked and fatally shot a man who was guarding the farm.<sup>21</sup>

Defendant appealed, contending, *inter alia*, that his sentence of life imprisonment violated the “cruel or unusual punishment[]” clause of the California Constitution.<sup>22</sup> At the outset of its analysis, the California Supreme Court observed that the felony-murder rule “condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable,” and, correspondingly, “the Legislature has provided only one punishment scheme for all homicides occurring during the commission of or attempt to commit an

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<sup>17</sup> *E.g.*, *Commonwealth v. Carter*, 855 A.2d 885, 892 (Pa. 2004) (upholding juvenile’s life sentence for felony murder); *Tate v. State*, 864 So. 2d 44, 54 (Fla. 4th Dist. Ct. App. 2003) (reversing and remanding on other grounds but “reject[ing] the argument that a life sentence without the possibility of parole is cruel or unusual punishment on a twelve-year-old child and that it violates [a]rticle I, [s]ection 17 of the Florida Constitution and the Eighth Amendment of the United States Constitution”).

<sup>18</sup> *People v. Launsbury*, 551 N.W.2d 460, 463–64 (Mich. App. 1996).

<sup>19</sup> *State v. Taylor*, No. 02C01-9501-CR-00029, 1996 WL 580997, at \*24 (Tenn. Crim. App. Oct. 10, 1996).

<sup>20</sup> 668 P.2d 697 (Cal. 1983).

<sup>21</sup> Specifically, defendant and seven other boys entered the victim’s farm with the intent to steal his marijuana. *Id.* at 701. After climbing the hill toward the victim’s farm, they split into pairs and spread out around a field. *Id.* Upon seeing one of the victim’s brothers tending to the plants, the boys elected to wait, prompting at least two to give up altogether. *Id.* As one of the boys attempted to return to the farm, he accidentally twice discharged his weapon. *Id.* Amidst the chaos, the victim had circled behind defendant and was approaching him with a shotgun. *Id.* As the victim drew near, defendant discharged his weapon, hitting the victim nine times; the victim died from his wounds several days later. *Id.*

<sup>22</sup> *Id.* at 700.

offense listed [by statute] regardless of the defendant's individual culpability with respect to that homicide."<sup>23</sup> The court continued, "in some first degree felony-murder cases this Procrustean penalty may violate the prohibition of the California Constitution against cruel or unusual punishments."<sup>24</sup>

With its disdain for the felony-murder rule as background, the court proceeded to evaluate defendant's challenge by using a proportionality analysis.<sup>25</sup> In doing so, it emphasized the importance of considering the nature of the offense (i.e., by evaluating "the totality of the circumstances surrounding the commission of the offense") and the nature of the offender (i.e., by assessing defendant's "age, prior criminality, personal characteristics, and state of mind").<sup>26</sup> With those factors in mind, the court observed, "a punishment which is not disproportionate in the abstract is nevertheless constitutionally impermissible if it is disproportionate to the defendant's individual culpability."<sup>27</sup>

Turning to the facts of the case, the *Dillon* court gave credence to defendant's trial testimony, which presented a "plausible picture . . . of the evolution of defendant's state of mind during these events—from youthful bravado, to uneasiness, to fear for his life, to panic."<sup>28</sup> Additionally, in evaluating defendant's specific circumstances, the court highlighted trial testimony from a clinical psychologist who stated that defendant was both intellectually and emotionally immature.<sup>29</sup> This, alongside the jury's apparent reluctance to

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<sup>23</sup> *Id.* at 719.

<sup>24</sup> *Id.*

<sup>25</sup> To evaluate a proportionality challenge in California, a court considers the following "techniques" outlined in *In re Lynch*, 503 P.2d 921 (Cal. 1972): (1) the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society, noting in the presence of aggravating circumstances or whether the offense was nonviolent, *id.* at 931; (2) a comparison of "the challenged penalty with the punishments prescribed in the *same jurisdiction* for *different offenses* which, by the same test, must be deemed more serious," *id.*; and (3) "a comparison of the challenged penalty with the punishments prescribed for the *same offense* in *other jurisdictions* having an identical or similar constitutional provision," *id.* at 932.

<sup>26</sup> *Dillon*, 668 P.2d at 720–21.

<sup>27</sup> *Id.* at 721.

<sup>28</sup> *Id.* at 722–23.

<sup>29</sup> *Id.* at 723.

convict defendant<sup>30</sup> and the limited punishment given to defendant's cohorts,<sup>31</sup> led the court to conclude that "the punishment of this defendant by a sentence of life imprisonment as a first degree murderer violates article I, section 17, of the [California] Constitution."<sup>32</sup> Although based on a state constitution, the *Dillon* decision suggests that the felony-murder doctrine may provide a basis for juveniles convicted of felony murder to argue for lesser sentences.<sup>33</sup>

## 2. Punishing Juvenile Nonkillers Convicted of Felony Murder

No opinion provides explicit guidance on whether the Eighth Amendment to the Federal Constitution permits sentencing a juvenile nonkiller convicted of felony murder to life in prison without parole. Several juvenile felony-murder cases illustrate the problem of imposing that sentence on juvenile nonkillers, regardless of their actual role in the victim's death. For example, compare the facts in the following two cases: In *People v. Petty*,<sup>34</sup> the Michigan Supreme Court affirmed a life without parole sentence imposed on fifteen-year-old Gregory Petty, who encouraged his twelve-year-old companion to commit armed robbery.<sup>35</sup> During the course of the robbery, the twelve-year-old shot and killed the victim because the defendant threatened to kill him if he did not shoot the victim.<sup>36</sup>

In contrast, the defendant in *Kaiser v. Hannigan*<sup>37</sup> was merely present at the time of the victim's death. Specifically, seventeen-

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<sup>30</sup> During its deliberations, the jury specifically asked if it could bring in a verdict of second-degree murder or manslaughter even if it found that defendant's killing occurred during an attempted robbery. *Id.* at 724.

<sup>31</sup> *Id.* at 727.

<sup>32</sup> *Id.*; *cf.* *State v. Broadhead*, 814 P.2d 401, 409 (Idaho 1991) ("As we read the lead opinion and those of the concurring justices, the result was dictated more by the California court's consideration of the felony murder rule than it was by the defendant's age."), *overruled on other grounds*, *State v. Brown*, 825 P.2d 482 (Idaho 1992).

<sup>33</sup> See Drizin & Keegan, *supra* note 13, at 531 (arguing, at a minimum, that the felony-murder rule was never intended to punish children under the age of fourteen because children that age are incapable of forming a criminal intent).

<sup>34</sup> 665 N.W.2d 443 (Mich. 2003).

<sup>35</sup> *Id.* at 445.

<sup>36</sup> *Id.* Defendant's twelve-year-old companion pled guilty to second-degree murder and received a "delayed sentence." *Id.* at 445 n.1.

<sup>37</sup> No. CIV.97-3239-DES, 1999 WL 1289470 (D. Kan. Dec. 16, 1999), *aff'd*, *Kaiser v. Nelson*, 229 F.3d 1163, 2000 WL 1125608 (10th Cir. 2000).

year-old defendant Joshua Kaiser and triggerman Jason Schaeffer absconded from a juvenile drug-treatment facility and conspired to steal a car.<sup>38</sup> Armed with an unloaded sawed-off shotgun, Schaeffer, along with defendant, spotted the victim starting his car.<sup>39</sup> Although defendant suggested they simply steal the car, Schaeffer insisted on kidnapping the victim by forcing him into the trunk.<sup>40</sup> The trio subsequently drove out to the country, where Schaeffer stopped the car, made the victim stand facing away from him, and then shot him in the back of the head.<sup>41</sup> Notwithstanding his comparatively lesser role in the victim's death, Kaiser—like Petty—received a life sentence.<sup>42</sup> Again, however, neither of these representative opinions provide any Eighth Amendment analysis and therefore serve only to provide illustrative examples of juveniles who receive identical sentences notwithstanding their disparate roles in the victim's death.

Even the few opinions that provide some remote guidance on the level of participation necessary to sustain a juvenile nonkiller's felony-murder conviction and life without parole sentence make apparent the need for clearer constitutional boundaries. In *People v. Cavitt*,<sup>43</sup> seventeen-year-old James Freddie Cavitt and two other juveniles, seventeen-year-old Mianta McKnight and sixteen-year-old Robert Williams, planned to burglarize McKnight's house where she lived with her stepmother.<sup>44</sup> To commence the robbery, McKnight let Cavitt and Williams into the house where the boys threw a sheet over McKnight's stepmother, and secured her with rope, duct tape, and plastic cuffs.<sup>45</sup> While Cavitt and Williams secured the stepmother, they repeatedly punched her in the back to quiet

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<sup>38</sup> *Id.* at \*1.

<sup>39</sup> *Id.* Although the shotgun was not loaded, Schaeffer had shells in his pocket.  
*Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Kaiser*, 2000 WL 1125608 (noting that Kaiser received life for aggravated kidnapping, life for felony murder, fifteen years to life for aggravated robbery, and one to five years for unlawful use of a weapon); *State v. Kaiser*, 918 P.2d 629, 632 (Kan. 1996) (same). Nothing in any of the *Kaiser* opinions suggests that Kaiser will ever be eligible for parole.

<sup>43</sup> 91 P.3d 222 (Cal. 2004).

<sup>44</sup> *Id.* at 226.

<sup>45</sup> *Id.*

her.<sup>46</sup> The pair then ransacked the house, tied up McKnight next to her stepmother, and left under the impression that the stepmother was still breathing.<sup>47</sup> McKnight's stepmother subsequently died from asphyxiation.<sup>48</sup>

Cavitt and Williams were convicted following a jury trial of felony murder notwithstanding their contention that McKnight killed her stepmother out of hatred *after* the pair left the house.<sup>49</sup> In affirming defendants' convictions, the California Supreme Court held that "the felony-murder rule does not apply to nonkillers where the act resulting in death is completely unrelated to the underlying felony other than occurring at the same time and place."<sup>50</sup> Thus, "there must be a logical nexus—i.e., more than mere coincidence of time and place—between the felony and the act resulting in death before the felony-murder rule may be applied to a nonkiller."<sup>51</sup> The court clarified that regardless of whether the nonkiller was present at the time of the victim's death, a temporal relationship between the underlying felony and the homicide exists so long as the felony and the killing are part of one continuous transaction.<sup>52</sup>

Turning to the facts of the case, the court held that a logical nexus existed between the burglary and the murder.<sup>53</sup> Without considering Cavitt's age, the court reasoned that "the crimes involved the same victim, occurred at the same time and place,

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<sup>46</sup> *Id.* (noting that McKnight's stepmother "sustained extensive bruising to her face, shoulders, arms, legs, ankles and wrists, consistent with blunt force trauma").

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 225. McKnight claimed that her stepmother was not breathing and that she then called her father who called the police. *Id.* at 226. Although medics were able to get a heartbeat, McKnight's stepmother suffered brain damage and later died from asphyxiation caused in part by her injuries. *Id.*

<sup>49</sup> *Id.* at 227. Cavitt was also convicted of personally inflicting great bodily injury during the commission of a murder. *Id.* Although he received a twenty-five-year-to-life sentence—as opposed to life without parole—the analysis underlying the court's decision further focuses the inquiry on how much a juvenile nonkiller must participate in the underlying felony preceding the killing in order to sustain a conviction for felony murder. *See id.* (noting Cavitt's sentence); *see also* Julie N. Lynem, *Man Convicted of Murder in '95 Brisbane Slaying*, S.F. CHRON., June 19, 1999, at A16 (reporting that the sentencing court spared Cavitt from a sentence of life in prison without parole because of Cavitt's age at the time of the killing and his expression of remorse).

<sup>50</sup> *People v. Cavitt*, 91 P.3d 222, 227 (Cal. 2004).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 227, 234.

<sup>53</sup> *Id.* at 231.

and were each facilitated by binding and gagging [the stepmother].”<sup>54</sup>

At first blush, the California Supreme Court’s pronouncement that “a nonkiller cannot be liable under the felony-murder rule where the killing has no relation to the felony other than mere coincidence of time and place”<sup>55</sup> seems to address the need for each co-felon to participate in some meaningful way in the killing in order to sustain a conviction and corresponding life without parole sentence. Yet, the amorphous “coincidence of time and place” language associated with this “logical nexus” test provides more questions than answers. Although subsequent opinions suggest that the participation threshold is low,<sup>56</sup> litigants and commentators are nonetheless left to wonder what specific role, if any, a juvenile’s age serves in the analysis.

### B. Juvenile Murder Accomplices

The imposition of a life without parole sentence on a juvenile nonkiller convicted of murder as an accomplice or coconspirator raises similar constitutional problems to those presented by juvenile felony-murder cases.<sup>57</sup> For example, the defendants in *Swinford v. State* and *People v. Miller* were merely present when the victims were killed, whereas the defendants in *Salinas v. State* and *People v. Jensen* contributed extensively to the victims’ deaths. Yet, notwithstanding their varying levels of participation, the applicable law mandated that all defendants receive a life without parole sentence.

#### 1. Minimal Participation: Darla Jo Swinford

“On December 28, 1990, twenty-two days after her fourteenth birthday, Darla Jo Swinford was present when her eighteen [-]year-old boyfriend shot and killed a young man whom Darla

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<sup>54</sup> *Id.* at 236.

<sup>55</sup> *Id.* at 231.

<sup>56</sup> *See, e.g.,* *People v. Dominguez*, 140 P.3d 866, 878 (Cal. 2006) (“Liability for felony-murder . . . extends to those who knowingly and purposefully participate in the underlying felony even if they take no part in the actual killing.”).

<sup>57</sup> *See infra* note 296 and accompanying text (discussing the Ninth Circuit’s conclusion in a 1996 decision that the evolving standards of decency did not preclude a life without parole sentence imposed upon a fifteen-year-old murder accomplice).

had dated.”<sup>58</sup> Swinford began dating the triggerman, George Johnson, Jr., at the age of twelve.<sup>59</sup> After Johnson returned from a trip to Florida with a friend and soon-to-be accomplice, he learned that Swinford—now fourteen—had initiated a relationship with the victim, Jamie Medlin, a Horn Lake, Mississippi, teenager.<sup>60</sup>

Out of jealousy, Johnson sought to take action against Medlin.<sup>61</sup> To do so, Johnson “told Swinford that he wanted to meet and talk with Jamie Medlin. Swinford informed Jamie Medlin of Johnson’s wishes and then arranged for them to meet behind a Malone & Hyde factory in DeSoto County.”<sup>62</sup> During the meeting, Swinford “suspected trouble” when she saw the gun but, rather than seeking help, she remained in Medlin’s car while “Johnson blew Jamie Medlin’s face away with a close-range blast from [a] borrowed shotgun.”<sup>63</sup> Two days after Swinford fled with Johnson and his accomplice, the trio was arrested in Florida.<sup>64</sup> Following a jury trial, Swinford was convicted of aiding and abetting Johnson in the commission of Medlin’s murder, for which she received a life sentence.<sup>65</sup>

Although appellate counsel for Swinford failed to challenge the duration of her sentence,<sup>66</sup> counsel did contend that the trial court should have announced its reasons on the record for declining to impose an alternative criminal sanction on Swinford

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<sup>58</sup> Swinford v. State, 653 So. 2d 912, 918 (Miss. 1995) (Banks, J., concurring in part and dissenting in part). In response to the dissent’s characterization of Swinford’s involvement, the majority, in holding that sufficient evidence existed to support a guilty verdict, notes: (1) that “Swinford testified that she suspected trouble when she saw Johnson arrive with a gun”; (2) “[s]he neither tried to stop the discussion or leave for help”; and (3) “she subsequently traveled with Johnson and Branum to Florida with packed bags.” *Id.* at 915 (majority opinion).

<sup>59</sup> *Id.* at 913.

<sup>60</sup> *Id.* at 913–14.

<sup>61</sup> *Id.* at 914.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 914–15. Johnson and his accomplice, without Swinford’s help, dragged the body into the nearby woods. *Id.* at 914.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* There is no indication in the *Swinford* opinion that defendant will have the opportunity to seek parole.

<sup>66</sup> Counsel for Swinford is an eminent domain attorney. See Attorneys—Smith, Phillips, Mitchell, Scott & Nowak, <http://www.smithphillips.com/attorneys.php?attorney=5> (last visited Nov. 24, 2008).

as a youth offender.<sup>67</sup> Despite the clear absence of on-the-record reasons from the trial court, the Mississippi Supreme Court merely “admonish[ed]” the trial court for its failure and noted that this case did not present the type of special circumstances necessary to invoke the requested alternative sentence.<sup>68</sup> Instead, the court observed without further analysis that Swinford “was a typical Horn Lake teenager” who did not merit an alternative sentence.<sup>69</sup>

## 2. *Minimal Participation: Leon Miller*

On November 19, 1997, two victims were shot and killed outside a Chicago apartment complex.<sup>70</sup> Four people were charged for their involvement in the crime, including fifteen-year-old Leon Miller who served as a “lookout.”<sup>71</sup> For his role in the victims’ deaths, a jury convicted Miller of murder.<sup>72</sup> Yet,

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<sup>67</sup> *Swinford*, 653 So. 2d at 917. The Mississippi Youth Court Act enabled the trial judge to “in his discretion, commit such child to the county jail for any term not in excess of one (1) year;” suspend sentence, commit the child to the custody of the Department of Corrections, or impose a fine as though the child were an adult. *Id.* at 917 (quoting MISS. CODE ANN. § 43-21-159(3) (Supp. 1990)).

<sup>68</sup> *Id.* at 918.

<sup>69</sup> *Id.* (citing *White v. State*, 374 So. 2d 843 (Miss. 1979)). Other than the outcome of the *White* decision, no aspect of that opinion supports the *Swinford* court’s transparent reasoning. See *infra* note 253 and accompanying text (noting that the single paragraph of constitutional analysis in the *White* opinion is “unaccompanied by legal citation or consideration of defendant’s age”).

Moreover, this comment as the basis for a court’s reasoning is particularly egregious given that the court declines to elaborate on who is, in fact, a “typical” Horn Lake teenager. As of the 2000 census, the 7.2-square-mile city of Horn Lake housed a population of 14,099 residents, less than ten percent of whom earned a bachelor’s degree, CityData.com, <http://www.city-data.com/city/Horn-Lake-Mississippi.html> (last visited Nov. 24, 2008), as compared to the Mississippi average of more than eighteen percent and the nationwide average of roughly twenty-seven percent, U.S. Census Bureau, <http://factfinder.census.gov> (follow “Data Sets” hyperlink; then follow “Ranking Tables” hyperlink under “2005 American Community Survey; then follow “R1402 Percent of People Who Have Completed a Bachelor’s Degree” hyperlink) (last visited Nov. 24, 2008). These facts by themselves suggest that there is nothing “typical” about growing up as a Horn Lake teenager. More importantly, even a half-hearted effort to individualize Swinford’s sentence demands a more detailed inquiry into, at a minimum, the role of her age, her background, and psychological condition. In this case, however, the trial court sentenced Swinford without even the benefit of a presentence report. *Swinford*, 653 So. 2d at 918 (Banks, J., concurring in part and dissenting in part).

