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Joseph L. Hoffmann
Indiana University Maurer School of Law, hoffma@indiana.edu

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Articles

On the Perils of Line-Drawing: Juveniles and the Death Penalty

by

JOSEPH L. HOFFMANN*

The use of the death penalty against juveniles is by no means a recent phenomenon in the United States. It has always been a rare practice, however, and its constitutional validity has come under increasing attack in the past several years. Within the past ten years, the Supreme Court has been presented with numerous petitions for certiorari alleging that imposing the death penalty against murderers who were juveniles when they committed their crimes violates the eighth amendment's ban

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* Assistant Professor of Law, Indiana University-Bloomington. B.A. 1978, Harvard College; J.D. 1984, University of Washington. The author clerked for Judge Phyllis A. Kravitch of the United States Court of Appeals for the Eleventh Circuit from 1984 to 1985, and for then-Associate Justice William H. Rehnquist of the United States Supreme Court during the 1985-86 Term.

The author assumes, for purposes of this Article, that the abolition of the death penalty itself is not at issue. Although some of the arguments presented in this Article could be used to support the abolition of the death penalty, the author believes that scholarship in the death penalty area need not, and should not, focus solely on the abolition question. Instead, the author believes, scholarship addressing other death penalty issues can help to improve the administration of the death penalty, pending political or legal resolution of the abolition question.

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1. The first recorded case involved a 16-year-old named Thomas Graunger, who was executed in the Plymouth Colony in 1642 for committing the crime of bestiality. See N. TEETERS & J. HEDBLOM, "HANG BY THE NECK" 111 (1967).

2. Professor Victor Streib, in his recently published comprehensive study of the juvenile death penalty, has calculated that the largest number of executions of juveniles in the United States during any decade since 1890 was the 53 such executions that took place during the 1940s. Overall, between 1890 and 1986, only 210 juveniles were executed in the United States, representing merely 2.5% of the total number of executions. V. STREIB, DEATH PENALTY FOR JUVENILES 25 (1987).
on cruel and unusual punishment.\textsuperscript{3} The Court has granted certiorari in six such cases,\textsuperscript{4} but to date either has failed to reach the juvenile death penalty issue at all\textsuperscript{5} or, as in the most recently argued case, has failed to produce a majority opinion on the subject.\textsuperscript{6} Three such cases await decision during the Court's 1988 Term.\textsuperscript{7}

The proponents and opponents of a constitutional ban on the use of the death penalty against juveniles have advanced several arguments to support their respective positions. Among the arguments for a ban are: (1) Our society, as represented by our legislatures, prosecutors, judges, and juries, has rejected the juvenile death penalty;\textsuperscript{8} (2) other nations, including many that share our Anglo-American heritage, have rejected the juvenile death penalty;\textsuperscript{9} (3) the threat of the death penalty does not deter potential juvenile murderers, because juveniles often do not consider the possible consequences prior to committing their murderous acts and because, even if they did consider these consequences, they would realize that very few juveniles actually receive the death penalty;\textsuperscript{10} (4) juveniles are especially likely to be rehabilitated or reformed while in prison, thus rendering the juvenile death penalty especially inappropriate;\textsuperscript{11} and (5) the juvenile death penalty does not serve a legitimate retributive purpose, since juveniles are generally less mature and responsible than adults, and should therefore be viewed as less culpable than adults who commit the

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\textsuperscript{5} See Eddings, 455 U.S. at 116; Bell, 438 U.S. at 642 n.* (plurality opinion) (Burger, C.J.).

\textsuperscript{6} See Thompson, 108 S. Ct. at 2689 (plurality opinion) (Stevens, J.).


\textsuperscript{8} See Thompson, 108 S. Ct. at 2692-98.

\textsuperscript{9} See id. at 2696 & n.34.

\textsuperscript{10} See id. at 2700; V. STREIB, supra note 2, at 188.

\textsuperscript{11} See V. STREIB, supra note 2, at 188.
same crimes. To bolster the view that juveniles are sufficiently different from adults to warrant special constitutional treatment, advocates of a ban have pointed to the existence of special laws relating to juveniles in such areas as driving, voting, gambling, marriage, and jury service.

Among the arguments against a constitutional ban on the death penalty for juveniles are: (1) The evidence of a societal consensus against the juvenile death penalty is nonexistent, or at least too weak to justify a constitutional ban; (2) the views of other nations are irrelevant to the proper interpretation of our Constitution, at least absent a consensus within our own society; (3) the threat of the death penalty can deter potential juvenile murderers, or at least the judgments of legislatures and prosecutors to that effect deserve deference; (4) the most heinous juvenile murderers, who are the only ones likely to receive the death penalty, are not good candidates for rehabilitation or reform; and (5) there are some juvenile murderers who are sufficiently mature and responsible to