<sup>70</sup> *People v. Miller*, 781 N.E.2d 300, 302 (Ill. 2002).

<sup>71</sup> *Id.* at 302–03.

<sup>72</sup> *Id.* at 303.

rather than imposing the statutorily required life sentence on Miller, the trial court sentenced him to serve fifty years and held that the Illinois “multiple-murder” statute violated both the Illinois and federal constitutions.<sup>73</sup>

Following the State’s appeal, the Illinois Supreme Court affirmed and, in doing so, engaged in a proportionality analysis to determine whether “the punishment for the offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community.”<sup>74</sup> In concluding “that the penalty mandated by the multiple-murder sentencing statute as applied to this defendant is particularly harsh and unconstitutionally disproportionate,” the court reasoned that: (1) the “multiple-murder” statute prevents a sentencing court from considering the offender’s age or participation level in the crime, (2) the automatic transfer statute required the sentencing court to treat Miller as an adult, and (3) the accountability statute equated Miller with the actual shooter.<sup>75</sup> According to the court, “[w]hen these three statutes converge, a court never considers the actual facts of the crime, including the defendant’s age at the time of the crime or his or her individual level of culpability.”<sup>76</sup>

### 3. *Substantial Participation: Erik Brendan Jensen*

Nathan Ybanez met Erik Brendan Jensen when a mutual friend, Brett Baker, introduced them at a pizzeria in Highlands Ranch, Colorado.<sup>77</sup> Unbeknownst to Jensen when he and Baker

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<sup>73</sup> *Id.* at 303–04. When sentencing Miller, the trial court observed, “I have a 15-year-old child who was passively acting as a look-out for other people, never picked up a gun, never had much more than—perhaps less than a minute—to contemplate what this entire incident is about, and he is in the same situation as a serial killer for sentencing purposes.” *Id.* at 303.

<sup>74</sup> *Id.* at 307.

<sup>75</sup> *Id.* at 308. Notably, the Illinois Supreme Court affirmed the trial court’s holding on the basis of the *state* constitution. *Id.* at 309–10.

<sup>76</sup> *Id.* at 308. In passing, the court also highlighted the distinction between adult and juvenile offenders, noting in particular that, “as a society we have recognized that young defendants have greater rehabilitative potential.” *Id.* at 309. Yet, the court simultaneously cautioned that “[i]t is certainly possible to contemplate a situation where a juvenile offender actively participated in the planning of a crime resulting in the death of two or more individuals, such that a sentence of natural life imprisonment without the possibility of parole is appropriate.” *Id.*

<sup>77</sup> Both Erik Jensen and Nathan Ybanez were profiled as part of PBS Frontline’s recent special entitled “When Kids Get Life.” *Frontline: When Kids Get Life* (PBS

invited Ybanez to join their rock band, Ybanez was enduring significant problems at home, including both physical and sexual abuse.<sup>78</sup> Those problems culminated on June 5, 1998,<sup>79</sup> when Ybanez's mother told him she was sending him to a Christian military school.<sup>80</sup>

That evening, then-seventeen-year-old Jensen, high on marijuana, drove then-sixteen-year-old Ybanez to his apartment, where Ybanez went inside and told Jensen to check on him if did not return in twenty minutes.<sup>81</sup> Approximately thirty minutes later, Jensen went up to the apartment, where Ybanez's mother let him in.<sup>82</sup> As Jensen entered the apartment, however, Ybanez hit his mother in the head with fireplace tongs.<sup>83</sup> Jensen admitted at trial that he provided Ybanez with plastic wrap to suffocate Ybanez's mother and that he "dropped" the fireplace tongs on her.<sup>84</sup> More pointedly, according to trial testimony from Baker, Jensen "told him that he had hit the victim three times in the head with the tongs, and that the last time, the tool

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television broadcast May 8, 2007), available at <http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife> [hereinafter Frontline, Ybanez & Jensen]. The totality of the program's transcript, along with interviews, original video, and analysis remains available on the PBS Web site. *Id.* Given that the opinion issued by the Colorado Court of Appeals provides limited background facts (it declines even to note that Jensen was a juvenile at the time of the crime), this Article makes periodic reference to the PBS interviews to provide a more complete factual context.

<sup>78</sup> Frontline, Ybanez & Jensen, *supra* note 77. The signs of Ybanez's troubled home life prompted Jensen's and Baker's parents to intervene by contacting a social worker, yet no social worker was ever assigned to investigate. *Id.*

<sup>79</sup> The PBS Web site erroneously lists 1996 as the year of the crime, but a review of pertinent news articles clarifies that the crime took place on this date in 1998. *E.g.*, Jason Blevins, *Teen Blames Fear for Role in Slaying of Friend's Mom*, DENVER POST, Aug. 6, 1999, at B2 (noting date of crime was June 5, 1998); Jason Blevins, *Trial Under Way for Teen in Slaying of Friend's Mom*, DENVER POST, Aug. 5, 1999, at B2 (same).

<sup>80</sup> Frontline, Ybanez & Jensen, *supra* note 77. Baker later testified at trial that Ybanez had previously told him he was going to kill his mother that night because she had threatened to send him to school and that Jensen was "scared shitless." *People v. Jensen*, 55 P.3d 135, 138 (Colo. Ct. App. 2001).

<sup>81</sup> *Jensen*, 55 P.3d at 137; Jason Blevins, *Teen Killer Gets Life Term: Jensen Helped Slay Pal's Mom*, DENVER POST, Aug. 12, 1999, at B2 (noting Jensen was seventeen at the time of the killing); Jason Blevins, *Teen Blames Fear for Role in Slaying of Friend's Mom*, DENVER POST, Aug. 6, 1999, at B2 (noting Ybanez was sixteen at the time of the crime).

<sup>82</sup> *Jensen*, 55 P.3d at 137.

<sup>83</sup> *Id.* at 137-38.

<sup>84</sup> *Id.* at 138.

‘got stuck in her head; and when he pulled it out, that’s how the blood got on the ceiling.’”<sup>85</sup> Ybanez completed the killing by using the fireplace tongs to strangle his mother.<sup>86</sup> The pair subsequently called Baker, who helped them clean up the scene.<sup>87</sup> A jury convicted Jensen of first-degree murder, along with conspiracy and accessory charges. Jensen received a sentence of life in prison without parole on the murder charge and concurrent sentences of twenty-four years and six years on the conspiracy and accessory counts.<sup>88</sup>

#### 4. *Substantial Participation: Jorge Alfredo Salinas*

On the evening of July 28, 2001, seventeen-year-old Jorge Alfredo Salinas was at home smoking marijuana with his brother, Lorenzo, and acquaintance, Oscar Villa Sevilla, when Sevilla expressed his desire to steal a car.<sup>89</sup> Salinas retrieved a shotgun, gave it to Sevilla, and the pair walked to a nearby intersection. Sevilla entered the road and pointed the shotgun at Geronimo Morales, driver of the first car that stopped at the intersection.<sup>90</sup> Sevilla and Salinas forced their way into the car; Sevilla got into the driver’s seat and pushed Geronimo to the

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<sup>85</sup> *Id.* This is the testimony that earned Jensen a spot under the heading “Substantial Participation.” Without it, Jensen’s case could easily represent an example of “Minimal Participation.” Interestingly, on that note, the prosecutor initially charged Jensen and Baker as accessories in the murder, but both were released on bail. Frontline, Ybanez & Jensen, *supra* note 77. Baker, however, entered into a plea bargain and agreed to testify against Jensen. *Id.* As part of that testimony, Baker told prosecutors that Jensen knew in advance about the murder and had told Baker he hit Ybanez’s mother with the tongs three times. *Id.* In exchange for his testimony, Baker received total immunity from the murder charges, a shortened preexisting sentence he was serving in a juvenile facility, and an agreement by prosecutors not to revoke his probation stemming from other charges. *Id.* At trial, Jensen denied hitting Ybanez’s mother with the fireplace tongs. Jason Blevins, *In Testimony, Jensen Denies Swinging Tongs at Ybanez*, DENVER POST, Aug. 10, 1999, at B-06.

<sup>86</sup> *Jensen*, 55 P.3d at 138.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* Jensen initially explored plea negotiations for second-degree murder, but they fell through in the wake of the Columbine school shootings. Frontline, Ybanez & Jensen, *supra* note 77; Luke Turf, *Headed for Trouble Erik Wanted to Help His Friend Get Out of the House: He Succeeded—They’re Both in Prison for Life*, DENVER WESTWORD, July 7, 2005, available at <http://www.westword.com/2005-07-07/news/headed-for-trouble/>.

<sup>89</sup> *Salinas v. State*, 163 S.W.3d 734, 737 (Tex. Crim. App. 2005).

<sup>90</sup> *Id.* at 737–38.

passenger seat while Salinas got into the backseat where twenty-one-month-old Leslie Ann Morales sat in her car seat.<sup>91</sup> Initially, Sevilla demanded money from Geronimo but, when Geronimo stated that he did not have any, Sevilla began beating him.<sup>92</sup> Sevilla then stopped the car, dragged Geronimo into an orchard and shot him, after which he stole Geronimo's wallet, a gold ring, and a silver necklace.<sup>93</sup>

Sevilla subsequently returned to the car, and the pair—along with the baby—returned to Salinas's house to pick up Lorenzo.<sup>94</sup> Upon seeing the baby in the car, Lorenzo suggested that they leave her where someone would find her. Sevilla, however, insisted on driving a mile and a half outside of town where he and Salinas took the baby out of the car, still in her car seat, and left her in tall grass.<sup>95</sup> Border patrol officers later recovered her lifeless body on July 29, 2001.<sup>96</sup> In the interim period, before their capture, the three cohorts (1) attempted to sell Geronimo's car, (2) sold the shotgun, and (3) fled to Mexico where they abandoned Geronimo's car after engaging in a car chase with Mexican authorities.<sup>97</sup>

Following his capture on August 3, 2001, Salinas was indicted for, and convicted of, three counts of capital murder and was sentenced to death.<sup>98</sup> In response to his appeal, the Court of Criminal Appeals of Texas affirmed the convictions but reduced Salinas's sentence to life in prison without parole because he was seventeen years old at the time of the crime.<sup>99</sup>

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<sup>91</sup> *Id.* at 738.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* Authorities recovered Geronimo's body on August 1, 2001. *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 738.

<sup>96</sup> *Id.* Leslie Ann died from dehydration, exposure to the elements, and heatstroke. *Id.* Testimony from the patrol officer reflected that the child was in an area where she was not likely to be found. *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Specifically, the three-count indictment charged Salinas with capital murder in the course of a robbery, committing multiple murders in the same criminal transaction, and murder of a child under the age of six. *Id.* at 741 n.3; see Jim Pinkerton, *Teen Arrested in Killing of Man, Baby; Police Seek 2 Other Suspects*, HOUSTON CHRON., Aug. 4, 2001, at A38 (noting date of Salinas's capture).

<sup>99</sup> *Salinas*, 163 S.W.3d at 743. Salinas has not fared well in prison; on August 18, 2004, he stabbed a prison guard thirteen times with a metal rod from a typewriter. Steve McVicker, *Proposal for TVs on Death Row Tuned Out; Backers Say State Is*

The foregoing examples illustrate the problematic nature of applying the extraordinarily harsh penalty of life without parole on juvenile nonkillers who had disparate levels of participation in the victim's death. Indeed, the lack of individualized consideration of each juvenile's participation raises questions about how current Supreme Court Eighth Amendment standards would treat the sentence of life without parole. It is to these questions that this Article now turns.

## II

### THE IMPACT OF THE EIGHTH AMENDMENT ON FEDERAL AND STATE COURTS

This Part of the Article broadly considers the evolution of the Supreme Court's Eighth Amendment jurisprudence and then focuses on the Court's historical treatment of juvenile offenders in the capital context. Finally, this Part considers how lower courts have applied the Supreme Court's Eighth Amendment jurisprudence to juvenile punishment.

#### *A. The Supreme Court's Eighth Amendment Jurisprudence*

The Supreme Court has never precisely defined the phrase "cruel and unusual."<sup>100</sup> The phrase does, however, hold a penal connotation, and its inclusion in the Constitution derives from the English Bill of Rights of 1688.<sup>101</sup> Early interpretations of the clause dating back to 1879 understood the terms "cruel and

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*Ignoring a Tool to Control the Condemned*, HOUSTON CHRON., Sept. 5, 2004, at A1. Amazingly, the guard was not seriously injured. *Id.*

<sup>100</sup> *Compare* *Weems v. United States*, 217 U.S. 349, 368 (1910) ("What constitutes a cruel and unusual punishment has not been exactly decided."); *Howard v. Fleming*, 191 U.S. 126, 136 (1903) ("But it is unnecessary to attempt to lay down any rule for determining exactly what is necessary to render a punishment cruel and unusual . . ."), *with* *Roper v. Simmons*, 543 U.S. 551, 560 (2005) ("The prohibition against 'cruel and unusual punishments,' like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design."); *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988) ("The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category.").

<sup>101</sup> *Trop v. Dulles*, 356 U.S. 86, 99–100 (1958) (noting the principle represented by the "cruel and unusual" phrase is traceable back to the Magna Carta); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) ("Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688.").

unusual” to prohibit only punishments of torture, such as “where the prisoner was drawn or dragged to the place of execution [for treason],” “where he was embowelled alive, beheaded, and quartered [for high treason],” or where a female was burned alive for treason.<sup>102</sup> Accordingly, the Court rejected early assertions that a punishment violated the Eighth Amendment solely because of its excessive duration.<sup>103</sup>

The Court’s approach expanded in 1910, when it recognized in *Weems v. United States* that “it is a precept of justice that punishment for crime should be graduated and *proportioned* to offense.”<sup>104</sup> With that in mind, the Court invalidated a fifteen-

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<sup>102</sup> *Wilkerson v. Utah*, 99 U.S. 130, 135 (1879). Interestingly, even these early interpretations recognized that “the sentence of death” does not inflict cruel and unusual punishment. *Id.* at 137; see *In re Kemmler*, 136 U.S. 436, 447 (1890) (observing that “the punishment of death is not cruel” because the Eighth Amendment “implies there something inhuman and barbarous, something more than the mere extinguishment of life”).

<sup>103</sup> *O’Neil v. Vermont*, 144 U.S. 323, 339–41 (1892) (Field, J., dissenting) (discussing cases). *But cf.* *McDonald v. Commonwealth*, 53 N.E. 874, 875 (1899) (“But it is possible that imprisonment in the state prison for a long term of years might be so disproportionate to the offence as to constitute a cruel and unusual punishment.”). In *O’Neil*, the Court affirmed defendant’s conviction for “selling intoxicating liquor without authority” and corresponding sentence to “pay a fine of \$6140, and the costs of prosecution, taxed at \$497.96, and stand committed until the sentence should be complied with”; and if the “fine and costs, and costs of commitment, ascertained to be 76 cents, the whole aggregating \$6638.72, should not be paid before March 20, 1883, he should be confined at hard labor, in the house of correction at Rutland, for the term of 19,914 days.” 144 U.S. at 330. Although the Court reasoned that the case presented no federal question, *id.* at 335–36, the dissent asserted that the language of the Eighth Amendment prohibited not only sentences involving torture, but also “all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged,” *id.* at 339–40 (Field, J., dissenting).

<sup>104</sup> *Weems*, 217 U.S. at 367 (emphasis added). As later courts would observe, however, “[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence.” *Solem v. Helm*, 463 U.S. 277, 284 (1983). The concept of proportionality dates back to the Magna Carta which, in 1215, dedicated three chapters to emphasizing that fines as a punishment may not be excessive. *Id.* The principle made its way through the common law, beginning with the First Statute of Westminster in 1275, and continuing when prison sentences became common. *Id.* at 285 (citation omitted). The English Bill of Rights reiterated the principle of proportionality and, when the Framers based the language of the Eighth Amendment on the English Bill of Rights, they too incorporated this concept. *Id.* at 285–86.

Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide

year prison sentence, including hard labor, imposed upon a defendant who falsified a public record.<sup>105</sup> Armed with this more discretionary approach to Eighth Amendment issues, the Court in *Trop v. Dulles* applied its proportionality analysis nearly a half-century later to strike down a statute that authorized a military court to revoke a soldier's citizenship and leave him stateless as a penalty for wartime desertion.<sup>106</sup> Although the Court recognized death, prison, and fines as examples of constitutionally acceptable sentences,<sup>107</sup> a plurality of the Court held that denationalization "is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."<sup>108</sup> The Court reasoned that the Eighth Amendment's scope "is not static," and the text "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>109</sup>

Notwithstanding the seemingly firm ground upon which proportionality was initially based, a series of post-*Trop* decisions left the viability of proportionality challenges uncertain.<sup>110</sup> For example, a proportionality analysis seemed indispensable in *Coker v. Georgia* where the Court held that a death sentence is disproportionate to the crime of raping an adult woman, and it therefore violates the Eighth Amendment.<sup>111</sup> The Court reasoned, after taking guidance "from the objective evidence of the country's present judgment

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at least the same protection—including the right to be free from excessive punishments.

*Id.* at 286 (emphasis added).

<sup>105</sup> *Weems*, 217 U.S. at 357–58, 381–82.

<sup>106</sup> 356 U.S. at 101.

<sup>107</sup> *Id.* at 100.

<sup>108</sup> *Id.* at 101.

<sup>109</sup> *Id.* at 100–01; see *Weems*, 217 U.S. at 378 ("The ['Cruel and Unusual'] clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." (citing *Ex parte Wilson*, 114 U.S. 417, 427 (1885))).

<sup>110</sup> Compare *Solem v. Helm*, 463 U.S. 277, 289 (1983) ("And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis."), with *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (opinion of Scalia, J., joined by Rehnquist, C.J.) ("*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.").