12. See Thompson, 108 S. Ct. at 2698-99; V. Streib, supra note 2, at 188.
13. In Thompson, 108 S. Ct. at 2702 app. C (Stevens, J.), the plurality noted that "in most States have various provisions regulating driving age, from learner's permits through driver's licenses. In all States but one, 15-year-olds either may not drive, or may drive only with parental consent or accompaniment." The one exception is Montana, which permits 15-year-olds to drive without parental consent upon completion of a driver's education course. See Mont. Code Ann. § 61-5-105 (1987).
14. The twenty-sixth amendment to the United States Constitution guarantees to 18-year-olds the right to vote. U.S. Const. amend. XXVI. All 50 states and the District of Columbia provide for an 18-year-old voting age. See Thompson, 108 S. Ct. at 2701 app. A.
15. In Thompson, 108 S. Ct. at 2705 app. F, the plurality noted that, in 39 of the 48 states in which some form of gambling is legal, "minors are absolutely prohibited from participating in some or all forms of such gambling." The remaining nine states either permit parental consent to vitiate the prohibition, see Okla. Stat. Ann. tit. 21, § 995.13 (West 1983); Pa. Stat. Ann. tit. 10, § 305 (Purdon Supp. 1988); Tex. Rev. Civ. Stat. Ann. art. 179d, § 17 (Vernon Supp. 1988), or, as in Kentucky, Maryland, Minnesota, New Mexico, North Carolina, and Virginia, express no minimum age within their gambling statutes.
17. In Thompson, 108 S. Ct. at 2701 app. B, the plurality noted that "[i]n no State may anyone below the age of 18 serve on a jury."
19. See id. at 2716 n.4.
21. Id. at 56-57. See generally Feld, Juvenile Court, Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitation Ideal," 65 Minn. L. Rev. 167, 233-37 (1980) (discussing problems of dealing with sophisticated, persistent, or violent juvenile offenders within rehabilitative juvenile justice system).
deserve the death penalty for their crimes, and thus the juvenile death penalty serves a legitimate retributive purpose.\textsuperscript{22} The opponents of a ban generally seek to distinguish age limits in other areas of the law, arguing that even if juveniles do not know how to vote conscientiously or how to drive a car safely, they certainly know that it is very wrong to kill another human being.\textsuperscript{23}

In this Article, I do not discuss most of the arguments mentioned above, nor do I attempt to decide whether such arguments ultimately "add up" to a conclusion in favor of, or against, a constitutional ban on the death penalty for juveniles. Rather, I discuss the juvenile death penalty issue solely in terms of the principles of retributive justice. In other words, I focus exclusively on the question whether a ban on the death penalty for juveniles is consistent with the fundamental retributive goal of ensuring that every person who commits a crime receives his or her "just deserts," or the punishment that is appropriate in light of the harm caused by the crime and the offender's culpability.

This question is central to the constitutional issue presented in the juvenile death penalty cases. According to the Supreme Court, the eighth amendment requires that the decision whether to impose the death penalty in a particular case be based on the defendant's "moral culpability,"\textsuperscript{24} or "personal responsibility and moral guilt."\textsuperscript{25} Thus, the Court's interpretation of the eighth amendment incorporates notions of retributive justice. Yet this question has not been considered adequately by those involved in the debate over the constitutionality of the juvenile death penalty.

The debate, in retributive terms, has boiled down to two competing claims. As noted above, the advocates of a ban have argued that most juveniles do not deserve to die for their crimes, and that a ban on the juvenile death penalty will therefore serve the ends of justice. The opponents of a ban have argued in response, as also noted above, that at least some juveniles deserve to die for their crimes, and that a ban will therefore frustrate the ends of justice. Given the concededly small number of "death-deserving" juvenile murderers, and the inherent risk, absent a ban, of improper exercises of capital sentencing discretion, the advocates

\textsuperscript{22} See Thompson, 108 S. Ct. at 2719; Ellison, State Execution of Juveniles: Defining Youth as a Mitigating Factor for Imposing a Sentence of Less Than Death, 11 LAW & PSYCHOLOGY REV. 1, 36 (1987).

\textsuperscript{23} See, e.g., Thompson, 108 S. Ct. at 2718 n.5.

\textsuperscript{24} See Booth v. Maryland, 107 S. Ct. 2529, 2534 (1987).

\textsuperscript{25} See id. at 2533 (citing Enmund v. Florida, 458 U.S. 782, 801 (1982)).
of a ban often have seemed to hold the higher ground with respect to the issue of retributive justice.

The debate about retributive justice described above badly misses the mark, however, because each side has relied entirely on cardinal proportionality to justify its position. In this Article I demonstrate that modern retributive theory, which properly demands both cardinal and ordinal proportionality, compels the Court to reject a ban on the juvenile death penalty, at least if such a ban is to be accomplished by means of a "bright line" based on the chronological age of the murderer. Those who advocate a ban on the juvenile death penalty may be able to base their constitutional claim on some set of alternative values, such as utilitarian considerations of rehabilitation or deterrence, or the symbolic value of extending mercy to murderers who are juveniles. In retributive terms, however, such a ban would produce serious injustice, and the advocates of a ban must realize this when making their alternative arguments.

In terms of retributive justice, what is most troubling about a "bright line" ban on the juvenile death penalty is not the fact that a small number of "death-deserving" juvenile murderers would escape the death penalty and receive life in prison or some other lengthy prison sentence. Rather, what is most troubling, or should be, is the fact that such "death-deserving" juvenile murderers would be treated differently from nonjuvenile murderers whose desert was exactly the same as, or even less than, that of the ineligible juvenile murderers, but who would nevertheless be eligible for and receive the death penalty. And the sole basis for this life-versus-death difference in punishment, between the nonjuvenile murderers and the equally or more culpable juvenile murderers, would be the chronological age of the murderer at the time of the crime.

The use of chronological age to draw a "bright line" and prohibit the death penalty for juveniles inevitably would produce results that, viewed in retributive justice terms, can only be described as "arbitrary" and "freakish." After all, age itself is not the factor that renders the imposition of the death penalty against most juveniles arguably unjust. Rather, age is simply a "proxy," and an imperfect one at that, for a combination of factors that determines the relative culpability of a juvenile murderer. These factors include maturity, judgment, responsibility, and the capability to assess the possible consequences of one's conduct. Because age only imperfectly reflects this complex combination of factors, the adoption of a "bright line" ban on the death penalty for juveniles,

27. See id. at 310 (Stewart, J., concurring).
defined in terms of age, necessarily violates the concept of ordinal, or comparative, proportionality, which is an important component of retributive justice. In the end, this means that the advocates of such a constitutional ban must demonstrate other reasons to adopt it, and these other reasons must be important enough to outweigh the serious injustice such a ban would produce.