<sup>111</sup> 433 U.S. 584, 592 (1977).

concerning the acceptability of death as a penalty for rape of an adult woman,”<sup>112</sup> that only Georgia authorized such a sentence (two other jurisdictions provided for capital punishment when the victim is a child).<sup>113</sup>

At first, the Court’s decision in *Coker* seemingly represented the only application of proportionality review to *non*-capital cases. In *Rummel v. Estelle*,<sup>114</sup> petitioner was convicted—at different times—of credit card fraud, forgery, and theft (each felonies) involving the total sum of \$229.11.<sup>115</sup> After his third conviction, petitioner was sentenced to life in prison (with the possibility of parole) pursuant to a Texas recidivist statute; in response, petitioner asserted that his punishment was disproportionate to his crimes and therefore constituted cruel and unusual punishment.<sup>116</sup> The lower courts denied petitioner’s writ of habeas corpus, and the Supreme Court affirmed, holding that petitioner’s life sentence did not violate the Eighth Amendment.<sup>117</sup> The Court reasoned that “[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare,”<sup>118</sup> and that for crimes “punishable by significant terms of

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<sup>112</sup> *Id.* at 593. Notably, the petitioner in *Coker* had previously raped and stabbed a young woman to death on December 5, 1971. *Id.* at 605 (Burger, C.J., dissenting). Roughly eight months later, petitioner kidnapped a second young woman, whom he raped twice, stripped, beat, and left in a wooded area. *Id.* For these crimes, he was sentenced to three life terms, two twenty-year terms, and one eight-year term of imprisonment. *Id.* While serving those sentences, petitioner escaped in September 1974, after which he immediately raped another woman, abducted her, and threatened to kill her. *Id.* It was this crime for which the Georgia court sentenced petitioner to death. *Id.* As the dissent noted, the plurality’s holding “prevents the State [of Georgia] from imposing any effective punishment upon Coker for his latest rape.” *Id.*

<sup>113</sup> *Id.* at 595–96 (plurality opinion).

<sup>114</sup> 445 U.S. 263 (1980).

<sup>115</sup> *Id.* at 264–66.

<sup>116</sup> *Id.* at 267.

<sup>117</sup> *Id.* at 285.

<sup>118</sup> *Id.* at 272. The Court emphasized the limited utility of challenges to the proportionality of noncapital sentences. *See id.* (“Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to [petitioner].”). *But see, e.g.,* *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (“Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards.”); *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (noting that the Eighth Amendment broadly “proscribes punishment

imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.”<sup>119</sup>

Yet, in *Solem v. Helm*,<sup>120</sup> the Court reaffirmed the utility of the proportionality analysis in noncapital cases.<sup>121</sup> In *Solem*, the Court considered the constitutionality of a life without parole sentence imposed on petitioner after his seventh nonviolent felony (uttering a “no account” check for \$100).<sup>122</sup> In affirming the Eighth Circuit’s holding that petitioner’s sentence violated

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grossly disproportionate to the severity of the crime” (citing *Weems v. United States*, 217 U.S. 349 (1910)); *Rummel*, 445 U.S. at 293 (Powell, J., dissenting) (“The principle of disproportionality has been acknowledged to apply to both capital and noncapital sentences.”). At least one subsequent decision reinforced that the Court would no longer entertain proportionality challenges to noncapital sentences. See *Hutto v. Davis*, 454 U.S. 370, 374 (1982) (per curiam) (refusing a proportionality review of a forty-year prison sentence and \$20,000 fine imposed on a defendant convicted of possession with intent to distribute nine ounces of marijuana).

<sup>119</sup> *Rummel*, 445 U.S. at 274. Such a statement suggests that, at least for a time, states could punish any offense with any noncapital sentence without being constrained by the Eighth Amendment.

<sup>120</sup> 463 U.S. 277, 277–78 (1983).

<sup>121</sup> Although not a focal point of the case, perhaps the Court’s opinion in *Rhodes v. Chapman* suggested the forthcoming resurgent viability of proportionality challenges in noncapital cases. 452 U.S. 337, 346 (1981) (“Today the Eighth Amendment prohibits punishments which . . . are grossly disproportionate to the severity of the crime.”). Proportionality challenges also appeared alive and well in capital cases. See *Enmund v. Florida*, 458 U.S. 782 (1982). In *Enmund*, the Court considered

whether the Eighth Amendment permits imposition of the death penalty on one such as [petitioner] who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed.

*Id.* at 797. In concluding that it does not, the Court surveyed (1) whether states allow for “the imposition of the death penalty for a vicarious felony murder in their capital sentencing statutes,” *id.* at 788–93; (2) the manner in which juries have reacted to the death penalty when the defendant is not the “triggerman,” *id.* at 794–96; and (3) the “climate of international opinion,” *id.* at 796 n.22 (quoting *Coker*, 433 U.S. at 596 n.10); accord *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988); *Trop v. Dulles*, 356 U.S. 86, 102 n.35 (1958). *But cf.* *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (“We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici . . . that the sentencing practices of other countries are relevant.”). Although each instance revealed a uniform disapproval of capital punishment for vicarious felony murder, the Court separately interjected its own seemingly subjective analysis to conclude that petitioner’s punishment was unconstitutionally excessive. See *Enmund*, 458 U.S. at 798–801. *But cf.* *Solem*, 463 U.S. at 290 n.15 (“[N]o sentence of imprisonment would be disproportionate for *Enmund*’s crime.”).

<sup>122</sup> 463 U.S. at 280–81.

the Eighth Amendment, the Supreme Court reasoned that petitioner's crime was "one of the most passive felonies a person could commit."<sup>123</sup>

Although the *Solem* Court reiterated that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted,"<sup>124</sup> it cautioned that successful challenges to the proportionality of noncapital cases would be "exceedingly rare."<sup>125</sup> To clarify the specific utility of proportionality challenges in noncapital cases, the Court advised reviewing courts to consider, *inter alia*, certain "objective criteria," including: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."<sup>126</sup>

The Court recognized its list was not exhaustive and thus offered additional considerations: "[A] lesser included offense should not be punished more severely than the greater offense"; "an accessory after the fact should not be subject to a higher penalty than the principal"; "negligent conduct is less serious than intentional conduct"; and "[a] court . . . is entitled to look at a defendant's motive in committing a crime."<sup>127</sup> The Court also highlighted the unique problem of applying Eighth Amendment proportionality challenges to terms of imprisonment:

For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to

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<sup>123</sup> *Id.* at 296 (internal quotation marks omitted) (noting that petitioner's crime "involved neither violence nor threat of violence to any person").

<sup>124</sup> *Id.* at 290. "There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences." *Id.* at 288.

<sup>125</sup> *Id.* at 289–90 (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)).

<sup>126</sup> *Id.* at 292. The gravity of the offense and the harshness of the penalty inquiry tasks a court with considering the seriousness of the crime and comparing it to other crimes. *See id.* at 291 (citing *Coker*, 433 U.S. at 597–98). In the same jurisdiction, "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." *Id.* at 291.

<sup>127</sup> *Id.* at 293; *see id.* at 296 (noting that "a State is justified in punishing a recidivist more severely than it punishes a first offender").

this area. The courts are constantly called upon to draw similar lines in a variety of contexts.<sup>128</sup>

Of course, as the dissent observed, the Court does not explain whether “all these factors [must] be present in order to hold a sentence excessive under the Eighth Amendment” or how the factors are “to be weighed against each other.”<sup>129</sup>

In light of the stark conflict between *Rummel* and *Solem*,<sup>130</sup> the Court again confronted a proportionality challenge to a sentence of imprisonment in *Harmelin v. Michigan*.<sup>131</sup> In *Harmelin*, the Court considered whether a life sentence without parole for cocaine possession, imposed upon a first-time offender, violated the offender’s Eighth Amendment rights.<sup>132</sup> Far from resolving the conflict, the *Harmelin* opinion further confused whether proportionality challenges to sentences of imprisonment remained viable.<sup>133</sup> The Court, per Justice Scalia, held in Part IV of the opinion that petitioner’s sentence did not violate the Eighth Amendment. Justice Scalia reasoned that “[o]ur cases creating and clarifying the ‘individualized capital sentencing doctrine’ have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties.”<sup>134</sup> The Court further reasoned that the phrase “cruel

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<sup>128</sup> *Id.* at 294 (footnote omitted).

<sup>129</sup> *Id.* at 315 (Burger, C.J., dissenting).

<sup>130</sup> Compare *id.* at 288 n.13 (majority opinion) (“[The dissent’s] assertion that the Eighth Amendment establishes only a narrow principle of proportionality is contrary to the entire line of cases cited in the text.”), with *id.* at 305 (Burger, C.J., dissenting) (asserting that the majority’s analysis is “completely at odds with the reasoning of our recent holding in *Rummel*”).

<sup>131</sup> 501 U.S. 957 (1991).

<sup>132</sup> *Id.* at 961–62.

<sup>133</sup> E.g., *Drew v. Tessmer*, 195 F. Supp. 2d 887, 890 (E.D. Mich. 2001). In *Drew*, “[t]he magistrate judge quoted *Harmelin v. Michigan* for the notion that *Weems* does not announce a constitutional proportionality guarantee.” *Id.* (citation and footnote omitted). In correcting the magistrate’s error, the district court observed that “[a] more careful analysis of *Harmelin*, however, indicates that there is, in fact, a requirement of proportionality.” *Id.* (noting that Part III of Justice Scalia’s opinion “carries little value . . . since the other seven Justices communicate that there is such a constitutional requirement”).

<sup>134</sup> *Harmelin*, 501 U.S. at 995. The so-called “individualized sentencing doctrine,” as used in capital cases, requires “individualized determinations in capital-sentencing proceedings.” *Sumner v. Shuman*, 483 U.S. 66, 75 (1987). Thus, the doctrine prohibits mandatory capital-sentencing provisions and constitutionally

and unusual” was historically designed to prohibit certain punishments, but not to guarantee proportionate sentencing.<sup>135</sup>

A majority of Justices only agreed on Part IV of the Court’s opinion. Seven Justices found the preceding three parts of Justice Scalia’s opinion objectionable;<sup>136</sup> indeed, only Chief Justice Rehnquist joined Justice Scalia in announcing, “*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.”<sup>137</sup> Justice Scalia reasoned that the totality of factors proposed by the *Solem* Court to aid in the proportionality analysis presents “an invitation to imposition of subjective values.”<sup>138</sup> Thus, according to Justice Scalia, the Eighth Amendment provides for proportionate sentencing only in the context of capital punishment, if at all.<sup>139</sup>

Justice Kennedy, joined by Justices O’Connor and Souter, authored a separate opinion concurring in part and concurring in the judgment, in which he observed, “the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle.”<sup>140</sup> Although Justice Kennedy conceded that the majority of Eighth Amendment jurisprudence emerged from death penalty cases, he nonetheless reaffirmed that “[t]he Eighth Amendment proportionality principle also applies to noncapital sentences.”<sup>141</sup> According to Justice Kennedy, the Amendment provides only a limited proportionality guarantee and thus “does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.”<sup>142</sup> To clarify and apparently streamline his proportionality analysis in relation to *Solem*, Justice Kennedy indicated that a reviewing court’s evaluation of the first *Solem* factor—the gravity of the offense and the

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guarantees to the defendant the ability to present any relevant mitigating evidence before the sentencing authority can impose death. *Id.* at 76.

<sup>135</sup> *Harmelin*, 501 U.S. at 992–93.

<sup>136</sup> Justice Kennedy, joined by Justices O’Connor and Souter, separately concurred in part and concurred in the judgment. Justices White, Blackmun, Stevens, and Marshall dissented.

<sup>137</sup> *Id.* at 965.

<sup>138</sup> *See id.* at 986.

<sup>139</sup> *Id.* at 994.

<sup>140</sup> *Id.* at 997 (Kennedy, J., concurring).

<sup>141</sup> *Id.* (citing *Rummel v. Estelle*, 445 U.S. 263 (1980)).

<sup>142</sup> *Id.* at 1001.

harshness of the penalty—“may be sufficient to determine the constitutionality of a particular sentence.”<sup>143</sup> Accordingly, “intra-jurisdictional and inter-jurisdictional analyses [*Solem* factors two and three] are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.”<sup>144</sup>

Writing for the dissent, Justice White revisited the Court’s previous Eighth Amendment decisions that, he concluded, reflect a consistent recognition of a proportionality principle.<sup>145</sup> Justice White asserted that to evaluate a proportionality challenge to a sentence of imprisonment, the factor test outlined in *Solem* objectively assesses “a given sentence’s constitutional proportionality, giving due deference to ‘public attitudes concerning a particular sentence.’”<sup>146</sup> In contrast, Justice White argued, Justice Scalia’s approach relied too heavily on a historical analysis<sup>147</sup> without addressing prior Court precedent.<sup>148</sup> The dissenters also disapproved of Justice Kennedy’s opinion and asserted that his streamlined approach to proportionality directly contradicted the *Solem* Court’s directive that “‘no one factor will be dispositive in a given case,’ and ‘no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment,’ ‘[b]ut a combination of objective factors can make such analysis possible.’”<sup>149</sup> Thus, according to the dissent, Justice Scalia delivered “a swift death sentence to *Solem*” and Justice Kennedy “prefer[red] to eviscerate it, leaving only an empty shell.”<sup>150</sup>

Since *Harmelin*, the Court has not had occasion to specify the extent to which the Eighth Amendment guarantees

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<sup>143</sup> *Id.* at 1004.

<sup>144</sup> *Id.* at 1005.

<sup>145</sup> *Id.* at 1012 (White, J., dissenting).

<sup>146</sup> *Id.* at 1021.

<sup>147</sup> *Id.* at 1011 n.1. Moreover, the dissent recognized, “the Court’s jurisprudence concerning the scope of the prohibition against cruel and unusual punishments has long understood the limitations of a purely historical analysis.” *Id.* at 1014.

<sup>148</sup> *See id.* at 1013 (“Not only is it undeniable that our cases have construed the Eighth Amendment to embody a proportionality component, but it is also evident that none of the Court’s cases suggest that such a construction is impermissible.”).

<sup>149</sup> *Id.* at 1019 (quoting *Solem v. Helm*, 463 U.S. 277, 291 n.17 (1983)).

<sup>150</sup> *Id.* at 1018.

proportionate sentencing in noncapital cases. But the Court seemingly adopted Justice Kennedy's concurrence in *Harmelin* as the lens through which to view Eighth Amendment challenges to terms of imprisonment.<sup>151</sup> Indeed, in *Ewing v. California*,<sup>152</sup> a Court plurality affirmed the constitutionality of petitioner's sentence of twenty-five years to life in prison pursuant to California's Three Strikes law.<sup>153</sup> In doing so, the Court rejected petitioner's argument that his sentence was grossly disproportionate to his most recent crime—grand theft of golf clubs valued at roughly \$1200.<sup>154</sup> In weighing the gravity of petitioner's offense,<sup>155</sup> the Court held that petitioner's sentence did not raise an inference of gross disproportionality, citing both his current offense and long history of felony recidivism.<sup>156</sup> It

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<sup>151</sup> *E.g.*, *Ewing v. California*, 538 U.S. 11, 23–24 (2003) (“The proportionality principles in our cases distilled in Justice Kennedy’s concurrence guide our application of the Eighth Amendment in the new context that we are called upon to consider.”). The Court’s approach comports with the interpretation of *Harmelin* adopted by a majority of Circuit Courts. *See, e.g.*, *Henderson v. Norris*, 258 F.3d 706, 709 (8th Cir. 2001) (“Since *Harmelin*, our court and others have applied the principles outlined in Mr. Justice Kennedy’s opinion to [Eighth Amendment] cases . . . .”); *United States v. Jones*, 213 F.3d 1253, 1261 (10th Cir. 2000) (“We have ruled that Justice Kennedy’s plurality opinion . . . sets forth the applicable Eighth Amendment test.”); *United States v. Harris*, 154 F.3d 1082, 1084 (9th Cir. 1998) (“Our court follows the narrow proportionality rule established by Justice Kennedy’s concurrence in *Harmelin* . . . .”); *United States v. Hill*, 30 F.3d 48, 50 (6th Cir. 1994) (“In reviewing Eighth Amendment challenges, this circuit has adhered to the ‘narrow proportionality principle’ articulated in *Harmelin v. Michigan*.” (citation omitted)); *United States v. Bland*, 961 F.2d 123, 128–29 (9th Cir. 1992) (calling Justice Kennedy’s test “the holding in *Harmelin*” because it is the “position taken by those Members who concurred in the judgment[] on the narrowest grounds”) (internal citation and quotation marks omitted)).

<sup>152</sup> 538 U.S. at 11.

<sup>153</sup> *Id.* at 20.

<sup>154</sup> *Id.* at 17–18. Petitioner stole the clubs while on parole from a nine-year prison term for first-degree robbery and multiple counts of residential burglary. *Id.* His subsequent conviction was his fifteenth, for which he had previously served nine separate terms of incarceration. *Id.* at 18.

<sup>155</sup> By weighing the gravity of petitioner’s offense, the Court’s analysis suggests a tacit return to the *Solem* factors. Yet, as the Kennedy concurrence in *Harmelin* observed, *Solem* “did not mandate” a subsequent comparative analysis “within and between jurisdictions.” *Harmelin*, 501 U.S. at 1004–05 (Kennedy, J., concurring).

<sup>156</sup> *Ewing*, 538 U.S. at 28 (noting that petitioner’s crime was “certainly not ‘one of the most passive felonies a person could commit’” (quoting *Solem v. Helm*, 463 U.S. 277, 296 (1983))).

specifically observed that petitioner's lengthy criminal history reflected a pattern of increasing violence.<sup>157</sup>

Similarly, in *Lockyer v. Andrade*,<sup>158</sup> a federal habeas corpus proceeding, the Court rejected a gross disproportionality claim from petitioner who stole videotapes worth \$153 from two K-Mart stores on separate occasions in November 1995.<sup>159</sup> Petitioner Andrade was sentenced, in light of his prior theft-related offenses,<sup>160</sup> to two consecutive Three Strikes sentences of twenty-five years to life, with no eligibility for parole until he served fifty years in prison.<sup>161</sup> The Supreme Court held that because "the precise contours" of the gross disproportionality principle were "unclear," the state court of appeals made an objectively reasonable application of clearly established federal law by upholding petitioner's sentence.<sup>162</sup> Indeed, reasoned the Court, legislatures enjoy broad discretion in crafting appropriate sentences for recidivists; thus, given petitioner's lengthy prior record, the state court of appeals appropriately concluded that petitioner's sentence was not an "extraordinary case" producing an unconstitutional sentence.<sup>163</sup>

The foregoing decisions suggest that non-habeas corpus defendants sentenced to life in prison without parole have two ways to challenge their sentence pursuant to the Eighth Amendment.<sup>164</sup> First, such a defendant may argue that, pursuant to *Trop v. Dulles*, the punishment is unconstitutional because the

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<sup>157</sup> *Id.* at 29–30.

<sup>158</sup> *Lockyer v. Andrade*, 538 U.S. 63 (2003).

<sup>159</sup> *Id.* at 66.

<sup>160</sup> Petitioner's criminal history included the following activities: multiple counts of burglary, for which he was sentenced to 120 months in prison; misdemeanor theft, for which he was sentenced to six days in jail with a year of probation; transportation of marijuana, for which he was sentenced to eight years in federal prison; misdemeanor theft, for which he was sentenced to 180 days in jail; and transportation of marijuana, for which he was sentenced to 2191 days in federal prison. *Id.* at 66–67. He was also arrested for a state parole violation arising from his escape from federal prison. *Id.* at 67.

<sup>161</sup> *Id.* at 66.

<sup>162</sup> *Id.* at 72–73 (internal quotation marks omitted) ("Through this thicket of Eighth Amendment jurisprudence, one governing legal principle emerges as 'clearly established' under § 2254(d)(1): A gross disproportionality principle is applicable to sentences for terms of years." *Id.* at 72).

<sup>163</sup> *Id.* at 76–77.

<sup>164</sup> *Accord Harris v. Wright*, 93 F.3d 581, 585 (9th Cir. 1996); *Foster v. Withrow*, 159 F. Supp. 2d 629, 644 (E.D. Mich. 2001).

“evolving standards of decency that mark the progress of a maturing society” reject it.<sup>165</sup> This defendant therefore bears a heavy burden to demonstrate that the evolving standards of decency disallow the challenged punishment by relying on the enactments from state legislatures nationwide.<sup>166</sup> In considering a defendant’s challenge to a life without parole sentence, a reviewing court must specifically consider: (1) whether a nationwide consensus favors the challenged punishment,<sup>167</sup> (2) the extent to which the behavior of juries and prosecutors invoke the challenged punishment,<sup>168</sup> (3) its own judgment by focusing on whether the challenged punishment furthers legitimate penological goals,<sup>169</sup> and (4) the climate of international law.<sup>170</sup>

Second, that same defendant alternatively could proffer a proportionality argument.<sup>171</sup> Today, an evaluation of this challenge requires a mix of *Solem*, Justice Kennedy’s concurrence in *Harmelin*, and the considerations prevalent in both *Ewing* and *Lockyer*.<sup>172</sup> Any analysis must focus on

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<sup>165</sup> 356 U.S. 86, 101 (1958).

<sup>166</sup> *Stanford v. Kentucky*, 492 U.S. 361, 369–71 (1989).

<sup>167</sup> *Roper v. Simmons*, 543 U.S. 551, 564 (2005); *Stanford*, 492 U.S. at 370; *Thompson v. Oklahoma*, 487 U.S. 815, 822 n.7 (1988).

<sup>168</sup> *Thompson*, 487 U.S. at 822 n.7; *Stanford*, 492 U.S. at 373; see *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (noting that jury determinations and legislative enactments are “two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society”).

<sup>169</sup> *Roper*, 543 U.S. at 571; *Thompson*, 487 U.S. at 823 n.8 (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1987)).

<sup>170</sup> *Roper*, 543 U.S. at 576–78; *Thompson*, 487 U.S. at 830.

<sup>171</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 997–98 (1991) (Kennedy, J., concurring). Significantly, “[f]ederal courts will not engage in a proportionality analysis except in cases where the penalty imposed is death or life in prison without possibility of parole.” *United States v. Thomas*, 49 F.3d 253, 261 (6th Cir. 1995).

<sup>172</sup> Before *Solem*, state courts often utilized a variety of subjective standards. See, e.g., *Faulkner v. State*, 445 P.2d 815, 819 (Alaska 1968) (evaluating punishment by examining whether it is “completely arbitrary” and “shocking to the sense of justice”); *State v. Espinosa*, 421 P.2d 322, 325 (Ariz. 1966) (evaluating punishment by asking whether it is “approximately proportionate to the type of crime and not so severe as to shock the moral sense of the community”) (internal quotation marks omitted); *In re Lynch*, 503 P.2d 921, 930 (Cal. 1972) (holding that a punishment is constitutionally disproportionate if it “shocks the conscience and offends fundamental notions of human dignity”); *Normand v. People*, 440 P.2d 282, 284 (Colo. 1968) (upholding punishment “where it does not shock the conscience of the court”); *State v. Evans*, 245 P.2d 788, 792 (Idaho 1952) (invalidating sentences if they are so disproportionate “as to shock the conscience of reasonable men”); *Cannon v. Gladden*, 281 P.2d 233, 235 (Or. 1955) (holding that a punishment is unconstitutional if it would “shock the moral sense of all reasonable men as to what

“objective factors” and begin with evaluating the “gravity of the offense and the harshness of the penalty.”<sup>173</sup> As *Ewing* and *Lockyer* make clear, this requires a reviewing court to consider both the crime’s severity and defendant’s criminal history.<sup>174</sup> Unless defendant’s sentence leads to an inference of disproportionality, the inquiry likely ends there.<sup>175</sup>

Assuming defendant’s crime is nonviolent or otherwise passive,<sup>176</sup> however, a reviewing court may evaluate the sentences imposed on other criminals in the same jurisdiction (the “inter-jurisdictional” analysis),<sup>177</sup> and the sentences imposed for commission of the same crime in other jurisdictions (the “intra-jurisdictional” analysis).<sup>178</sup> In doing so, a court must be mindful of the additional *Solem* pronouncements.<sup>179</sup> The *Solem* factors, however, are rarely helpful because “[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare.”<sup>180</sup>

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is right and proper”). Notwithstanding the *Solem* decision, at least one court continued using a subjective standard. *Commonwealth v. Alvarez*, 596 N.E.2d 325, 331 (Mass. 1992) (invalidating a punishment that “shocks the conscience and offends fundamental notions of human dignity”) (internal quotation marks omitted). *But see* *State v. Bonner*, 577 N.W.2d 575, 579 (S.D. 1998) (rejecting the “shocks the conscience” test and employing the set of principles articulated in Justice Kennedy’s *Harmelin* concurrence).

<sup>173</sup> See *Solem v. Helms*, 463 U.S. 277, 290–91 (1983) (citing *Coker*, 433 U.S. at 597–98).

<sup>174</sup> *Ewing v. California*, 538 U.S. 11, 28 (2003).

<sup>175</sup> See *Harmelin*, 501 U.S. at 1004–05 (Kennedy, J., concurring); accord *James v. Kernan*, No. C 03-0020, 2007 WL 879071, at \*15 (N.D. Cal. Mar. 21, 2007) (“The threshold for an ‘inference of gross disproportionality’ is quite high.” (citing *Ewing*, 538 U.S. at 30)).

<sup>176</sup> See *Ewing*, 538 U.S. at 28 (evaluating whether petitioner’s crime was a “passive felony”); *Solem*, 463 U.S. at 296 (same).

<sup>177</sup> *Solem*, 463 U.S. at 291.

<sup>178</sup> *Id.* at 292.

<sup>179</sup> *Id.* at 293–94.

<sup>180</sup> *Id.* at 289–90 (alterations in original) (citation omitted) (emphasis omitted) (quotation marks omitted). The Court’s words were indeed prophetic; successful challenges to the proportionality of particular sentences are exceedingly rare. See, e.g., *United States v. Cupa-Guillen*, 34 F.3d 860, 864 (9th Cir. 1994) (“[A] sentence within the limits set by a valid statute may not be overturned on appeal as cruel and unusual punishment unless the sentence is so ‘grossly out of proportion to the severity of the crime’ as to shock our sense of justice.” (quoting *United States v. Vega-Mejia*, 611 F.2d 751, 753 (9th Cir. 1979))); *United States v. Atteberry*, 447 F.3d 562, 565 (8th Cir. 2006) (“A sentence within the statutory limits is generally

*B. Juvenile Offenders, Capital Punishment, and the Supreme Court*

Historically, the Supreme Court has accommodated for the differences between children and adults by affording children greater legal protection.<sup>181</sup> Due to children's underdeveloped maturity, poor rationality, and their adult potential, reviewing courts traditionally have given children special consideration when determining whether their sentences violate the Eighth

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not subject to [Eighth Amendment] review." (alteration in original)); *United States v. Gonzalez*, 922 F.2d 1044, 1053 (2d Cir. 1991) (stating that the "Eighth Amendment condemns only punishment that shocks the collective conscience of society"); see also Kathi A. Drew & R. K. Weaver, *Disproportionate or Excessive Punishments: Is There a Method for Successful Constitutional Challenges?*, 2 TEX. WESLEYAN L. REV. 1, 19 (1995) ("In the literally hundreds of cases dealing with proportionality since *Harmelin*, the federal courts have not declared a single prison sentence to be disproportionate."). *But cf.* *Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004). In *Ramirez*, defendant was caught walking out of a Sears department store in broad daylight carrying a \$199 VCR for which he had not paid. *Id.* at 756. Although defendant immediately surrendered to authorities and returned the VCR (and the state *could* have charged him with a misdemeanor), the prosecution charged him with one count of petty theft with a prior theft-related conviction (defendant had a prior record). *Id.* After his conviction, defendant was sentenced to life pursuant to California's "Three Strikes" law. *Id.* After considering the objective factors of defendant's case and performing the fact-specific analysis of his criminal history, the court held that this was an "exceedingly rare" case in which the sentence imposed was grossly disproportionate to the crimes committed and therefore violated the Eighth Amendment. *Id.* at 762-75.

The court's decision in *Ramirez*, however, clearly represents an isolated instance. Indeed, the *great* majority of cases reject defendants' Eighth Amendment proportionality challenges. See, e.g., *Little v. Butler*, 848 F.2d 73, 77 (5th Cir. 1988) (holding twenty-five-year sentence for attempted armed robbery not disproportionate); *United States v. Oglesby*, 764 F.2d 1273, 1279 (7th Cir. 1985) (holding same for twenty-year sentence for armed robbery); *Hanks v. Jackson*, 123 F. Supp. 2d 1061, 1075 (E.D. Mich. 2000) (holding same for twenty- to fifty-year sentence for armed robbery); *Atkins v. Overton*, 843 F. Supp. 258, 261-62 (E.D. Mich. 1994) (holding same for ten- to thirty-year sentence for armed robbery).

<sup>181</sup> See, e.g., *Schall v. Martin*, 467 U.S. 253, 265 (1984) ("Children, by definition, are not assumed to have the capacity to take care of themselves."); *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults."); *Bellotti v. Baird*, 443 U.S. 622, 636 (1979) (reviewing and reiterating "the Court's concern over the inability of children to make mature choices"); *Parham v. J. R.*, 442 U.S. 584, 603 (1979) (noting that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized"); *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) (observing that children do not possess "full capacity for individual choice").

Amendment.<sup>182</sup> Three cases in particular best trace the Court's approach to juvenile criminal defendants.

### 1. *Thompson v. Oklahoma*

In 1988, the Supreme Court reaffirmed that children hold a “very special place in life”<sup>183</sup> in *Thompson v. Oklahoma*,<sup>184</sup> wherein a fifteen-year-old boy and three others “actively participated” in the murder of petitioner's former brother-in-law.<sup>185</sup> The victim was shot twice; his throat, chest, and abdomen were cut; he had several bruises and a broken leg; and his body was chained to a concrete block and thrown in a river.<sup>186</sup> Petitioner was sentenced to death for his role and, after the Oklahoma Court of Criminal Appeals affirmed, the Supreme Court granted certiorari to consider, in part,<sup>187</sup> whether a death sentence is cruel and unusual punishment for a fifteen-year-old who participated in a murder.<sup>188</sup>

In holding that “the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense,” a Court plurality considered whether contemporary standards of decency allowed a juvenile to act with the degree of culpability that justifies capital punishment.<sup>189</sup> To facilitate its *Trop* analysis,<sup>190</sup> the Court

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<sup>182</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988).

<sup>183</sup> *Id.* at 825 n.23 (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)).

<sup>184</sup> *Id.* at 815.

<sup>185</sup> *Id.* at 819 (declining to delineate petitioner's specific role in the offense).

<sup>186</sup> *Id.* at 819.

<sup>187</sup> At the guilt phase of petitioner's trial, the prosecutor admitted three photographs depicting the victim's condition upon his removal from the river. *Id.* at 820. The Oklahoma Court of Criminal Appeals held that the admission of two of the photographs—although erroneous—was nonetheless harmless because of the overwhelming evidence of petitioner's guilt. *Id.* The prosecutor, however, *also* used the photographs in his closing argument at the penalty phase; the Oklahoma court did not consider the propriety of this practice. *Id.* Thus, the Supreme Court was also asked to review “whether photographic evidence that a state court deems erroneously admitted but harmless at the guilt phase nevertheless violates a capital defendant's constitutional rights by virtue of its being considered at the penalty phase.” *Id.* at 820–21. Given the Court's resolution of the Eighth Amendment issue, however, it declined to consider this second question. *Id.* at 838 n.48.

<sup>188</sup> *Id.* at 820–21.

<sup>189</sup> *Id.* at 822–23, 838. Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, authored the plurality opinion; Justice O'Connor separately concurred; and Justice Scalia, joined by Justices Thomas and White, dissented.

examined legislative enactments, jury sentences,<sup>191</sup> and recognized that ultimately its own judgment would determine “the acceptability of the death penalty” in this instance.<sup>192</sup>

The Court first considered pertinent legislative enactments and observed that Oklahoma, like several other states, prohibits minors from (1) voting, (2) sitting on a jury, (3) marrying without parental consent, and (4) purchasing alcohol or cigarettes.<sup>193</sup> Additionally, Oklahoma retains a juvenile-justice system in which most offenders under age eighteen are not held criminally responsible for their actions.<sup>194</sup> The Court closely surveyed state law to explore how other states treat minors in relation to voting, jury service, driving privileges, marriage, the purchase of pornographic materials, gambling, and the maximum age for juvenile court jurisdiction.<sup>195</sup> Taken together, the Court reasoned, “[a]ll of this legislation is consistent with the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult.”<sup>196</sup>

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<sup>190</sup> Although not explicitly stated in the opinion, the Court presumably declined to engage in a strict proportionality analysis because “there [was] no claim that the punishment would be excessive if the crime had been committed by an adult.” *Id.* at 819. *But cf. id.* at 853 (O’Connor, J., concurring) (criticizing Part V of the plurality opinion for employing a “kind of disproportionality analysis”).

<sup>191</sup> *Id.* at 822 n.7 (plurality opinion).

<sup>192</sup> *Id.* at 823 n.8 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

<sup>193</sup> *Id.* at 823.

<sup>194</sup> *Id.* at 823–24. The Court did, however, observe that Oklahoma considers a sixteen- or seventeen-year-old charged with murder (or other serious felonies) an adult and, using a “special certification procedure,” defendants who are petitioner’s age could similarly be charged as an adult. *Id.* at 824.

<sup>195</sup> *Id.* at 824–25.

<sup>196</sup> *Id. But cf. Stanford v. Kentucky*, 492 U.S. 361, 374 (1989) (“It is, to begin with, absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one’s conduct to that most minimal of all civilized standards.”).

The Court subsequently examined the minimum age for the imposition of capital punishment and realized that, of the eighteen states “that have expressly established a minimum age in their death penalty statutes, . . . all of them require that the defendant have attained at least the age of 16 at the time of the capital offense.” *Thompson*, 487 U.S. at 829. The Court thereafter confirmed the wisdom of state law by reflecting on international customs and noted, “The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of [the] offense is consistent with . . . other nations that share our

Second, the Court investigated the “behavior of juries” to determine whether the death penalty was administered to juveniles in an unguided fashion.<sup>197</sup> Statistics from the Department of Justice revealed a startling reality: of the 1392 defendants sentenced to death between 1982 and 1986, only five (including petitioner) were less than sixteen years old at the time of their offense.<sup>198</sup> According to the Court, “[s]tatistics of this kind . . . suggest that these five young offenders have received sentences that are ‘cruel and unusual in the same way that being struck by lightning is cruel and unusual.’”<sup>199</sup>

Finally, the Court exercised its own judgment to conclude that sentencing petitioner to death violated the Eighth Amendment.<sup>200</sup> In doing so, the Court emphasized that a juvenile’s criminal behavior should not be measured using adult standards.<sup>201</sup> Unlike adults, juveniles—including adolescents—exhibit less maturity and responsibility.<sup>202</sup> Justice Stevens succinctly articulated:

[L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.<sup>203</sup>

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Anglo-American heritage, and by the leading members of the Western European community.” *Id.* at 830.

<sup>197</sup> *Thompson*, 487 U.S. at 831.

<sup>198</sup> *Id.* at 832–33.

<sup>199</sup> *Id.* at 833 (quoting *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring)).

<sup>200</sup> *Id.* at 833–38. Notwithstanding a self-described exercise of its own judgment, the Court constrained its inquiry to evaluating first whether juveniles and adults should be held to equivalent standards and, second, whether administering capital punishment to juveniles facilitates the societal purposes underlying the death penalty. *Id.* at 833.

<sup>201</sup> *Id.* at 833–38.

<sup>202</sup> *Id.* at 834.

<sup>203</sup> *Id.* at 835 (footnotes omitted).

## 2. *Stanford v. Kentucky*

One year after its decision in *Thompson*, the Court in *Stanford v. Kentucky*<sup>204</sup> considered whether imposing capital punishment on individuals for crimes committed at sixteen or seventeen constituted cruel and unusual punishment pursuant to the Eighth Amendment. The *Stanford* petitioners argued that sentencing them to death would violate the Eighth Amendment's prohibition against cruel and unusual punishments because they were juveniles at the time of their crimes.<sup>205</sup> Specifically, they contended, pursuant to *Trop*, that "their punishment is contrary to the 'evolving standards of decency that mark the progress of a maturing society.'"<sup>206</sup>

To evaluate petitioners' challenges, the Court again turned first to state and federal legislative enactments. Of the thirty-seven states that authorized capital punishment, fifteen states refused to impose the death penalty on sixteen-year-olds and twelve states refused to impose it on seventeen-year-olds.<sup>207</sup> This, according to the Court, was insufficient to establish "the degree of national consensus . . . previously thought sufficient to label a particular punishment cruel and unusual."<sup>208</sup> Although no federal death penalty for sixteen- or seventeen-year-old offenders existed, the Court viewed this as insufficient to demonstrate a national consensus against using capital punishment for sixteen- or seventeen-year-old juvenile defendants.<sup>209</sup>

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<sup>204</sup> 492 U.S. 361, 364–65 (1989). Specifically, the *Stanford* Court considered the cases of two juvenile murder defendants from Kentucky and Missouri, respectively. The first, seventeen-year-old Kevin Stanford, was convicted of murder, first-degree sodomy, first-degree robbery, and receiving stolen property, and was sentenced to death and forty-five years in prison after he and an accomplice: (1) repeatedly raped and sodomized a gas station attendant; (2) robbed the gas station; and (3) drove the attendant to a secluded area near the station where Stanford shot her in the face and in the back of the head. *Id.* at 365–66. The second defendant, sixteen-year-old Heath Wilkins, fatally stabbed a twenty-six-year-old mother of two who was working behind the sales counter of the convenience store she and her husband owned and operated in Missouri. *Id.* at 366.

<sup>205</sup> *Id.* at 368.

<sup>206</sup> *Id.* at 369 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>207</sup> *Id.* at 370.

<sup>208</sup> *Id.* at 370–71.

<sup>209</sup> *Id.* at 372–73.