In section I of this Article, I review the modern history of the juvenile death penalty, focusing on the Supreme Court's unsuccessful attempts to resolve the question whether the eighth amendment bars the death penalty for juveniles. In section II, I explain the significance of and relationship between the concepts of cardinal and ordinal proportionality. In particular, I argue that, although ordinal proportionality allows us to make much more refined judgments about the "justice" of punishments than cardinal proportionality, the two kinds of proportionality are not theoretically distinct. Instead, cardinal and ordinal proportionality simply involve different comparative approaches to resolving the same issue, namely, the determination of "just" punishments. In section III, I show the relevance of the principles of retributive justice to the constitutional issue raised in the juvenile death penalty cases by examining how the Court already has incorporated such principles into its eighth amendment jurisprudence. In section IV, I discuss how the principles of retributive justice might influence the Court's analysis of the constitutionality of the juvenile death penalty, and particularly how the Court might remedy any comparative injustice that exists under the current guided discretionary capital sentencing system for juveniles. In section V, I contrast the use of "bright lines" in the context of the juvenile death penalty with the use of such lines in other areas of death penalty law. Finally, in section VI, I argue that the analogy, often drawn by advocates of a ban on the juvenile death penalty, between the use of chronological age as a "bright line" for the purpose of imposing such a ban and the use of age as a "bright line" in other areas of the law is inappropriate and misleading.

I. Background: The Juvenile Death Penalty and the Constitution

A. The Early Cases: Bell v. Ohio and Eddings v. Oklahoma

During the modern death penalty era, which began with the Supreme Court's 1972 decision in Furman v. Georgia, the first case in

28. See infra notes 90-156 and accompanying text.
which the Supreme Court was faced with the argument that the juvenile
death penalty violated the Constitution was *Bell v. Ohio.*

In *Bell,* the defendant was sixteen years old when he committed the murder for
which he received his death sentence. At the sentencing hearing, the de-
fense attorney argued that the defendant's youth should be a mitigating
factor. The Ohio death penalty statute, however, prohibited the use of
any mitigating factors, such as youth, that were not specified in the statute.

On certiorari to the Supreme Court, Bell challenged his sentence
on several grounds, including both the procedural claim that Ohio had
wrongly prevented him from arguing his youth as a mitigating factor,
and the substantive claim that the death penalty was disproportionate as
applied to his case, presumably because of his age.

The Court never reached Bell's substantive claim. Instead, in the
companion case of *Lockett v. Ohio,* a plurality concluded that the
eighth amendment requires the states to permit a defendant to introduce
any available evidence in mitigation of a death sentence, regardless of
whether such a mitigating factor was set forth specifically in the particu-
lar state's death penalty statute. Relying on the decision in *Lockett,* the
same plurality of the Court reversed Bell's sentence and remanded the
case to the Ohio courts without deciding the juvenile death penalty
issue.

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32. *Bell,* 438 U.S. at 642 & n.* (plurality opinion) (Burger, C.J.).
opinion in *Lockett,* although technically only a plurality opinion, is properly viewed as the
equivalent of a majority opinion. Justice Marshall refused to join the opinion reversing the
death sentence in *Lockett* on the basis of his belief, as expressed in his dissent in *Gregg v.*
Georgia, 428 U.S. 153, 231-41 (1976) (Marshall, J., dissenting), that the Court should have
gone further and declared the death penalty facially unconstitutional. *Lockett,* 438 U.S. at
619-21 (Marshall, J., concurring in the judgment). Justice Marshall certainly agreed, however,
that any death sentence that failed to meet the requirements set forth by the *Lockett* plurality
could not stand. The Chief Justice's *Lockett* opinion thus properly carries the weight of a
majority, rather than a plurality, opinion, and might be termed a "false" plurality opinion.

Justice Brennan, who did not participate in the decision in *Lockett,* 438 U.S. at 609, and
Justice Marshall refused to join several other early post-*Gregg* opinions reversing particular
death sentences, thus giving rise to additional "false" plurality opinions. *See Godfrey v. Geor-
gia,* 446 U.S. 420, 433-44 (1980) (Marshall, J., joined by Brennan, J., concurring in the judg-
ment); *Coker v. Georgia,* 433 U.S. 584, 600 (1977) (Brennan, J., concurring in the judgment);
*id.* at 600-01 (Marshall, J., concurring in the judgment); *Gardner v. Florida,* 430 U.S. 349,
364-65 (1977) (Brennan, J., concurring in part and dissenting in the judgment); *id.* at 365-71
(Marshall, J., dissenting).

34. *Bell,* 438 U.S. at 642-43 (plurality opinion) (Burger, C.J.). *Bell,* like *Lockett,* is a
"false" plurality opinion that properly should be viewed as the equivalent of a majority opin-
ion. *See supra* note 33. Justice Marshall concurred only in the judgment in *Bell,* but certainly
agreed that the case was governed by the same rule announced by the plurality in *Lockett.* *See*
Four years later, the Court decided the case of *Eddings v. Oklahoma*.\(^\text{35}\) In *Eddings*, as in *Bell*, the defendant was sixteen when he committed his crime; Eddings had murdered a police officer. At the sentencing hearing, the defense attorney presented evidence of the defendant's troubled background, including his broken home, his resulting mental and emotional problems, and his many prior episodes of violent behavior. This evidence was introduced pursuant to the Oklahoma death penalty statute, which, unlike Ohio's statute, permitted the defense to present "any mitigating circumstances."\(^\text{36}\) The sentencing judge, however, apparently did not view Eddings' evidence as truly "mitigating" in nature. The judge explained, in the course of sentencing Eddings to death: "Nor can the Court in following the law, in my opinion, consider the fact of this young man's violent background."\(^\text{37}\)

Eddings filed a petition for certiorari raising both procedural and substantive challenges to his death sentence.\(^\text{38}\) Unlike in *Bell*, however, the Court in *Eddings* specifically limited the grant of certiorari to the claim that the eighth amendment prohibited the death penalty for juveniles.\(^\text{39}\) Nevertheless, the Court again failed to reach the juvenile death penalty issue. Instead, the Court reversed the death sentence on the ground that the sentencing judge violated *Lockett* by failing to consider all of the evidence presented by Eddings in mitigation.\(^\text{40}\) The Court held, in effect, that evidence of a bad background can be just as "mitigating" as evidence of a good background, or at least that the sentencer must conscientiously weigh both kinds of mitigating evidence before imposing a death sentence. Therefore, as in *Bell*, the Court sent the defendant back to the state courts for resentencing without deciding whether the juvenile death penalty is constitutional.\(^\text{41}\)

**B. Thompson v. Oklahoma**

The Court most recently revisited the juvenile death penalty issue during the 1987 Term, when it decided *Thompson v. Oklahoma*.\(^\text{42}\) While the Court finally reached the issue of the constitutionality of the juvenile

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\(^{35}\) *Bell*, 438 U.S. at 643-44 (Marshall, J., concurring in the judgment). Justice Brennan did not participate in the decision in *Bell*. *Id.* at 643.

\(^{36}\) 455 U.S. 104 (1982).

\(^{37}\) OKLA. STAT. ANN. tit. 21, § 701.10 (West 1980).

\(^{38}\) *Eddings*, 455 U.S. at 109 (citing Record app. at 189) (emphasis omitted).

\(^{39}\) *Id.* at 113 n.9.

\(^{40}\) *Id.* at 113.

\(^{41}\) *Id.* at 113, 117.

death penalty, it was unable to agree sufficiently on the resolution of the issue to produce a majority opinion.

In Thompson, the defendant was only fifteen years old when he, along with three older accomplices, murdered his former brother-in-law. Under Oklahoma law, fifteen year olds are treated as “children” subject to the juvenile courts rather than the adult criminal justice system, unless a specific finding is made to the contrary. In order to certify a fifteen year old to stand trial as an adult, the trial judge must find that (1) the state has established the “prosecutive merit” of the case, and (2) there are no reasonable prospects for rehabilitation of the “child” within the juvenile justice system. After hearing testimony from a clinical psychologist, a juvenile justice system employee, and other witnesses familiar with Thompson’s background, the trial judge entered an order certifying Thompson to be tried as an adult.

Thompson was convicted of first-degree murder, and a sentencing hearing was conducted to determine the appropriateness of the death penalty. At the sentencing hearing, the defense attorney was allowed to argue Thompson’s youth as a mitigating circumstance. Nevertheless, the jury recommended, and the sentencing judge imposed, the death sentence. Subsequently, the Supreme Court granted Thompson’s petition for a writ of certiorari with respect to both the substantive claim that the juvenile death penalty violated the eighth amendment and a procedural claim that the introduction at the sentencing phase of the trial of certain gruesome photographs of the victim’s body was improper.

The Court reversed Thompson’s death sentence by a five to three vote, but failed to produce a majority opinion on the issue of the constitutionality of the juvenile death penalty. The plurality opinion, written by Justice Stevens and joined by Justices Brennan, Marshall, and Blackmun, concluded that the eighth amendment prohibits the death penalty for juvenile murderers who commit their crimes while under the age of sixteen. Justice O’Connor concurred in the judgment but wrote a separate opinion. Justice Scalia wrote a dissenting opinion, which was joined by

44. Id. at § 1112(b).
45. See Thompson, 108 S. Ct. at 2713 (Scalia, J., dissenting).
46. See id. at 2691.
47. Id. at 2700.
48. Id. at 2711 (O’Connor, J., concurring in the judgment) (vacating death sentence because there was insufficient evidence that Oklahoma’s legislature had carefully considered the minimum age for death eligibility).
Chief Justice Rehnquist and Justice White. Justice Kennedy, who joined the Court after the oral arguments in the case, did not participate in the decision.

In concluding that imposing the death penalty on juveniles under sixteen was unconstitutional, Justice Stevens relied upon two primary factors: (1) An examination of societal standards, as manifested in the laws of states and other countries and as evidenced by the behavior of juries in deciding whether to impose the death penalty on juveniles; and (2) principles of relative culpability, retribution, and deterrence. Justice Stevens began by noting that eighth amendment jurisprudence requires the Court to determine the contours of the "evolving standards of decency that mark the progress of a maturing society." He reviewed the legislative judgments of the states, pointing to the fact that fourteen states do not have a death penalty at all, while an additional eighteen states have expressly established either sixteen, seventeen, or eighteen as the minimum age for the death penalty. This left nineteen states in which a fifteen year old could legally receive the death penalty. Nonetheless, Justice Stevens placed "to one side" these latter statutes because the legislatures in those states had "not expressly confronted the question of establishing a minimum age for imposition of the death penalty." He concluded that, based on legislative judgments, "it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense . . . ." He bolstered this conclusion by referring to international standards of decency as expressed by the death penalty laws of the United Kingdom, New Zealand, and the Soviet Union, among others.