Petitioners nonetheless argued that contemporary societal attitudes showed juries' reluctance to impose the death penalty on sixteen- and seventeen-year-olds and a corresponding prosecutorial reluctance to seek such sentences.<sup>210</sup> For support, petitioners relied on statistics reflecting that, from 1982 to 1988, only fifteen of 2106 death sentences were imposed on sixteen-year-old offenders and only thirty on defendants who were seventeen at the time of their offense.<sup>211</sup> The Court dismissed these statistics and relied on "the undisputed fact that a far smaller percentage of capital crimes are committed by persons under 18 than over 18."<sup>212</sup>

At this point, the *Stanford* Court's approach differed from the *Thompson* Court. In a last-ditch effort, petitioners urged the Court to exercise its "own informed judgment" to hold that imposing the death penalty in this context would not serve legitimate penological goals because it would fail to deter juveniles.<sup>213</sup> In response, the Court observed that petitioners' argument has no place in Eighth Amendment jurisprudence and, unlike in *Thompson*, "emphatically reject[ed]" petitioners' request for the Court to exercise its own judgment.<sup>214</sup> The Court concluded that no historical or current national consensus existed against capital punishment for sixteen- or seventeen-

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<sup>210</sup> *Id.* at 373.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 374.

<sup>213</sup> *Id.* at 377–78 (quotation marks omitted). Petitioners also attempted to demonstrate a national consensus against capital punishment for sixteen- and seventeen-year-old offenders by offering "public opinion polls, the views of interest groups, and the positions adopted by various professional associations." *Id.* at 377. Such evidence, however, has no role in determining the constitutionality of punishment; indeed, only through the judgments of legislatures could petitioners establish the requisite national consensus. *Id.*

<sup>214</sup> *Id.* at 378. *But cf.* *Thompson v. Oklahoma*, 487 U.S. 815, 833 (1988) ("[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty' on one such as petitioner who committed a heinous murder when he was only 15 years old." (quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982))). The Court's decision in *Stanford* not to exercise its own judgment now appears anomalous. See *Roper v. Simmons*, 543 U.S. 551, 574 (2005) ("[T]o the extent *Stanford* was based on a rejection of the idea that this Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders, . . . it suffices to note that this rejection was inconsistent with prior Eighth Amendment decisions." (citations omitted)); *Atkins v. Virginia*, 536 U.S. 304, 313 (2002) ("[I]n cases involving a consensus, our own judgment is 'brought to bear' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators." (citation omitted)).

year-old murderers and, as a result, imposing such a sentence does not violate the Eighth Amendment.<sup>215</sup>

### 3. *Roper v. Simmons*

To resolve the conflict between *Thompson* and *Stanford*, the Court revisited the relationship between juvenile punishment and the Eighth Amendment in *Roper v. Simmons*.<sup>216</sup> At the age of seventeen, respondent Christopher Simmons<sup>217</sup> entered the victim's home with an accomplice after dark and used duct tape to cover the victim's eyes and mouth and bind her hands.<sup>218</sup> They then put the victim in her own minivan and drove her to a state park where they walked her to a railroad trestle and threw her from the bridge.<sup>219</sup> Within days, authorities received information that led to respondent's arrest, confession, and videotaped reenactment of the crime.<sup>220</sup> Following a jury trial, respondent was found guilty of first-degree murder and sentenced to death.<sup>221</sup>

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<sup>215</sup> *Stanford*, 492 U.S. at 380. Ultimately, neither petitioner was executed. In June 2003, then-Kentucky Governor Paul Patton commuted Kevin Stanford's death sentence to life in prison. See Andrew Wolfson, *Patton Pardons 4 in Election Case and Will Commute Death Sentence; Stanford's Family Celebrates; Victim's Sister Is Repulsed*, COURIER-JOURNAL (Louisville, Ky.), June 19, 2003, at 1A (announcing commutation of Stanford's sentence but declining to specify the terms); Andrew Wolfson, *Governor Will Spare Jefferson Killer's Life*, COURIER-JOURNAL (Louisville, Ky.), Nov. 26, 2003, at 6A (announcing formal terms of commutation).

Earlier, on May 16, 1996, the U.S. District Court for the Western District of Missouri ordered the State to allow Heath Wilkins to withdraw his plea of guilty. *Wilkins v. Bowersox*, 933 F. Supp. 1496, 1526 (W.D. Mo. 1996), *aff'd*, 145 F.3d 1006 (8th Cir. 1998). The court held that Wilkins was not mentally competent when he waived his right to counsel. *Id.* at 1515. Wilkins subsequently received three consecutive life sentences after pleading guilty in Clay County Circuit Court to second-degree murder, armed robbery, and armed criminal action. Associated Press, *Youngest Ever Sent to Death Row Gets Three Life Sentences*, ST. LOUIS POST-DISPATCH, May 22, 1999, at 17.

<sup>216</sup> 543 U.S. at 551.

<sup>217</sup> Testimony during a postconviction hearing revealed that respondent was immature, impulsive, and easily influenced. *Id.* at 559. Evidently, respondent also endured a difficult childhood and performed poorly in school as a teenager. *Id.* Although respondent was also a frequent alcohol and drug user, *id.*, he had no criminal record prior to committing murder, *id.* at 558.

<sup>218</sup> *Id.* at 556.

<sup>219</sup> *Id.* at 556–57.

<sup>220</sup> *Id.* at 557.

<sup>221</sup> *Id.* at 557–58.

As Simmons submitted a series of failed post conviction filings in state appellate court,<sup>222</sup> the Supreme Court issued its decision in *Atkins v. Virginia*,<sup>223</sup> wherein it held that the Eighth and Fourteenth Amendments prohibit the execution of a mentally retarded person.<sup>224</sup> Based on the reasoning of *Atkins*, respondent filed a new petition for state postconviction relief, contending that the Constitution precluded executing a juvenile who was under eighteen at the time of the crime.<sup>225</sup> The Missouri Supreme Court agreed and resentenced respondent to

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<sup>222</sup> *Id.* at 558–59.

<sup>223</sup> 536 U.S. 304 (2002).

<sup>224</sup> *Id.* at 321. Initially, the Eighth Amendment did not mandate a categorical exemption from the death penalty for the mentally retarded. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989). In reaching this conclusion, the *Penry* Court stressed that only two states had enacted laws banning the imposition of the death penalty on a mentally retarded person convicted of a capital offense. *Id.* at 334. Yet, when revisiting the issue in *Atkins*, the Court reached the opposite conclusion. Relying on the changed legal landscape, the court observed that “[t]he practice . . . has become truly unusual, and it is fair to say that a national consensus has developed against it.” 536 U.S. at 316.

Interestingly, despite the Court’s *Atkins* opinion, the petitioner in *Penry*, Johnny Paul Penry, still faced the possibility of execution until earlier this year. Mike Tolson, *Penry’s Fate to Be Weighed a 4th Time; He’s Set to Face a Jury in June for Sentencing in ’79 Murder*, HOUSTON CHRON., May 14, 2007, at B1. After navigating nearly three decades worth of legal twists and turns, Penry finally reached an agreement with prosecutors in February 2008 to serve three consecutive life sentences. Mike Tolson, *An End to a Legal Saga: Deal Keeps Penry Imprisoned for Life*, HOUSTON CHRON., Feb 16, 2008, at B1. As part of the agreement, Penry’s lawyers agreed that Penry was competent to stand trial and that at all times during the criminal proceedings he was not mentally retarded. Elizabeth White, *State Won’t Seek Death Penalty Against Convicted Killer*, ASSOCIATED PRESS, Feb. 16, 2008.

Interestingly, since *Atkins*, the petitioner Daryl Atkins has not left death row. David G. Savage, *IQ Debate Unsettled in Death Penalty Cases; The Supreme Court Ruled Against Executing the Mentally Retarded, but Defining that Group has Proved Difficult*, L.A. TIMES, June 11, 2007, at A1. Although, as noted, the *Atkins* decision prohibits the execution of mentally retarded defendants, prosecutors in *Atkins* remain focused on proving that Atkins is not mentally retarded. *Id.* In August 2007, lawyers for Atkins were scheduled to try again to convince a jury that Atkins is mentally retarded and “therefore deserves a life term in prison, not execution.” *Id.* Before that hearing could occur, however, Atkins’ sentence was commuted to life when his codefendant’s attorney came forward with his belief that prosecutors committed misconduct by coaching a witness and hiding it from the defense at the time of Atkins’s trial. Donna St. George, *Death Sentence Commuted in Va. Case; Prosecutor Action is Issue, Not Mental Status of Defendant*, WASH. POST, Jan. 18, 2008, at B1. Prosecutors have since appealed the commutation of Atkins’ sentence. Danielle Zielinski, *Atkins Will Remain on Death Row Pending Appeal*, DAILY PRESS (Newport, Va.), Feb. 7, 2008.

<sup>225</sup> *Roper*, 543 U.S. at 559.

life in prison without parole, after which the Supreme Court granted certiorari.<sup>226</sup>

In affirming the Missouri Supreme Court's decision, the U.S. Supreme Court held that the Eighth and Fourteenth Amendments prohibit executing individuals under the age of eighteen.<sup>227</sup> Like the analysis in *Thompson* and *Stanford*, the *Roper* Court began by examining the constitutionality of a juvenile death penalty by considering the "national consensus."<sup>228</sup> In reviewing legislative changes since *Stanford*, the Court observed that "[f]ive [s]tates that allowed the juvenile death penalty at the time of *Stanford* have abandoned it in the intervening fifteen years—four through legislative enactments and one through judicial decision."<sup>229</sup> Although such changes reflected a "less dramatic" trend than in *Atkins*, the Court nonetheless viewed the development as significant, particularly when considered alongside the infrequent use of juvenile capital punishment in states that allow the practice.<sup>230</sup> Taken together, the evidence reflected that juveniles are "categorically less culpable than the average criminal."<sup>231</sup>

Unlike the *Thompson* and *Stanford* Courts, the *Roper* Court did not consider the attitudes of contemporary society through jury verdicts and the actions of prosecutors. Instead, the Court directly exercised its own judgment to demonstrate why the death penalty is a disproportionate punishment for juveniles.<sup>232</sup> To prove that juveniles cannot be classified among the worst offenders, the *Roper* Court, like the *Thompson* Court, highlighted differences between adults and juveniles: (1)

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<sup>226</sup> *Id.* at 560.

<sup>227</sup> *Id.* at 578. The Court's decision in *Roper* evidently resonated most in Texas, which houses more than one-third of the country's convicts who were sentenced to death for crimes they committed as juveniles. Maro Robbins, *Justices Rule Teen Killers Can't Be Put to Death; Decision Could Have the Biggest Impact on Texas, Which Has the Most Kids Sentenced to Be Executed*, SAN ANTONIO EXPRESS-NEWS, March 2, 2005, at A1.

<sup>228</sup> 543 U.S. at 564.

<sup>229</sup> *Id.* at 565.

<sup>230</sup> *Id.* at 565, 566–67.

<sup>231</sup> *Id.* at 567 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316) (2002).

<sup>232</sup> The *Atkins* Court likewise followed this approach. 536 U.S. at 313 ("[W]e shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider reasons for agreeing or disagreeing with their judgment.").

juveniles lack the maturity of adults and possess an underdeveloped sense of responsibility, (2) juveniles are more susceptible to peer pressure, and (3) “the character of a juvenile is not as well formed as that of an adult.”<sup>233</sup> Thus, according to the Court, “[o]nce the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults.”<sup>234</sup>

Finally, the Court considered, for the first time in detail, the climate of international law. The Court observed that Article 37 of the United Nations Convention on the Rights of the Child—ratified by every country except the United States and Somalia—expressly prohibits capital punishment for juvenile offenders under age eighteen.<sup>235</sup> Only seven countries other than the United States have executed juvenile offenders since 1990 and, since then, these countries have either abolished capital punishment or publicly renounced the practice.<sup>236</sup> Although its examination of international law was not dispositive, the Court concluded that “[t]he opinion of the world community . . . provide[s] respected and significant confirmation for our own conclusions.”<sup>237</sup>

And, yet, the foregoing cases leave unclear the manner in which the Court might evaluate a *juvenile’s* proportionality challenge.<sup>238</sup> Some anecdotal language from the Court’s opinions suggests that a juvenile accomplice convicted of felony murder could not proffer a proportionality challenge to a sentence of life in prison without the possibility of parole.<sup>239</sup>

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<sup>233</sup> *Roper*, 543 U.S. at 569–70.

<sup>234</sup> *Id.* at 571.

<sup>235</sup> *Id.* at 576.

<sup>236</sup> *Id.* at 577.

<sup>237</sup> *Id.* at 578.

<sup>238</sup> See *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) (noting “that our precedents in this area have not been a model of clarity” (citing *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (opinion of Scalia, J.)). “Indeed, in determining whether a particular sentence for a term of years can violate the Eighth Amendment, we have not established a clear or consistent path for courts to follow.” *Id.* (citing *Ewing v. California*, 538 U.S. 11, 20–23 (2003)).

<sup>239</sup> *Compare Enmund v. Florida*, 458 U.S. 782, 798 (1982) (“[Petitioner] did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to [petitioner] the culpability of those who killed the [victims]. This was impermissible under the Eighth Amendment.”), with *Solem v. Helm*, 463 U.S. 277, 290 n.15 (1983) (“[N]o

That said, however, the Supreme Court has not yet had occasion to consider such a challenge and, more specifically, a challenge from a minimal-role juvenile murder accomplice who, for example, participated by serving as a mere lookout.<sup>240</sup> Given the potential uncertainty surrounding the viability of this challenge, this Article will assume for purposes of discussion that only in a narrow set of circumstances, discussed in Part III below, might a juvenile proffer a proportionality challenge to a sentence of life in prison following a murder conviction.

### C. *Applying the Supreme Court's Eighth Amendment Jurisprudence to Juvenile Punishment in the Lower Courts*

Authors have widely discussed the evolving philosophies underlying the existence of the juvenile court system<sup>241</sup> and its increasingly harsh juvenile penalties.<sup>242</sup> Some commentators contend that the imposition of harsher juvenile penalties began in response to a perceived increase in juvenile crime.<sup>243</sup> Others

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sentence of imprisonment would be disproportionate for Enmund's crime [of felony-murder].").

<sup>240</sup> Compare *People v. Miller*, 781 N.E.2d 300, 308 (Ill. 2002) (reversing life sentence for juvenile murder accomplice), with *Swinford v. State*, 653 So. 2d 912, 918 (Miss. 1995) (upholding trial court's sentence of life imprisonment for fourteen-year-old who aided and abetted murder). Both of these cases are subsequently discussed in more depth.

<sup>241</sup> See, e.g., Marisa Slaten, Note, *Juvenile Transfers to Criminal Court: Whose Right Is It Anyway?*, 55 RUTGERS L. REV. 821, 824–26 (2003); Mary E. Spring, Comment, *Extended Jurisdiction Juvenile Prosecution: A New Approach to the Problem of Juvenile Delinquency in Illinois*, 31 J. MARSHALL L. REV. 1351, 1356–58 (1998). A majority of commentators agree that the juvenile justice system shifted from rehabilitation to retribution, the goal of the criminal justice system, following the Supreme Court's decision in *Kent v. United States*, 383 U.S. 541, 554 (1966). See, e.g., Jon-Michael Foxworth, *An Unjust Act: The Schizophrenic State of Maturity and Culpability in Juvenile Justice and Minor Abortion Rights Law; Recent Trends in Virginia and Nationally*, 9 WM. & MARY J. WOMEN & L. 495, 498 (2003); Lynda E. Frost & Adrienne E. Volenick, *The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent*, 14 WASH. U. J.L. & POL'Y 327, 332 (2004); Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 390 (1996).

<sup>242</sup> E.g., Judith L. Hunter, *They Grow Up So Fast: When Juveniles Commit Adult Crimes: A Dilemma for the Juvenile System*, 29 AKRON L. REV. 473, 473–74 (1996) (noting rise in violent crime committed by youth).

<sup>243</sup> See Jarod K. Hofacket, *Justice or Vengeance: How Young Is Too Young for a Child to Be Tried and Punished As an Adult?*, 34 TEX. TECH L. REV. 159, 164 (2002); Hon. W. Don Reader, *They Grow Up So Fast: When Juveniles Commit Adult Crimes: The Laws of Unintended Results*, 29 AKRON L. REV. 477, 480 (1996).

maintain that juvenile institutions were largely unable to rehabilitate juveniles effectively.<sup>244</sup> Regardless of the reason for harsher penalties, a review of the judiciary's approach reflects a dynamic shift in favor of upholding the more severe punishment of juveniles convicted of heinous felonies. Indeed, as the philosophy behind the juvenile system of justice has changed, so too have prevailing attitudes in the judiciary.

Whether life in prison without the possibility of parole is a constitutionally permissible sentence for juveniles, for a time, seemed an open question. In 1968, the Kentucky Supreme Court squarely held, in *Workman v. Commonwealth*,<sup>245</sup> that life imprisonment without the benefit of parole is cruel and unusual punishment when applied to juvenile offenders.<sup>246</sup> In *Workman*, two fourteen-year-old defendants forcibly raped a seventy-one-year-old woman, after which they were convicted and sentenced to life in prison without the possibility of parole.<sup>247</sup> The court held that this punishment was "cruel and unusual" by reasoning "that life imprisonment without benefit of parole for two fourteen-year-old youths under all the circumstances shocks the general conscience of society today and is intolerable to fundamental fairness."<sup>248</sup> In tacitly highlighting a juvenile's potential for rehabilitation, the court further reasoned that "it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life."<sup>249</sup>

Over the following eleven years, a series of state court opinions suggested that *Workman* would stand as an anomalous decision.<sup>250</sup> For example, the Arkansas Supreme Court, in 1974,

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<sup>244</sup> See Randi-Lynn Smallheer, Note, *Sentence Blending and the Promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle*, 28 HOFSTRA L. REV. 259, 266 (1999).

<sup>245</sup> 429 S.W.2d 374 (Ky. 1968).

<sup>246</sup> *Id.* at 378. The Kentucky Supreme Court later remarked that the *Workman* decision "was not whimsical" and "was based on the fact that juveniles have historically been labeled as a separate class. We think the distinction is a rational one." Fryrear v. Commonwealth, 507 S.W.2d 144, 146 (Ky. 1974).

<sup>247</sup> *Workman*, 429 S.W.2d at 375-76.

<sup>248</sup> *Id.* at 378.