Justice Stevens next examined the attitudes of American juries. In this context, he noted that apparently only eighteen to twenty persons have been executed during the twentieth century for crimes committed before the age of sixteen. Moreover, the last such execution took place

49. Id. at 2712 (Scalia, J., dissenting) (asserting that under some circumstances a particular juvenile may be mature enough for a state to punish his actions with death).
50. Id. at 2700.
51. Id. at 2691 (plurality opinion) (Stevens, J.) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) (Warren, C.J.)).
52. Id. at 2694-96. The Court included the District of Columbia as a state, which accounts for the survey total of 51. The District of Columbia, along with 13 other states, had found the death penalty unconstitutional. Id. at 2694 n.25.
53. See id. at 2694-95 & n.29.
54. Id. at 2693-95.
55. Id. at 2696.
56. Id.
57. Id. at 2697 & n.36 (citing V. STREIB, supra note 2, at 190-208). In his book, Profes-
In 1948.\textsuperscript{58} In his evaluation of jury behavior, Justice Stevens cited statistics showing that only five of the persons who received a death sentence between 1982 and 1986 were younger than sixteen at the time of the crime.\textsuperscript{59}

Finally, Justice Stevens considered whether the death penalty for fifteen-year-old murderers is appropriate in light of the relative culpability of such murderers and the legitimate purposes of the death penalty. He began by observing that "punishment should be directly related to the personal culpability of the criminal defendant."\textsuperscript{60} He explained that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."\textsuperscript{61} This was so, he argued, because juveniles are typically less experienced, less educated, less intelligent, and more likely to be motivated by "mere emotion or peer pressure" than adults.\textsuperscript{62}

Turning to the twin purposes of the death penalty, retribution and deterrence, Justice Stevens reasoned that the juvenile offender's decreased culpability renders the retributive purpose inapplicable.\textsuperscript{63} Moreover, the typical juvenile's lack of careful consideration of the consequences of his actions, coupled with the small number of juveniles executed during the twentieth century, renders the deterrence purpose equally inapplicable.\textsuperscript{64} Justice Stevens concluded that the death penalty, for those murderers who are under the age of sixteen at the time of the crime, is "‘nothing more than the purposeless and needless imposition of pain and suffering,’” and hence an unconstitutional punishment.\textsuperscript{65}

Justice O'Connor, concurring only in the judgment, did not find the plurality's evidence of a societal consensus against the death penalty for fifteen-year-old murderers sufficiently persuasive to warrant adopting a constitutional ban.\textsuperscript{66} Instead, she voted to reverse Thompson's death
sentence because Oklahoma's legislature had failed to set any minimum age in its death penalty statute. This failure, according to Justice O'Connor, created "a considerable risk that the Oklahoma legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility." She declared:

Were it clear that no national consensus forbids the imposition of capital punishment for crimes committed before the age of 16, the implicit nature of the Oklahoma legislature's decision would not be constitutionally problematic. In the peculiar circumstances we face today, however, the Oklahoma statutes have presented this Court with a result that is of very dubious constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty. In this unique situation, I am prepared to conclude that petitioner... may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution.

Justice Scalia, in his dissent, took issue primarily with the plurality's analysis of the "societal consensus" issue. He noted that, outside the death penalty context, both state and federal legislatures have recently lowered the minimum age for juvenile criminal responsibility. Within the death penalty context, he observed that nineteen, or more than half, of the thirty-seven states with valid capital punishment statutes "have determined that no minimum age for capital punishment is appropriate, leaving that to be governed by their general rules for the age at which juveniles can be criminally responsible." He characterized these statutes as representing "the view that death is not different insofar as the age of juvenile criminal responsibility is concerned." Commenting on the plurality's evidence of a trend against executing juveniles, Justice Scalia argued that the plurality's statistics provided "no rational basis for discerning... a societal judgment that no one so much as a day under 16 can ever be mature and morally responsible enough to deserve that penalty... ." He found "no justification except our own predilection for converting a statistical rarity of occurrence into an absolute constitu-

67. Id. at 2711.  
68. Id.  
69. Id.  
70. Id. at 2712 (Scalia, J., dissenting).  
71. Id. at 2715-16.  
72. Id. at 2716.  
73. Id.  
74. Id. at 2718 (emphasis in original).
Justice Scalia did not try to refute the plurality's analysis of the relative culpability of fifteen-year-old murderers, or of the twin purposes of the death penalty, claiming such analyses to be "irrelevant" to the constitutional issue. He argued that the Court's proper role in eighth amendment cases is limited to deciding whether a particular punishment violates either the original meaning of the amendment or the meaning that the amendment has taken on in light of the "'evolving standards of decency' of our national society." He therefore chastised the plurality for going beyond the "societal consensus" issue and relying instead on "perceptions of decency, or of penology, or of mercy, entertained—or strongly entertained, or even held as an 'abiding conviction'—by a majority of the small and unrepresentative segment of our society that sits on this Court."

Justice Scalia's dissent concluded by sharply criticizing Justice O'Connor's concurrence for attempting to engage in "solomonic" but ultimately improper efforts to tell the Oklahoma legislature how to do its job.

C. The State of the Law

The current state of constitutional law with respect to the juvenile death penalty may therefore be summarized as follows. State and lower federal courts must reverse the death sentence of any murderer whose crime was committed under the age of sixteen, unless that sentence satisfies the test set forth by Justice O'Connor, who provided the crucial fifth vote for the judgment of reversal in Thompson. Justice O'Connor required, for the valid imposition of a death sentence against a fifteen-year-old murderer, that a state explicitly identify, in its death penalty statute, a minimum age for the death penalty. Because all of the states that have sentenced fifteen-year-old murderers to death lacked such a minimum age in their respective death penalty statutes at the time the juveniles were sentenced, none of these defendants may be executed.

75. Id.
76. Id. at 2719.
78. Id.
79. Id. at 2720-21. Justice Scalia also addressed, and rejected, Thompson's claim regarding the introduction of the photographs of the victim's body. See id. at 2721-22.
80. See supra text accompanying notes 66-69.
81. As noted by both Justice Stevens and Justice O'Connor, every state that had set a minimum age for the death penalty within its death penalty statute, as of the date of the
For crimes committed beyond the age of fifteen, however, the issue is governed by *Lockett* and *Eddings*. These cases hold that the youth of a defendant may be presented to the sentencer as a mitigating factor, but that a defendant's age alone will not automatically bar the imposition of the death penalty.

Despite the Court's inability, in three separate cases decided over a ten year period, to resolve the issue whether the death penalty for juveniles violates the eighth amendment, the Court has agreed to face the issue again. On the day after its decision in *Thompson* was announced, the Court granted certiorari in the cases of *High v. Zant* and *Wilkins v. Missouri*. Less than four months later, the Court granted certiorari in a third juvenile death penalty case, *Stanford v. Kentucky*. The defendants in *High* and *Stanford* allegedly were seventeen when they committed their crimes, and the defendant in *Wilkins* was sixteen. The Court, in each case, granted a writ of certiorari only with respect to the issue of the constitutionality of the juvenile death penalty. The *Wilkins* and Stan-

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Court's ruling in *Thompson*, had chosen at least age 16 as the minimum age. *Thompson*, 108 S. Ct. at 2695-96 (plurality opinion) (Stevens, J.); id. at 2706 (O'Connor, J., concurring in the judgment).


85. High, 819 F.2d at 989; Stanford, 734 S.W.2d at 783.

Jose Martinez High was convicted in 1978 of murder, two counts of kidnapping, armed robbery, possession of a firearm during the commission of a crime, and aggravated assault. He received the death penalty for the armed robbery, murder, and kidnapping convictions. High, 819 F.2d at 989. The death sentences for the armed robbery and kidnapping convictions were later reduced to life in prison. *Id.*; High v. State, 247 Ga. 289, 297, 276 S.E.2d 5, 14 (1981), *cert. denied.* 455 U.S. 927 (1982). There is some question as to High's true age. See infra note 88.

Kevin Stanford raped, sodomized, and ultimately shot to death a female gas station attendant during the course of a robbery. He was convicted of murder, first-degree sodomy, first-degree robbery, and receipt of stolen property. Stanford, 734 S.W.2d at 783.

86. Wilkins, 736 S.W.2d at 415. The defendant, Heath Wilkins, pleaded guilty to the first-degree murder of a convenience store clerk in Avondale, Missouri, and was sentenced to death. He also pleaded guilty to a charge of armed criminal action, for which he received a life sentence, and a charge of unlawful use of a weapon, for which he received a five year sentence. *Id.* at 410.

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ford cases will be argued in early 1989, and the decisions should be forthcoming before the end of the 1988 Term, most likely in June or July 1989.


The juvenile death penalty cases described above share a common element. In each case, the constitutional issue is framed in terms of a clear-cut “bright line” based on chronological age, separating those defendants who may receive the death penalty from those who may not. Such a “bright line” approach seems attractive because it reflects the criminal law’s preference for “rules,” as opposed to discretionary, ad hoc adjudication. Tension inevitably exists, however, between the preference for rules and the realization that rules can be, and generally are, both overinclusive and underinclusive. This tension is magnified by the importance of the interests at stake in a death penalty case.

A. An Introduction to the Problem

The problem with drawing a “bright line” prohibiting the death penalty for juveniles on the basis of chronological age can perhaps best be illustrated by example. Consider the facts of Tison v. Arizona, a death penalty case decided by the Supreme Court in 1987. With one small change in these facts, the Tison case, or one like it, easily could become a nightmare for the Court if it adopts the proposed “bright line” constitutional ban on the juvenile death penalty.

Ricky and Raymond Tison, brothers, grew up in a “rather amoral”

88. The High case was originally scheduled for oral argument along with the Wilkins case. In September, however, the State of Georgia moved to dismiss in High because newly discovered records indicated that the defendant was nineteen years old, not seventeen, at the time of the crime. See Motion by Respondent to Dismiss for Mootness or Lack of Standing, High v. Zant, 56 U.S.L.W. 3894 (U.S. June 30, 1988) (No. 87-5666). On October 18, 1988, the Supreme Court substituted Stanford for High on the oral argument calendar, without announcing its reason. See Stanford v. Kentucky, 57 U.S.L.W. 3280 (U.S. Oct. 18, 1988) (No. 87-5765).

89. See Kelman, Interpretive Construction in the Substantive Criminal Law, 33 Stan. L. Rev. 591, 652 (1981) (“At the philosophical level, the liberal state’s commitment to a rule-like criminal law is pervasive and grandiose.”); see also J. Hall, General Principles of Criminal Law 25, 28 (2d ed. 1960). “The principle of legality is in some ways the most fundamental of all principles. . . . The essence of this principle of legality is limitation on penalization by the state’s officials, effected by the prescription and application of specific rules.”

90. See Kelman, supra note 89, at 598-600. But see infra text accompanying notes 226-37 (describing “perfect” bright lines).

home environment under the malevolent influence of their father, Gary Tison, described as "one of the premier sociopaths of recent Arizona history." In 1978, Gary Tison was serving a life term for the killing of a prison guard during an escape. Ricky and Raymond, along with a third brother, Donald, plotted another escape for their father and his cellmate, Randy Greenawalt, also a convicted murderer. On July 30, 1978, the three Tison brothers entered their father's prison carrying an ice chest filled with guns. The brothers armed their father and Greenawalt, and the five men fled the prison without firing a shot. After having trouble with their getaway car, however, the men flagged down a passing car, stole it, and kidnapped its four occupants, including a two-year-old boy. The five men drove their victims into the desert, where, while the Tison brothers took a short walk away from the car in search of water, Gary Tison and Greenawalt shotgunned the victims to death.