<sup>249</sup> *Id.*

<sup>250</sup> See, e.g., *Rogers v. State*, 515 S.W.2d 79, 86-87 (Ark. 1974), *cert. denied*, 421 U.S. 930 (1975); *White v. State*, 374 So. 2d 843, 847 (Miss. 1979); *State v. Forrester*, 587 P.2d 179, 189 (Wash. Ct. App. 1978); see also *People v. Isitt*, 127 Cal. Rptr. 279,

upheld a sentence of life imprisonment without possibility of parole for a first-degree rape conviction imposed upon a defendant who was seventeen at the time of trial.<sup>251</sup> Then, in 1978, the Washington Court of Appeals upheld a life sentence given to a seventeen-year-old defendant who was convicted, following a jury trial, of first-degree murder.<sup>252</sup> Finally, in 1979, the Supreme Court of Mississippi affirmed a sixteen-year-old male's sentence of life imprisonment without parole for the armed robbery of \$21 against his assertion that it was cruel and unusual punishment.<sup>253</sup> Given that the defendants in each case were relatively close to the age of majority at the time of their crimes, however, the question of "how young is too young" to sentence a juvenile to life imprisonment persisted.<sup>254</sup>

The 1980s offered little additional guidance and reignited the question of whether the Eighth Amendment permitted sentencing the juvenile felon to life without parole. Although state courts affirmed life sentences without parole imposed upon a fourteen-year-old convicted of murder<sup>255</sup> and a fifteen-year-old

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285 (Cal. Ct. App. 1976) (upholding life sentence given to seventeen-year-old (without discussing defendant's age) following his conviction for kidnapping and robbery with bodily harm); *State v. Spence*, 367 A.2d 983, 989 (Del. 1976) (holding life sentence for juvenile of an unspecified age is constitutional).

<sup>251</sup> *Rogers*, 515 S.W.2d at 86–87.

<sup>252</sup> *Forrester*, 587 P.2d at 189. In *Forrester*, defendant murdered an elderly couple in their home by slashing their throats, shooting one, and stabbing the other. *Id.* at 182.

<sup>253</sup> *White*, 374 So. 2d at 847. In *White*, defendant and two others flagged down a college student and asked her to drive them to the hospital. *Id.* at 844. Rather than leave the car when they arrived, defendant pointed a gun at the victim and told her to keep driving. *Id.* at 844–45. After defendant took the victim's \$21 and made a series of stops, the group finally stopped at a rest station where the victim escaped. *Id.* at 845. In response to defendant's Eighth Amendment sentencing challenge, the court offered a one-paragraph analysis, unaccompanied by legal citation or consideration of defendant's age, wherein it reasoned that "[t]his was a heinous crime and we do not feel that life imprisonment is a cruel and unusual punishment under the proven facts of this case." *Id.* at 847.

<sup>254</sup> See *Forrester*, 587 P.2d at 189 n.10 (reasoning, in part, that "defendant's 18th birthday was only about 2 months away when he committed the murders").

<sup>255</sup> *Commonwealth v. Sourbeer*, 422 A.2d 116, 123–24 (Pa. 1980). The *Sourbeer* court, however, did not discuss the role of defendant's age when affirming his sentence. *Id.*; see *People v. Rodriguez*, 480 N.E.2d 1147, 1156–57 (Ill. App. Ct. 1985) (affirming life without parole sentence imposed on a minor of an unspecified age); *Commonwealth v. Diatchenko*, 443 N.E.2d 397, 401 (Mass. 1982) (affirming minor's life without parole sentence and upholding constitutionality of sentencing statute that did not allow for consideration of minor's age as a mitigating factor at sentencing).

convicted of rape,<sup>256</sup> the Supreme Court of Nevada concluded that the Nevada and Federal Constitutions prohibited life sentences for juveniles who commit crimes under the age of sixteen.<sup>257</sup> In *Naovarath v. State*, the court considered the constitutionality of sentencing a delusional thirteen-year-old seventh grader convicted of an unspecified degree of murder to life in prison without the possibility of parole.<sup>258</sup> At the outset of its analysis, the court observed, “it is necessary to look at both the age of the convict and at his probable mental state at the time of the offense.”<sup>259</sup> After again noting defendant’s age and that he was psychotic, delusional, and unable to distinguish reality from fantasy, the court provided the following analysis:

Children are and should be judged by different standards from those imposed upon mature adults. To say that a thirteen-year-old deserves a fifty or sixty year long sentence, imprisonment until he dies, is a grave judgment indeed if not Draconian. To make the judgment that a thirteen-year-old must be punished with this severity and that he can never be reformed, is the kind of judgment that, if it can be made at all, must be made rarely and only on the surest and soundest of grounds. Looking at the case before us from this perspective, we conclude that the sentence of life imprisonment without possibility of parole imposed upon [defendant] was cruel and unusual under the Nevada Constitution and the United States Constitution.<sup>260</sup>

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<sup>256</sup> *State v. Foley*, 456 So. 2d 979, 984 (La. 1984). In *Foley*, fifteen-year-old defendant was convicted, following a jury trial, of aggravated rape and sentenced to life imprisonment at hard labor without benefit of parole. *Id.* at 980. In rejecting defendant’s contention on appeal that his sentence was “cruel and unusual,” a divided Louisiana Supreme Court held that “[t]he mandatory life sentence for aggravated rape is a valid exercise of the state legislature’s prerogative to determine the length of sentence for crimes classified as felonies.” *Id.* at 981 (citations omitted). *But cf. id.* at 989 (Calogero, J., concurring in part and dissenting in part). A little more than a decade later, the Louisiana Court of Appeals held that a life sentence without possibility of parole for a fifteen-year-old murderer was not unconstitutional pursuant to the Eighth Amendment. *State v. Pilcher*, 655 So. 2d 636, 644 (La. Ct. App.), *writ denied*, 662 So. 2d 466 (La. 1995); *see State v. Wilson*, 938 So. 2d 1111, 1147 (La. Ct. App. 2006) (upholding life sentence for seventeen-year-old murderer).

<sup>257</sup> *Naovarath v. State*, 779 P.2d 944, 947 (1989).

<sup>258</sup> *Id.* at 945.

<sup>259</sup> *Id.* at 946.

<sup>260</sup> *Id.* at 946–47.

Accordingly, the court ordered the sentencing court to impose a sentence of life *with* the possibility of parole.<sup>261</sup>

The 1990s, however, ushered in the judiciary's new "get tough" approach to juvenile sentencing. Indeed, an overwhelming number of states affirmed life without parole sentences imposed upon juvenile felony defendants at a variety of ages notwithstanding constitutional objections, including: (1) a seventeen-year-old convicted of extreme indifference murder,<sup>262</sup> (2) a sixteen-year-old defendant who committed aggravated murder and assault,<sup>263</sup> (3) a fifteen-year-old who committed second-degree murder,<sup>264</sup> (4) a fourteen-year-old who was an active participant in two aggravated kidnappings and an aggravated arson,<sup>265</sup> and (5) a thirteen-year-old convicted of a

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<sup>261</sup> *Id.* at 949.

<sup>262</sup> *People v. Fernandez*, 883 P.2d 491, 495 (Colo. Ct. App. 1994).

<sup>263</sup> *State v. Garcia*, 561 N.W.2d 599, 609–11 (N.D. 1997), *cert. denied*, 522 U.S. 874 (1997); *see generally* *Rice v. Cooper*, 148 F.3d 747, 752 (7th Cir. 1998) (upholding life without parole sentence for an illiterate and mildly retarded sixteen-year-old convicted of first-degree murder); *Foster v. Withrow*, 159 F. Supp. 2d 629, 646 (E.D. Mich. 2001) (affirming life without parole sentence for defendant who was sixteen at the time he committed first-degree premeditated murder, armed robbery, and possession of a firearm during the commission of a felony), *aff'd*, 42 F. App'x 701 (6th Cir. 2002); *Brennan v. State*, 754 So. 2d 1, 11 (Fla. 1999) (vacating death penalty imposed on sixteen-year-old defendant convicted of murder and reducing sentence to life imprisonment without a possibility of parole); *Jackson v. Commonwealth*, 499 S.E.2d 538, 554–55 (Va. 1998) (affirming death penalty sentence imposed upon sixteen-year-old following his commission of capital murder during a carjacking).

<sup>264</sup> *State v. Broadhead*, 814 P.2d 401, 411 (Idaho 1991), *overruled on other grounds*, *State v. Brown*, 825 P.2d 482 (Idaho 1992); *see* *State v. Shanahan*, 994 P.2d 1059, 1061 n.1, 1062–63 (Idaho Ct. App. 1999) (holding that fifteen-year-old defendant's life sentence for murder was not cruel and unusual); *State v. Mitchell*, 577 N.W.2d 481, 488–91 (Minn. 1998) (holding that mandatory life imprisonment for fifteen-year-old convicted of first-degree murder is not cruel and unusual punishment); *State v. Stinnett*, 497 S.E.2d 696, 701–02 (N.C. 1998) (holding life without parole sentence given to fifteen-year-old for first-degree murder and assault with a deadly weapon with intent to kill does not violate the federal or statute constitutions); *see also* *Rodriguez v. Peters*, 63 F.3d 546, 566–68 (7th Cir. 1995) (holding that it was not cruel and unusual to sentence defendant, who was fifteen years old when he committed two murders, to life in prison without parole).

<sup>265</sup> *State v. Walker*, 843 P.2d 203, 213 (Kan. 1992); *see* *State v. Jensen*, 579 N.W.2d 613, 623–25 (S.D. 1998) (holding that life imprisonment without possibility of parole for fourteen-year-old convicted of murder is not cruel and unusual); *State v. Avery*, 509 S.E.2d 476, 481 (S.C. 1998) (upholding sentencing of fourteen-year-old convicted of murder, armed robbery, and possession of a weapon while committing a violent crime to concurrent prison sentences of life, twenty-five years, and five years).

first-degree sexual offense.<sup>266</sup> Thus, the time when the judiciary questioned the propriety of sentencing a juvenile to life without parole has long passed, and now a juvenile as young as thirteen may—depending on the state—be sentenced to life without parole.<sup>267</sup>

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<sup>266</sup> *State v. Green*, 502 S.E.2d 819, 827–34 (N.C. 1998); see *State v. Massey*, 803 P.2d 340, 348 (Wash. Ct. App. 1990) (declining to create a distinction between a thirteen-year-old juvenile and an adult who are sentenced to life imprisonment without parole for first degree aggravated murder), *cert. denied*, *Massey v. Washington*, 499 U.S. 960 (1991). Compare Matthew Thomas Wagman, Note, *Innocence Lost: In the Wake of Green, the Trend is Clear—If You Are Old Enough to Do the Crime, Then You Are Old Enough to Do the Time*, 49 CATH. U. L. REV. 643, 675 (2000) (criticizing the *Green* decision and emphasizing that the North Carolina Constitution provides more protections to its citizens than does the Federal Constitution), with Paul G. Morrissey, Note, *Do the Adult Crime, Do the Adult Time: Due Process and Cruel and Unusual Implications for a 13-Year-Old Sex Offender Sentenced to Life Imprisonment in State v. Green*, 44 VILL. L. REV. 707, 739 (1999) (“Based on the staggering statistics and both the local and national reaction to increased juvenile violence, the North Carolina Supreme Court was justified in holding that transferring a thirteen-year-old sex offender and sentencing him to life imprisonment comported with society’s standards of decency.”).

<sup>267</sup> The legislature’s attitude corresponds with the judiciary’s attitude; the great majority of jurisdictions permit life without parole sentences for offenders over the age of sixteen. See, e.g., ARIZ. CONST. art. IV, pt. 2, § 22(1); ARIZ. REV. STAT. § 13-703(A) (LexisNexis 2008); ARK. CODE ANN. § 9-27-318(c)(2) (2007); GA. CODE ANN. §§ 17-10-31.1, 15-11-28(b)(2)(A)(i) (2007); KY. REV. STAT. ANN. § 532.030(1), 640.030(1) (LexisNexis 2007); ME. REV. STAT. ANN. tit. 17-A, § 1251 (2007); MD. CODE ANN., CRIM. LAW § 2-202(b)(2)(i) (LexisNexis 2008); MASS. ANN. LAWS ch. 119, § 72B (LexisNexis 2008); ch. 265, § 2 (LexisNexis 2008); MICH. COMP. LAWS §§ 769.1(1)(g), 769.9 (2007); MISS. CODE ANN. §§ 43-21-151(1)(a), 97-3-21 (2007); NEV. REV. STAT. §§ 62B.390, 200.030(4)(b)(1) (2007); N.J. STAT. ANN. §§ 2A:4A-26, 2C:11-3g (West 2008); OHIO REV. CODE ANN. §§ 2152.12 (2007), 2929.03(E)(1) (2008); OKLA. STAT. tit. 10, § 7301-1.3(4), tit. 21, § 701.9(A) (2008); 42 PA. CONS. STAT. § 6355(e) (2008); R.I. GEN. LAWS §§ 11-23-2, 14-1-7 (2007); S.C. CODE ANN. §§ 20-7-7605(5), 16-3-20(A) (2007); TENN. CODE ANN. §§ 37-1-134(a)(1), 39-13-202(c)(2) (2007); UTAH CODE ANN. §§ 76-3-206(1), 78-3a-603 (2007); VT. STAT. ANN. tit. 13, § 2303, tit. 33, § 5506 (2007).

Some jurisdictions make life without parole sentences mandatory upon conviction for murder in adult court. See ARK. CODE ANN. §§ 5-4-104(b), 9-27-318(b)(2) (2008); CONN. GEN. STAT. §§ 46b-127, 53a-35a (2008); FLA. STAT. §§ 775.082, 985.225 (2008); HAW. REV. STAT. §§ 571-22(b), 706-656 (2007); IOWA CODE § 902.1 (2007); LA. REV. STAT. ANN. § 14:30.1(B) (2008); MINN. STAT. ANN. §§ 260B.125, 609.106 (2007); MO. REV. STAT. § 565.020(2) (2007); N.H. REV. STAT. ANN. §§ 169-B:24, 630:1-a(III) (2008); N.C. GEN. STAT. § 14-17 (2007); TEX. FAM. CODE ANN. § 54.02(a) (Vernon 2007); TEX. PENAL CODE ANN. § 12.31 (Vernon 2007); WASH. REV. CODE §§ 10.95.030, 13.40.110 (2008).

Only a finite number of jurisdictions impose statutory limits on juvenile punishment. D.C. CODE § 22-2104(a) (2008) (no life without parole for crimes committed under age eighteen); IND. CODE § 35-50-2-3(b)(2) (2008) (no life without parole for crimes committed under age sixteen); OR. REV. STAT. § 161.620

## III

## THE CONTINUED NEED FOR INDIVIDUALIZED SENTENCES

Collectively, Parts I and II illustrate the potential for disparate results induced by determinate life without parole sentences. Putting aside the question of whether such a sentence is *morally* correct, automatically sentencing juvenile nonkillers to life in prison without parole serves only to eviscerate the now-seemingly outdated and idealistic notion of individualized sentencing. The lack of judicial unanimity on the question of whether a sentencing court should consider, *inter alia*, a juvenile murder accomplice's age, mental/emotional stability, and the nature and circumstances of the crime further exacerbates the problem. Finally, life without parole for less culpable juvenile murder accomplices erodes whatever is left of the rehabilitation ideal underlying juvenile punishment.

Equally problematic, the Supreme Court's Eighth Amendment jurisprudence does not resolve a juvenile nonkiller's constitutional challenge to a life without parole sentence imposed following a felony murder or accomplice-to-murder conviction. Current Eighth Amendment standards do not provide sentencing courts with the analytical tools necessary to account for the stark differences in the fact scenarios presented by, for example, the crimes giving rise to the decisions discussed in Part I, namely *Petty*, *Kaiser*, *Swinford*, *Miller*, *Jensen*, and *Salinas*. Therefore, the Eighth Amendment evidently allows a court to treat each of those defendants identically.

*A. What's the Problem?*

"The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."<sup>268</sup> Although stated in the context of capital punishment, this

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(2007) (no life imprisonment for juveniles waived from juvenile court); *cf.* 705 ILL. COMP. STAT. ANN. 405/5-805 (LexisNexis 2007); 730 ILL. COMP. STAT. ANN. 5/5-8-1 (a)(1)(a) (LexisNexis 2007) (sentence of twenty to sixty years following conviction for first-degree murder). Notably, several jurisdictions do not have life without parole sentences. See IDAHO CODE § 18-4004 (2007); KAN. STAT. ANN. §§ 21-4633, 21-4638 (2006); N.M. STAT. ANN. § 31-21-10 (West 2008).

<sup>268</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988).

observation by the *Thompson* Court applies with equal force to the punishment of life without parole. Yet, mandatory life without parole sentences for juvenile nonkillers divests from the sentencing court any modicum of sentencing discretion, which correspondingly prevents the court from considering the totality of offender and crime circumstances. Although the federal sentencing guidelines require judges to consider, *inter alia*, “the nature and circumstances of the offense and the history and characteristics of the defendant,”<sup>269</sup> no uniformly similar mandate exists at the state level. Indeed, disparate state decisions fail even to clarify the extent to which age is a relevant consideration at sentencing.<sup>270</sup>

Moreover, the determinate sentencing of juvenile accomplice nonkillers is inconsistent with what is left of the “rehabilitation-based” approach to juvenile criminal justice. Although the fundamental goal of the juvenile justice system was—and ostensibly still is—to rehabilitate the juvenile,<sup>271</sup> the dynamic shift in response to juvenile crime has replaced the idealistic rehabilitative approach with lengthy determinate sentences. This movement has prompted courts to approve of the harsh juvenile penalties discussed in Part II.C and spurred various legislatures to lower the age at which minors can be waived into

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<sup>269</sup> 18 U.S.C. § 3553(a)(1) (2006).

<sup>270</sup> *Compare, e.g., Davis v. State*, 718 So.2d 1148, 1166 (Ala. Crim. App. 1995) (upholding death sentence for twenty-three-year-old defendant, but considering defendant’s age as a mitigating factor); *People v. Eshelman*, 275 Cal. Rptr. 810, 816 (Cal. Ct. App. 1990) (considering defendant’s age in determining whether a sentence of seventeen years’ imprisonment for the crime of second-degree murder constituted cruel and unusual punishment); *Bryant v. State*, 824 A.2d 60, 87 (Md. 2003) (vacating death sentence and holding that “a defendant who has not attained the age of nineteen as of the date of the crime(s) is entitled to have the youthful age mitigator considered, albeit the weight given it may be attenuated, depending on the presence of non-chronological factors”), *with State v. Mitchell*, 577 N.W.2d 481, 492 (Minn. 1998) (“[I]t does not violate substantive due process that a court may not consider age as a mitigating factor when sentencing a child who has been certified as an adult and subsequently convicted of first-degree murder.”); *State v. Massey*, 803 P.2d 340, 348 (Wash. Ct. App. 1990) (noting that the proportionality test “does not embody an element or consideration of the defendant’s age, only a balance between the crime and the sentence imposed”). See Benjamin L. Felcher, *Kids Get the Darndest Sentences: State v. Mitchell and Why Age Should Be a Factor in Sentencing for First Degree Murder*, 18 LAW & INEQ. 323, 348 (2000) (noting that “the moment of certification to adult court determined Mitchell’s sentence”).