Ricky and Raymond Tison were convicted of murder based on both accomplice liability and the felony-murder doctrine, and were sentenced to death. They appealed their death sentences on the ground that they were not sufficiently culpable, with respect to the killings, to satisfy the constitutional requirements of proportional punishment set forth in Enmund v. Florida. The Supreme Court agreed with the Tisons that the Arizona courts had not used the proper standard in applying Enmund. The Court also held, however, that given the brothers' "major participation" in the underlying felony, their death sentences

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92. This was the view of a psychologist who examined the Tison brothers. See Brief for Petitioners at 11 n.16, Tison v. Arizona, 107 S. Ct. 1676 (1987) (No. 84-6075).
94. Id. at 1679.
97. Tison, 107 S. Ct. at 1680. Donald Tison, the third brother, was killed in a shootout with police several days after the murders. Gary Tison, the father, escaped into the desert and subsequently died of exposure. Id. at 1679. Randy Greenawalt was captured, convicted of murder, and sentenced to death. State v. Greenawalt, 128 Ariz. 150, 176, 624 P.2d 828, 854 (1981).
99. Tison, 107 S. Ct. at 1684. In Enmund, the Supreme Court held that the eighth amendment prohibits the death penalty for nontriggerman felony-murderers who do not "kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." Enmund, 458 U.S. at 797. In reviewing the death sentences handed down against the Tison brothers, the Arizona Supreme Court ruled that the "intent to kill" described in Enmund included those situations in which the defendant "anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony." State v. Tison, 142 Ariz. 454, 456, 690 P.2d 755, 757 (1984), vacated, 107 S. Ct. 1676 (1987). The Supreme Court, however, rejected this attempt by the Arizona court "to reformulate 'intent to kill' as a species of foreseeability." Tison, 107 S. Ct. at 1684.
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could stand under Enmund so long as the Arizona courts found on re-
mand that their behavior manifested "reckless indifference to the value of
human life." The Court reviewed the record and found it sufficient to
support the required findings of reckless indifference. In the course of
this review, the Court noted that the behavior of the Tison brothers "dif-
fer[ed] in slight details only."102

According to the Tison Court, Ricky Tison was twenty years old at
the time of the crime, and Raymond was nineteen. Because Arizona
had set no minimum age for either the waiver of juvenile offenders into
the adult court system or for the death penalty, however, the age of the
Tison brothers was irrelevant except as a potential mitigating factor
under Lockett and Eddings, at the capital sentencing hearing.104

A slightly altered version of the Tison facts illustrates the problem
created if a "bright line" prohibits imposition of the death penalty on
murderers below a given age. If Ricky had been eighteen years old at the
time of the crime and Raymond only seventeen, it would be difficult to
justify sentencing Ricky to death while sparing Raymond solely because
he was a minor. The Court stated in Tison that the brothers were equally
and sufficiently culpable to warrant the death penalty as a matter of
eighth amendment proportionality doctrine.105 Because they were
equally culpable, they should be punished equally.

This scenario is by no means limited to the realm of hypothetical
cases invented by law professors. English history provides a glaring ex-
ample of two defendants treated differently on the basis of chronological
age alone. "On November 3, 1952 a London policeman was killed in a
gun battle while attempting to apprehend two youths who had broken
into a warehouse. The youths were Christopher Craig, aged 16, and
Derek Bentley, aged 19." The evidence showed, beyond a shadow of a
doubt, that the younger man, Craig, was the actual killer. In fact, Bent-
ley apparently had been arrested before the fatal shot was fired. More-
over, Bentley was partially mentally deficient. Both Craig and Bentley
were convicted of murder, Bentley’s conviction being based on the doc-

100. Tison, 107 S. Ct. at 1688.
101. Id. at 1684.
102. Id. at 1684-85. The only difference noted by the Court was the fact that Raymond
"performed the crucial role of flagging down a passing car occupied by an innocent family
whose fate was then entrusted to the known killers he had previously armed." Id. at 1685.
103. Id. at 1680.
104. The trial judge specifically found that the Tison brothers’ youth was a nonstatutory
mitigating factor. Nevertheless, the judge sentenced both brothers to death. Id.
105. Id. at 1684-85.
106. J. CHRISTOPH, CAPITAL PUNISHMENT AND BRITISH POLITICS 98 (1962).
trine of constructive malice. Because Craig was only sixteen at the time of the crime, he could not receive the death penalty under English law. Bentley, on the other hand, was sentenced to death and executed. 107

The Bentley-Craig case unleashed a firestorm of criticism against the death penalty in England, much of the criticism leveled at the comparative injustice of executing Bentley, the less culpable murderer, while Craig, the more culpable, was spared. 108 The Howard Journal wrote at the time, “Seldom has any execution caused so much controversy and public concern...[or] such scenes of public emotion, in Parliament and outside, [or so much criticism of a] Home Secretary for refusing to grant a reprieve.” 109 The Bentley-Craig case, along with two other celebrated instances of apparent injustice in the administration of the death penalty, ultimately served as a catalyst for the effective abolition, in 1957, of the death penalty in England. 110

The hypothetical and real cases described above are troubling not only, or even primarily, because of a feeling that the nonjuvenile murderer in each case, considered independently, did not deserve the death penalty. In fact, in the hypothetical case based upon the facts of Tison, four members of the current Supreme Court have already declared that, in their view and on such facts, the death penalty would not be disproportionate to the crime. 111 And while Derek Bentley undeniably was a

108. After the Home Secretary, Sir David Maxwell Fyfe, refused to grant a reprieve and spare Bentley's life, a motion was placed on the Order Paper in the House of Commons. The motion, which was signed by 200 Members and later presented to the Home Secretary, read:

That this House respectfully dissents from the opinion of the Home Secretary, that there are not sufficient grounds on which to advise the exercise of Her Majesty's mercy in the case of Derek Bentley and urges him to reconsider the matter so as to give effect to the jury's recommendation and to the expressed view of the Lord Chief Justice that Bentley's guilt was less than that of Christopher Craig.

Id. at 105; see also J. Christoph, supra note 106, at 99.
109. 8 Howard J. 227 (1953). In the Picture Post, another writer, Kenneth Allsop, compared the state of public emotion to that which had overtaken the country at the time of Dunkirk and at the death of King George VI. See J. Christoph, supra note 106, at 99; R. Paget & S. Silverman, supra note 107, at 106.
110. “It is difficult not to believe that had the several Home Secretaries chosen the other alternatives open to them in each of these cases, the subsequent successes of the abolitionists would not have come about.” J. Christoph, supra note 106, at 107.