<sup>271</sup> *Kent v. United States*, 383 U.S. 541, 554 (1966).

adult court.<sup>272</sup> The less restrictive waiver provisions and the trend of punishing more minors like adults for a growing number of crimes, reflect a philosophical shift in juvenile punishment ideology from rehabilitative to punitive.<sup>273</sup>

This shift in response to juvenile crime has, as outlined throughout this Article, in some cases inappropriately exposed less culpable juvenile nonkillers to mandatory life without parole sentences. Although some jurisdictions have responded by reforming their approach to juvenile punishment,<sup>274</sup> the awkward juxtaposition between determinate sentencing schemes and the eviscerated idealistic goals of the juvenile court hardly provides a clear recipe for uniformity.<sup>275</sup>

### *B. The Supreme Court's Eighth Amendment Jurisprudence Provides No Answers*

A juvenile petitioner convicted of murder pursuant to accomplice liability, coconspirator liability, or the felony-murder rule, could likely challenge the constitutionality of a life without parole sentence in one of two ways. First, petitioner could undertake the “heavy burden” of asserting that the punishment

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<sup>272</sup> See Hofacket, *supra*, note 243, at 163–64. Most notably, between 1990 and 1996, forty legislatures passed laws designed to make it easier to prosecute juveniles as adults. 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, 642 (2002) (arguing that change in legislative landscape produced “less individualized justice and more decisions based solely on the nature of the charged offense”).

<sup>273</sup> See Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 72–90 (1997). Given the decreasing effectiveness of the juvenile court, some commentators have argued to abolish the court altogether. *Id.* at 69 (“[S]tates should abolish juvenile courts’ delinquency jurisdiction and formally recognize youthfulness as a mitigating factor in the sentencing of younger criminal offenders.”).

<sup>274</sup> See *infra* note 332 and accompanying text; see also Patricia Torbet & Linda Szymanski, U.S. DEP’T JUSTICE, STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME: 1996–97 UPDATE 7 (1998), available at <http://www.ncjrs.gov/pdffiles/172835.pdf> (outlining Texas’s revision to juvenile punishment by implementing blended sentencing).

<sup>275</sup> Cf. Jennifer A. Chin, Note & Comment, *Baby-Face Killers: A Cry for Uniform Treatment for Youths Who Murder, From Trial to Sentencing*, 8 J.L. & POL’Y 287, 318 (1999) (“To eliminate the disparate treatment from state to state of juvenile delinquents for similar criminal offenses, society requires uniformity in the law by employing the same juvenile procedures nationwide.”).

is contrary to society's evolving standards of decency. Alternatively, petitioner could argue that the sentence is disproportionate to the crime. Neither the *Trop* analysis nor the proportionality test, however, provides the analytical tools necessary to resolve either challenge. Simply stated, the Supreme Court's Eighth Amendment jurisprudence is unworkable in this context.

1. "Evolving standards of decency"

To evaluate a juvenile accomplice's evolving standards of decency challenge pursuant to *Trop*, a reviewing court must assimilate some combination of the following factors: (1) whether a nationwide consensus favors the challenged punishment,<sup>276</sup> (2) the extent to which the behavior of juries and prosecutors invoke the challenged punishment,<sup>277</sup> (3) its own judgment by focusing on whether the challenged punishment furthers legitimate penological goals,<sup>278</sup> and (4) the climate of international law.<sup>279</sup>

Although "[t]he beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question,"<sup>280</sup> two questions immediately spring to mind: first, how should courts define the ambiguous term "consensus;" and second, what evidence is sufficient to demonstrate the requisite consensus?

As to the first question, the following examples clarify that an inordinate number of ways exist to define a "national consensus." For instance, assigning a narrow definition to the term "national consensus" may reveal a lack of applicable sources and, thus, an inability to find the requisite consensus in favor of the challenged punishment. Indeed, if a court construed the inquiry strictly by focusing specifically on whether juvenile murder accomplices should *always* receive sentences of life

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<sup>276</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551, 564 (2005); *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989); *Thompson v. Oklahoma*, 487 U.S. 815, 822 n.7 (1988).

<sup>277</sup> See, e.g., *Stanford*, 492 U.S. at 373; *Thompson*, 487 U.S. at 822 n.7; *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976).

<sup>278</sup> *Roper*, 543 U.S. at 571; *Thompson*, 487 U.S. at 823 n.8 (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

<sup>279</sup> *Roper*, 543 U.S. at 576–78; *Thompson*, 487 U.S. at 830; see *Coker*, 433 U.S. at 596 n.10 (citing *Trop v. Dulles*, 356 U.S. 86, 102 (1958)).

<sup>280</sup> *Roper*, 543 U.S. at 564.

without parole, it would likely find no applicable state legislative enactments.

Consider, however, the possible result obtained by expanding the inquiry to whether the more recent enactments of state legislatures reveal a growing disapproval of the felony-murder rule. A brief overview of the felony-murder rule's origins reflects its early popularity.<sup>281</sup> Indeed, the first real felony-murder statute was enacted in 1827 when Illinois defined murder to include a "felony exception"<sup>282</sup> by which a death occurring

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<sup>281</sup> The true origins of the felony-murder rule are difficult to trace. In 1235, Henry de Bracton assessed the culpability of a person who unintentionally killed another by distinguishing between whether the death occurred during a lawful or unlawful act. Binder, *supra* note 16, at 74. In contrast, Edward Coke in 1628 articulated a much harsher rule by defining murder broadly to include unintentional deaths resulting from intentional unlawful acts. *Id.* at 81. Cases applying these felony-murder principles, however, were few and indeed did not appear until the end of the nineteenth century, e.g., *R. v. Horsey*, 176 Eng. Rep. 129, 130–31 (Kent Assizes 1862); *R. v. Serné*, 16 Cox's Crim. L. Cas. 311 (Cent. Crim. Ct. 1887), well after the time English law would have influenced American law, see Birdsong, *supra* note 16, at 18. *But see* *Enmund v. Florida*, 458 U.S. 782, 816–17 (1982) (O'Connor, J., dissenting) (asserting that "the common-law [felony-murder] rule was transplanted to the American Colonies"). Perhaps not surprisingly, then, at least two commentators assert that the American felony-murder rule developed independently from England's. Birdsong, *supra* note 16, at 17; Binder, *supra* note 16, at 108.

<sup>282</sup> Binder, *supra* note 16, at 162 n.530. Perhaps the truest precursor to the Illinois statute is the Pennsylvania Reform Act of 1794, which divided murder into degrees and provided that murder "committed in the perpetration of or attempt to perpetrate any arson, rape, robbery or burglary" constituted murder in the first degree. Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 771–72 (1949); see JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 658 (Little, Brown and Co. 1858). Although the Reform Act was actually a "felony aggravator statute," Pennsylvania courts nevertheless construed the Reform Act to have the effect of a true felony-murder rule. See Binder, *supra* note 16, at 145; see also *Commonwealth v. Flanagan*, 7 Watts & Serg. 415, 418 (Pa. 1844) (affirming a first-degree murder conviction after approving the jury instruction: "[I]f the homicide took place in the commission or attempt to perpetrate [arson, rape, robbery, or burglary], it is . . . murder in the first degree."); *Commonwealth v. Epps*, 44 A. 570, 571 (Pa. 1899) (calling the question of whether the defendant intended to kill a robbery victim "wholly immaterial" because the death occurred during the defendant's attempted commission of the robbery); *Brown v. Commonwealth*, 76 Pa. 319, 330–31 (Pa. 1874) (recognizing that murder requires "malice aforethought, either express or implied" but reasoning that in the absence of deliberateness or premeditation, "the perpetration of or the attempt to perpetrate . . . arson, rape, robbery, or burglary" would render the party "guilty of murder in the first degree, for he would come within the very words of the statute"). As a "felony aggravator statute," the Reform Act could raise the degree of murder if it occurred during an enumerated offense. Binder, *supra* note 16, at 144–46; see *People v. Aaron*, 299 N.W.2d 304, 323

during an “unlawful act” would be “deemed and adjudged to be murder.”<sup>283</sup> Other jurisdictions soon followed by enacting their own felony-murder statutes. In 1829, New Jersey enacted a statute imposing murder liability for both enumerated felonies and “any unlawful act against the peace of this state, of which the probable consequence may be bloodshed.”<sup>284</sup> That same year, New York defined murder to include killings “without any design to effect death, by a person engaged in the commission of any felony”<sup>285</sup> and later expanded the definition to include deaths occurring during *any felony*.<sup>286</sup> Texas then amended its penal code to allow for murder convictions based either on deaths occurring during an enumerated felony, or a theory of “transferred intent.”<sup>287</sup>

Since these early enactments, however, a number of U.S. jurisdictions have limited the effect of the felony-murder

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(Mich. 1980) (noting that a statute of similar language only *aggravates the degree of murder* and does not provide the malice for elevating manslaughter to murder).

<sup>283</sup> *Binder*, *supra* note 16, at 121 (quoting ILL. REV. CODE. CRIM. CODE § 22 (1827)). The Illinois Supreme Court, however, did not have a chance to interpret this “felony exception” until 1883 when, in *Mayes v. People*, it interpreted the statute’s language to mean that the defendant’s intent was “utterly immaterial.” 106 Ill. 306, 313 (1883). *But cf.* *Brennan v. People*, 15 Ill. 511, 517 (1854) (imposing liability on a defendant who encouraged or aided and abetted an unlawful act resulting in death, regardless of whether he intended for the death to occur). According to the court, “manifest[ing] a reckless, murderous disposition” and “act[ing] solely from general malicious recklessness, disregarding any and all consequences” was sufficient to support a murder conviction. *Mayes*, 106 Ill. at 313.

<sup>284</sup> *Binder*, *supra* note 16, at 121 (citing Act of Feb. 17, 1829, § 66, 1828-1829 N.J. Acts 109, 128). In *State v. Cooper*, the New Jersey Supreme Court clarified that a killing would amount to murder if committed during the course of felony “especially if death were a probable consequence of the [felony].” 13 N.J.L. 361, 1 (1833).

<sup>285</sup> *Binder*, *supra* note 16, at 121 (citing N.Y. REV. STAT. pt. 4, ch. 1, tit. 1, § 5 (1829)).

<sup>286</sup> *Id.* at 173 (citing Act of May 29, 1873, ch. 644, 1873 N.Y. Laws 1014). Early decisions seemed to limit the applicability of the felony-murder doctrine to accomplices. *See* *People v. Van Steenburgh*, 1 Parker’s Crim. Rep. 39 (N.Y. Ct. Oyer & Terminer 1845). During a riot where an officer was shot and killed, fifty men were convicted of various crimes yet only two were ultimately convicted for the killing. *Id.*

<sup>287</sup> *Binder*, *supra* note 16, at 168; *Rodriguez v. State*, 953 S.W.2d 342, 346 (Tex. Crim. App. 1997); *see, e.g., McCoy v. State*, 25 Tex. 33 (1860) (providing example of “transferred intent” doctrine in the context of felony murder); *Richards v. State*, 30 S.W. 805, 806 (Tex. Crim. App. 1895). Notably, Texas was the “felony murder center of America during the nineteenth century, with about one-fourth of all the reported felony murder convictions in the country.” *Binder*, *supra* note 16, at 167.

doctrine. Pennsylvania, for instance, has reduced the degree and corresponding punishment for felony murder to murder in the second degree.<sup>288</sup> Other jurisdictions require a *mens rea* beyond the mere intent to commit the underlying felony to sustain a murder conviction.<sup>289</sup> Still other jurisdictions allow less-culpable accomplices to raise an affirmative defense to a felony-murder charge.<sup>290</sup>

Perhaps more significantly, at least four jurisdictions have abolished the felony-murder rule.<sup>291</sup> In the course of formally abolishing its felony-murder statute, the Hawaii legislature noted that even a “limited formulation [of] the felony-murder rule is still objectionable.”<sup>292</sup> Similarly, Kentucky’s legislature abandoned felony murder in favor of an “intentional” and “wantonness with extreme indifference” standard.<sup>293</sup> In contrast, Ohio statutory law now states that “[n]o person shall cause the death of another . . . as a proximate result of the offender’s committing or attempting to commit a felony.”<sup>294</sup> Finally, Michigan abandoned its felony-murder rule by judicial decision in 1980.<sup>295</sup> The collective movement by state legislatures away from original formulations of the felony-murder rule suggests its growing disfavor and may therefore justify a court’s decision to hold that the evolving standards of decency preclude the imposition of a life without parole sentence on a less-culpable juvenile nonkiller convicted of felony murder.

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<sup>288</sup> 18 PA. CONS. STAT. ANN. § 2502 (West 2008); *accord* ALASKA STAT. § 11.41.110 (2008); LA. REV. STAT. ANN. § 14:30.1 (2008); UTAH CODE ANN. § 76-5-203 (West 2007).

<sup>289</sup> *E.g.*, DEL. CODE ANN. tit. 11, § 636(2) (2007) (requiring a defendant to recklessly cause a death while committing or attempting to commit any felony to sustain a first-degree murder conviction).

<sup>290</sup> *E.g.*, N.Y. PENAL LAW § 125.25 (McKinney 2008) (providing an affirmative defense if the defendant did not (1) commit or solicit the killing, (2) carry a deadly weapon, (3) reasonably believe his accomplices were armed with deadly weapons, and (4) reasonably believe his accomplices intended for the death or injury to occur).

<sup>291</sup> *See, e.g.*, *People v. Aaron*, 299 N.W.2d 304, 325–26 (1980).

<sup>292</sup> *See id.* at 314 (citations omitted).

<sup>293</sup> *Meredith v. Commonwealth*, 164 S.W.3d 500, 504 (Ky. 2005) (explaining that a defendant’s culpability “must now be measured by the degree of wantonness or recklessness reflected by the extent of his participation in the underlying robbery” (citation omitted)), discussing KY. REV. STAT. § 507.020 (West 2007).

<sup>294</sup> OHIO REV. CODE ANN. § 2903.04 (West 2007).

<sup>295</sup> *Aaron*, 299 N.W.2d at 325–26.

Alternatively, a court need only tweak the inquiry to approve the punishment by focusing on (1) the offender's age and the proposed punishment, without also considering the offender's role;<sup>296</sup> or (2) whether the crime committed by the juvenile would be murder if committed by an adult.<sup>297</sup>

The second question—what evidence is sufficient to demonstrate a national consensus—also presents something of a moving target. Although the Supreme Court has expressed a preference for relying on the enactments of state legislatures, it has not indicated that state statutes comprise the *only* acceptable evidence of a “national consensus.”<sup>298</sup> The Supreme Court's imprecise instructions for how to demonstrate a national consensus arguably extends to reviewing courts an invitation to

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<sup>296</sup> *Harris v. Wright*, 93 F.3d 581, 585 (9th Cir. 1996). In *Harris*, fifteen-year-old Michael Harris and thirteen-year-old Barry Massey entered Paul Wang's store where Massey shot and stabbed Wang to death, after which the two emptied the cash register, took assorted merchandise, and left. *Id.* at 582. Following his conviction and sentence of life in prison without parole, Harris appealed and asserted that his sentence was cruel and unusual because he was a fifteen-year-old first-time offender and his codefendant killed the victim. *Id.* at 582–83. Viewing the “national consensus” prong broadly, the Ninth Circuit asked whether there existed “a strong legislative consensus against imposing mandatory life without parole on offenders who commit their crimes before the age of sixteen.” *Id.* at 583. This broad view allowed the court to conclude that Harris could not meet his “heavy burden” to demonstrate that the evolving standards of decency precluded his sentence because at least twenty-one states allowed for the imposition of mandatory life without parole on fifteen-year-olds. *Id.* at 583–84.

Moreover, according to the court, Harris's sentence was not disproportionate to his crime. *Id.* at 585 (“[W]hile capital punishment is unique and must be treated specially, mandatory life imprisonment without parole is, for young and old alike, only an outlying point on the continuum of prison sentences.”). Yet, one commentator criticized the *Harris* decision for failing “to address adequately the unique station of juvenile defendants within the proportionality formula.” Recent Case, *Eighth Amendment—Juvenile Sentencing—Ninth Circuit Upholds Life Sentence Without Possibility of Parole of Fifteen-Year-Old Murderer*, 110 HARV. L. REV. 1185, 1185 (1997); see Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 691–93 (1998) (criticizing the *Harris* decision and arguing that “age must play a distinct and central role in the proportionality analysis of juvenile [life without parole] sentences”); Hofacket, *supra* note 243, at 180–81 (criticizing the *Harris* court's failure “to address the Supreme Court's assurance that ‘individualized consideration’ of a juvenile's maturity is performed when trying and sentencing minors”).

<sup>297</sup> *E.g.*, *Thomas v. State*, 562 N.E.2d 43, 45 (Ind. Ct. App. 1990).

<sup>298</sup> As noted, the Court has also relied on the judgment of juries. *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989); *Thompson v. Oklahoma*, 487 U.S. 815, 833 (1988); *Enmund v. Florida*, 458 U.S. 782, 794–96 (1982).

expand their analysis by relying on more attenuated sources like the decisions of state courts. Yet, relying on the decisions of state courts to establish a national consensus leaves unresolved the question of what impact another state court's decision should have if rendered on the basis of that state's constitution.

Alternatively, nothing definitively prevents a court from turning to congressional findings for objective indicia of consensus. Consider, then, the congressional findings published in connection with the codification of the Juvenile Justice and Delinquency Prevention Act ("Juvenile Act") where Congress observed that "[a]lthough the juvenile violent crime arrest rate in 1999 was the lowest in the decade, there remains a *consensus* that the number of crimes and the rate of offending by juveniles nationwide is still too high."<sup>299</sup> Moreover, the Juvenile Act lists an array of figures demonstrating how current methods of juvenile crime prevention and punishment are failing.<sup>300</sup> The Juvenile Act then cryptically suggests that, to address the problem of juvenile crime, juvenile punishments should include "methods for increasing victim satisfaction with respect to the penalties imposed on juveniles for their acts."<sup>301</sup> These illustrative examples serve only to amplify the point that a court can manipulate the consensus inquiry by simply changing the search parameters. Indeed, any of these examples provide an adequate definition for, and evidence of, a national consensus.

Defining national consensus in this manner, however, hardly reveals the nationwide sentiment toward sentencing less-culpable juvenile nonkillers to life in prison without parole. Instead, this analytical framework allows the cooperative relationship between automatic transfer statutes and determinate sentencing statutes to persist. As the *Miller* court observed, those statutes may require a sentencing court to treat juvenile nonkillers in the same manner it would treat an accomplished adult serial killer.<sup>302</sup> This same statutory relationship does not reflect that a majority of state legislatures would affirm the practice of sentencing *all* juvenile accomplice

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<sup>299</sup> 42 U.S.C. § 5601(a)(1) (2006) (emphasis added).

<sup>300</sup> See 42 U.S.C. § 5601(a)(6) (reporting that the number of cities reporting gang problems has increased 843%).

<sup>301</sup> 42 U.S.C. § 5601(a)(10)(B).

<sup>302</sup> See *People v. Miller*, 781 N.E.2d 300, 308 (Ill. 2002).

nonkillers to life in prison, particularly those convicted of felony murder.<sup>303</sup> Given the ease with which courts can manipulate—even perhaps unintentionally—the meaning of “national consensus,” this aspect of the *Trop* analysis cannot resolve more focused punishment questions.

Second, without additional Supreme Court guidance, the manner in which one inquires into the “behavior” of juries and prosecutors seems open to interpretation. To aid in the resolution of this inquiry, the *Thompson* Court relied on Department of Justice statistics, noting that such statistics help identify trends in societal views.<sup>304</sup> The Department of Justice does not maintain statistics on the number of juvenile nonkillers convicted of felony murder, or murder as accomplices/coconspirators, and serving life sentences.<sup>305</sup> Although the Office of Justice Programs (within the Department of Justice) keeps extremely detailed statistics on an inordinate number of trends in juvenile crime,<sup>306</sup> none approaches the specificity needed to examine juries’ and prosecutors’ approaches to sentencing juvenile nonkillers convicted of murder. Thus, in this context, any inquiry into the behavior of juries and prosecutors appears futile.

Third, this Article can only speculate as to how a reviewing court might exercise its own judgment. By piecing together anecdotal rationale from *Roper* and its progeny, it is clear that a reviewing court should reject the notion that sentencing a juvenile nonkiller convicted of murder to life without parole furthers the traditional penological goals of retribution,

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<sup>303</sup> See *People v. Dillon*, 668 P.2d 697, 727 (Cal. 1983).

<sup>304</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 832–33 (1988).

<sup>305</sup> According to the Human Rights Watch, “[e]ach state department of corrections has its own method for coding the type of crime committed by its prisoners.” HUMAN RIGHTS WATCH, AMNESTY INTERNATIONAL, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* 26 n.46 (2005), <http://hrw.org/en/reports/2005/10/11/rest-their-lives-0>. Additionally, “in many states the category of ‘first degree murder’ or ‘murder’ includes both intentional homicide and the felony crime described in the text as ‘felony murder.’” *Id.* As a result, it becomes “difficult to determine which types or sub-categories of youth crimes tended to result in a life without parole sentence.” *Id.*

<sup>306</sup> HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEPT OF JUSTICE, *JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT*, <http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf>.

deterrence, incapacitation, and rehabilitation.<sup>307</sup> Instead, in the exercise of its own judgment, a reviewing court should likely reason, as did the *Thompson* and *Roper* Courts, that the case for justifying juvenile sentences by reference to penological goals is not as strong with a minor as with an adult.<sup>308</sup>

Lastly, the climate of international law unambiguously reflects a worldwide disdain for life without parole sentences imposed upon children under the age of eighteen,<sup>309</sup> a far broader proposition than is undertaken by this Article. The Convention on the Rights of the Child (“CRC”) states, in pertinent part, that “[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”<sup>310</sup> Importantly, as of 2005, 192 out of a total of 194 countries were parties to the CRC; only the United States and Somalia have declined to ratify the CRC (although both have signed it).<sup>311</sup>

The “evolving standards of decency” inquiry is both overly flexible and “tantalizingly vague.”<sup>312</sup> It allows courts to craft and define their own version of a national consensus, selectively rely on tangentially related statistics, and exercise their own judgment to either accept or reject a juvenile nonkiller’s sentencing challenge. Accordingly, one reviewing court might sustain a sentencing challenge proffered by Kaiser, Swinford, or Miller, while another rejects identical challenges from Petty,

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<sup>307</sup> HUMAN RIGHTS WATCH, *supra* note 305, at 111–13 (discussing how life without parole sentences for juveniles fail to meet any of the four goals of punishment).

<sup>308</sup> See *Roper v. Simmons*, 543 U.S. 551, 570–71 (2005); *Thompson*, 487 U.S. at 837–38.

<sup>309</sup> HUMAN RIGHTS WATCH, *supra* note 305, at 98 (“Recognizing the unacceptability of sentences that negate the potential of children to make changes for the better over time, the [Convention on the Rights of the Child] flatly prohibits sentencing children to life sentences without parole or to the death penalty.”). *But cf.* *Roper*, 543 U.S. at 576 (discussing Article 37 of the United Nations Convention on the Rights of the Child).

<sup>310</sup> HUMAN RIGHTS WATCH, *supra* note 305, at 98 (quoting CRC, art. 37(a)) (emphasis removed).

<sup>311</sup> *Id.* at 99. “The United States signed the CRC on February 16, 1995, and Somalia signed on May 2, 2002.” *Id.* at 99 n.293.

<sup>312</sup> Carol S. Steiker, *Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1480 (2002).

Jensen, or Salinas.<sup>313</sup> The potential for such disparate results suggests that courts should reject the *Trop* analysis in the unique context of a sentencing challenge proffered by a juvenile nonkiller convicted of murder and sentenced to life in prison without parole.

## 2. Proportionality

Second, a juvenile nonkiller sentenced to life in prison without the possibility of parole could proffer a disproportionality argument.<sup>314</sup> Any modern court's response to a proportionality challenge must focus on objective criteria and specifically begin with considering the gravity of the offense and the harshness of the punishment.<sup>315</sup> A reviewing court must likewise consider the severity of the crime alongside the juvenile's criminal history.<sup>316</sup> As noted, unless the juvenile's sentence leads to an inference of disproportionality, the inquiry ends after a court considers this factor.<sup>317</sup>

Applying this test to hypothetical sentencing challenges from the six defendants discussed in Part I, *supra*, reveals that the Supreme Court's standards do not provide a sentencing court with the tools necessary to resolve an Eighth Amendment challenge at the time of sentencing. Although the Court's opinions collectively counsel *reviewing* courts to examine specifically a juvenile's offense and punishment, the proportionality analysis makes no provision for dealing with the "statutory bootstrapping" problem confronted by the *Miller*

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<sup>313</sup> As discussed earlier, a hypothetical challenge by a defendant like Kaiser carries the unique context of applying felony murder to less-culpable juvenile nonkillers. See generally *supra* Part I and accompanying discussion. Moreover, as a broad proposition, it seems the felony-murder rule was never intended to apply to juvenile accomplices. See Drizin & Keegan, *supra* note 13, at 531; see also Scott Robinson, *Felony Murder Statute Dates to 1535 English Law*, ROCKY MOUNTAIN NEWS, March 29, 2005, [http://www.rockymountainnews.com/drmn/news\\_columnists/article/0,1299,DRMN\\_86\\_3658375,00.html](http://www.rockymountainnews.com/drmn/news_columnists/article/0,1299,DRMN_86_3658375,00.html) (criticizing Colorado's felony-murder rule and noting that "[p]arliament abolished the doctrine of felony murder in 1957, based on the recognition that the rule often had overly harsh consequences").

<sup>314</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 997–98 (1991) (Kennedy, J., concurring).

<sup>315</sup> See *Solem v. Helm*, 463 U.S. 277, 291 (1983) (citing *Coker v. Georgia*, 433 U.S. 584, 597–98 (1977)).

<sup>316</sup> See *Ewing v. California*, 538 U.S. 11, 28 (2003).

<sup>317</sup> See *supra* note 175 and accompanying text.

court (i.e., the convergence of automatic transfer, accountability/felony-murder, and mandatory-punishment statutes). Thus, short of finding these statutes unconstitutional, as did the trial court in *Miller*,<sup>318</sup> nothing allows a *sentencing* court to independently consider a juvenile's circumstances at sentencing. Problems of judicial inefficiency aside, failing to provide a lower court with the opportunity to render a subsequent appeal unnecessary by considering offender and punishment circumstances during sentencing is perhaps the largest flaw in the disproportionality analysis.

Assuming, *arguendo*, that a reviewing court has the opportunity to consider the gravity of the offense and nature of the punishment, juveniles like Darla Jo Swinford and Leon Miller may, given their minimal roles in the underlying murders, be entitled to an "inference of disproportionality."<sup>319</sup> Although murder is "the most extreme of crimes"<sup>320</sup> neither Swinford nor Miller had a prior juvenile record and each received the harshest possible sentence, short of death,<sup>321</sup> for their minimal roles in the underlying crime. Moreover, compared to the principal perpetrators, both Swinford and Miller had only a "passive" role in the victims' deaths.<sup>322</sup>

Ordinarily, Supreme Court jurisprudence next requires a hypothetical reviewing court considering a sentencing challenge from a defendant like Miller or Swinford to evaluate: (1) the

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<sup>318</sup> *People v. Miller*, 781 N.E.2d 300, 303–04 (Ill. 2002).

<sup>319</sup> *See People v. Dillon*, 668 P.2d 697, 721 (Cal. 1983); *see also Tison v. Arizona*, 481 U.S. 137, 154 (1987) (focusing on participation level of defendants and noting that "substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill'" (emphasis added)). To avoid belaboring the point, this paragraph and corresponding subsection focus exclusively on Swinford and Miller solely for illustrative purposes. Of course, similar arguments could be made on behalf of defendant Kaiser, discussed above in Part I.

<sup>320</sup> *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality).

<sup>321</sup> *See Harmelin v. Michigan*, 501 U.S. 957, 1025–26 (1991) (White, J., dissenting).

<sup>322</sup> *See Solem v. Helm*, 463 U.S. 277, 296 (1983). The *Solem* Court appeared to define a "passive felony" as one that involves "neither violence nor threat of violence to any person." *Id.* If a reviewing court strictly applied this definition, then surely Swinford's and Miller's mere involvement in the murder would preclude a court from categorizing their felony as "passive." Thus, only if a reviewing court focused on their *roles* in the felony could they earn the passive designation.

sentences imposed on other criminals in the same jurisdictions,<sup>323</sup> and (2) the sentences imposed for commission of the same crime in other jurisdictions.<sup>324</sup> Yet, on the basis of vicarious-liability statutes,<sup>325</sup> states can punish convicted conspirators, accomplices, or abettors to a capital murder with, *at a minimum*, life in prison.<sup>326</sup> Those laws were, however, enacted to address adult—not juvenile—offenders.<sup>327</sup> Thus, reviewing courts cannot infer that each state’s legislature has made a *specific* decision to sentence the less-culpable juvenile nonkiller accomplice to life in prison without parole.<sup>328</sup> Doing so arguably enables the reviewing court to at least partially individualize each juvenile’s sentence.

A court undertaking this analysis must also consider the additional factors listed by the *Solem* Court.<sup>329</sup> Particularly mindful of *Solem*’s offering that “[a] court . . . is entitled to look at a defendant’s motive in committing a crime,”<sup>330</sup> reviewing

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<sup>323</sup> *Id.* at 291.

<sup>324</sup> *Id.*

<sup>325</sup> Although separate statutes exist governing an accomplice’s criminal liability, *see, e.g.*, ARIZ. REV. STAT. ANN. § 13-301, 13-303 (2008); DEL. CODE ANN. tit. 11, § 271 (2008); MONT. CODE ANN. § 45-2-302 (2007); N.J. STAT. ANN. § 2C:2-6 (2008); 18 PA. CONS. STAT. § 306 (2008); TEX. PENAL CODE ANN. § 7.02 (Vernon 2007), being an accomplice is ordinarily not a separately chargeable offense; it is instead a theory that the state may utilize to establish the commission of a substantive criminal offense, *see, e.g.*, *State v. Woods*, 815 P.2d 912, 914 (Ariz. Ct. App. 1991); *People v. Verlinde*, 123 Cal. Rptr. 2d 322, 331 (Cal. Ct. App. 2002).

<sup>326</sup> *See, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 1251 (2008); MASS. ANN. LAWS ch. 265, § 2 (LexisNexis 2008); MISS. CODE ANN. § 97-3-21 (2008).

<sup>327</sup> *See generally* Christine Chamberlin, Note, *Not Kids Anymore: A Need for Punishment and Deterrence in the Juvenile Justice System*, 42 B.C. L. REV. 391, 403 (2001) (“[I]f jurisdiction over a juvenile is transferred to adult court and the juvenile is found guilty of the offense, the court may impose upon the juvenile the adult sanction appropriate for the offense.”); Cathi J. Hunt, Note, *Juvenile Sentencing: Effects of Recent Punitive Sentencing Legislation on Juvenile Offenders and a Proposal for Sentencing in the Juvenile Court*, 19 B.C. THIRD WORLD L.J. 621, 633 (1999) (“Transfer represents a decision that the more punitive sentences the adult criminal justice system offers are necessary for the particular juvenile offender.”).

<sup>328</sup> *See* *Concerned Residents of Buck Hill Falls v. Grant*, 537 F.2d 29, 35 n.12 (3d Cir. 1976) (noting Congress did not consider the issue, and thus court was unwilling to assume Congressional intent); *United States v. Ibarra-Galindo*, 206 F.3d 1337, 1342 (9th Cir. 2001) (Canby, J., dissenting) (noting that it is error for a court to assume, without evidence, that Congress actually considered and rejected certain alternatives).

<sup>329</sup> *Solem v. Helm*, 463 U.S. 277, 293–94 (1983) (listing additional factors).

<sup>330</sup> *Id.* at 293.

courts should construe the term “motive” broadly and view this language as an invitation to investigate any aspects of the juvenile’s background that led to his or her participation in the crime.<sup>331</sup>

Regardless of how a court ultimately assimilates the maze that is *Solem*, *Harmelin*, *Ewing*, *Lockyer*, and others, the problematic reality is that, even if a less-culpable juvenile nonkiller ultimately challenges his or her sentence of life without parole following a murder conviction obtained pursuant to a charge of felony murder or coconspirator/accomplice liability, the remedy, if any, comes at the end of a lengthy string of appeals. Given a state trial court’s inability to consider offender circumstances at the time of a defendant’s sentencing, both courts and legislatures should reexamine the propriety of sentencing the less-culpable juvenile nonkiller to life in prison without parole. Specifically, state legislatures should revisit the laws governing juvenile sentences in order to individualize punishments in accordance with the juvenile perpetrator’s participation.<sup>332</sup>

Alternatively, at a minimum, sentencing courts should retain the discretion to account for the juvenile’s age, criminal and

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<sup>331</sup> For example, in *Swinford*, the Mississippi Supreme Court should have viewed the sentencing court’s decision to sentence Swinford without the benefit of a presentencing report as unacceptable. See *Sucik v. State*, 689 A.2d 78, 81 (Md. 1997) (“When a trial court ignores the PSI requirement, it acts counter to the requirements of the very law that makes possible a sentence of life without parole.”); see also *State v. Maschek*, 706 So. 2d 512, 516 (La. Ct. App. 1998) (remanding for resentencing of defendant and noting “the court’s decision to ignore the recommendation of the PSI and impose a stricter sentence is disturbing because it is based upon unsupported evidentiary facts”).

<sup>332</sup> Colorado, for example, recently reversed its life without parole statute for juveniles and now imposes a determinate forty-year sentence on juveniles prosecuted directly as adults or transferred from juvenile court. COLO. REV. STAT. §§ 18-1.3-401(4)(b)(I), 18-1.3-401(4)(b)(II) (2008) (stating that the revised penalty provided in “paragraph (b) shall apply to persons sentenced for offenses committed on or after July 1, 2006”). The change was overdue; Colorado ranked eleventh in the nation for the rate at which life sentences are imposed on juveniles and applied felony-murder charges disproportionately to juveniles. Miles Mofeit & Kevin Simpson, *Teen Crime, Adult Time: Laws Converge to Put Teens Away Forever*, DENVER POST, Oct. 26, 2006, [http://www.denverpost.com/teencrime/ci\\_3636564](http://www.denverpost.com/teencrime/ci_3636564) (“Among [Colorado] juveniles sentenced to life since 1998, 60 percent went to prison on felony[-]murder convictions, compared with 24 percent of adult cases.”); see Gwen Florio & Sue Lindsay, *Locked up Forever: Debate Builds over the Fate of 46 Teen Killers Sentenced to Life in Prison Without Parole*, ROCKY MOUNTAIN NEWS, Sept. 16, 2005, [http://www.rockymountainnews.com/drmn/local/article/0,1299,DRMN\\_15\\_4083343,00.html](http://www.rockymountainnews.com/drmn/local/article/0,1299,DRMN_15_4083343,00.html) (noting that one of every eight inmates serving life without parole sentences in Colorado was convicted as a juvenile).

family history, mental health, and role in the crime.<sup>333</sup> Regardless of the source, be it judicial or legislative, the law should account for the unique circumstances of juvenile's role in the killing at sentencing rather than the end of the appellate process.

#### CONCLUSION

The Supreme Court's current Eighth Amendment jurisprudence is not prepared to resolve the persistent and perhaps growing problem of sentencing less-culpable juvenile murder accomplices to life without parole.<sup>334</sup> Although the Court has expressed a willingness to treat juvenile punishment differently, it has not had occasion to evaluate the constitutionality of sentencing less-culpable juvenile nonkillers to life without parole following their murder convictions pursuant to felony murder, coconspirator, or accomplice liability. Until the Court has an opportunity to consider the issue, sentencing courts will continue to punish juvenile nonkiller accomplices without considering factors like offender characteristics, motive, level of participation, or the nature of the crime.<sup>335</sup> Such one-dimensional sentencing is plainly inconsistent

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<sup>333</sup> *In re Lynch*, 503 P.2d 921, 931–32 (Cal. 1972) (outlining the “techniques” a reviewing court must employ when determining whether a punishment violates the “cruel or unusual” clause of the California Constitution); see *People v. Gonzalez*, 104 Cal. Rptr. 2d 247, 257–59 (Cal. Ct. App. 2001) (applying *Lynch* in the context of juvenile offenders). Although such techniques remain wrapped up in the appeals process, the “techniques”—like the *Solem* Court's approach—at least seek to individualize each defendant's sentence.

<sup>334</sup> *Tanenhous & Drizin*, *supra* note 272, at 667 (“[B]ecause prosecutorial waivers and legislative waivers 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; at least one estimate places the number as high as 200,000.”). Accurate statistics are indeed difficult to come by; some statistics reflecting the increase in juvenile gang violence suggest that courts may increasingly encounter varied participation levels from juvenile accomplice nonkillers like the fact patterns presented by the case studies in this Article. See *supra* note 303 and accompanying text. Conversely, other studies suggest that juvenile violence began decreasing in the 1990s. See *Hofacket*, *supra* note 243, at 164–65.

<sup>335</sup> See *Mullaney v. Wilbur*, 421 U.S. 684, 697–98 (1975) (noting that American criminal law has long considered a defendant's intention to be critical to “the degree of [his] criminal culpability”).

with the uniformly desirable judicial goal of individualizing each defendant's punishment.<sup>336</sup>

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<sup>336</sup> See *Burns v. United States*, 287 U.S. 216, 220 (1932) ("It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion.").