The other two cases that served as catalysts for the abolition movement in England were the Evans-Christie case, which involved a man, Timothy Evans, who, in light of later-discovered evidence, appeared to have been innocent of the murder for which he was executed; and the Ellis case, which involved a young and attractive woman, Ruth Ellis, who was hanged despite the pleas of thousands that she, by virtue of being a woman, should receive mercy. See id. at 100-07. Together, the three cases “shocked sensitivities and raised in diverse quarters serious doubts over the character of British justice.” Id. at 97.
111. Chief Justice Rehnquist and Justices White and Scalia, along with former Justice
poor candidate for the death penalty, it seems unlikely that his plight would have attracted such attention without the juxtaposition of his case with that of Christopher Craig. Rather, what is most troubling about these cases is that they raise difficult issues of *comparative* justice, in the context of the most severe punishment that society can impose against a person who has been convicted of a crime. These cases therefore will, or should, make one think more carefully about the basic principles of retributive justice and, especially, about the relationship between just deserts and equality.

**B. Fundamentals of Retributive Justice**

Retributivism, or retributive justice, is a theory of punishment that has undergone a vigorous revival in the United States during the last ten or fifteen years. In 1976 Andrew von Hirsch, who was serving as Executive Director of the Committee for the Study of Incarceration, sponsored by the Field and New World Foundations, authored an influential book entitled *Doing Justice.* In this book, which constituted the Committee’s report, von Hirsch advocated a retributive theory of punishment based on the Kantian principle of “just deserts.” This kind of retributivism, which in modern times has been labelled “protective retributivism,” “moral retributivism,” and the “principle of personhood,” focuses not on the vengeful reactions of the victim of a crime or of others in society, but instead on the importance of treating the defendant as a “person” by responding to his or her conduct in a manner that respects the defendant’s choice to engage in such conduct.

Powell, joined Justice O’Connor’s opinion stating that the record “would support a finding of the culpable mental state of reckless indifference to human life,” which in turn would warrant the imposition of the death penalty against the Tison brothers. *Tison v. Arizona,* 107 S. Ct. 1676, 1684 (1987).

113. Von Hirsch used the phrase, “commensurate deserts,” to describe the form of retributivism advocated in his book. *Id.* at 66.
117. J. MURPHY, RETRIBUTION, JUSTICE, AND THERAPY 229-30 (1979); Morris, *Persons and Punishment, reprinted in Punishment 75* (J. Feinberg & H. Gross eds. 1975); see also A. VON HIRSCH, JUSTICE, supra note 112, at 52 (distinguishing between so-called “channeling” retributivism, which focuses on the utility of “channeling” society’s instinct for vengeance, and “just deserts” or Kantian retributivism).

The Supreme Court seems unable, or unwilling, to recognize that there are at least two distinct kinds of retributivism. For an example of an opinion using the term to describe the Kantian, justice-based retributivism, see *Enmund v. Florida,* 458 U.S. 782, 801 (1982)
stated, "The very concept of deserved punishment . . . looks to the person's past wrongs. His deserts depend on his choice—on his having chosen to act (and having acted) wrongfully . . . ."118 This justice-based ideal, that punishment should be assessed solely on the basis of the "just deserts" of the offender, represents a dramatic departure from the view that punishment should serve the utilitarian goals of rehabilitation and deterrence.119

(1) The Cardinal and Ordinal Requirements of Proportionality

The central concept within the aforementioned theory of retributive justice is proportionality. Proportionality involves two closely related requirements. The first requirement of proportionality is that punishment, in order to be "just," must be proportional to the seriousness of the crime.120 Seriousness, in turn, is based on the harm caused or threatened by the crime and the culpability of the offender.121 If an offender acts intentionally, and there are no mitigating circumstances, he or she is
deemed fully responsible for the crime. In such a case, the seriousness of the crime will depend upon the harm caused. Even so, however, it does not necessarily follow that a proportional punishment must correspond precisely to the harm caused, in the sense of *lex talionis*.\footnote{122} Instead, a proportional punishment will be defined in terms of whatever the particular society views as appropriate for the crime.\footnote{123} This kind of proportionality, which deals with the relationship between the seriousness of a given offender's crime and the punishment imposed against the offender, is called "cardinal" proportionality.\footnote{124}

Proportionality also imposes a second requirement, however, and it is a requirement no less important in terms of retributive justice than the

between 0\% and 100\%), and "H" represents the harm caused by the crime (and can be unlimited). R. Nozick, *Philosophical Explanations* 363-66 (1981).

Another, and perhaps a somewhat better, explanation of the relationship between culpability, harm, and seriousness is that of Hyman Gross. He suggests that the "culpability" of criminal conduct (Gross uses this term as a synonym for what this Article calls "seriousness") depends upon: (1) the harm it threatens; (2) the degree of risk of the harm occurring; (3) the actor's control over the harm-threatening aspects of his conduct; and (4) the legitimacy of the conduct under the circumstances. H. Gross, *A Theory of Criminal Justice* 74-88 (1979). Gross' formulation explicitly recognizes that the same conduct can, given events beyond the control of the actor, result in widely differing amounts of harm. The existence and effects of such fortuities must be accounted for in a complete retributive theory of punishment, although many such theories in vogue today do not even attempt to do so.

For a worthwhile recent discussion of the philosophical difficulties posed by the use of harm as a component in determining punishment under a retributive theory, see G. Fletcher, *A Crime of Self-Defense* 63-83 (1988) (discussing the infamous Bernhard Goetz trial). As Fletcher explains:

The relevance of the victim's suffering in the criminal law poses a serious hurdle to the struggle for reasoned principles in the law. Generations of theorists have sought to explain why we punish actual homicide more severely than attempted homicide, the real spilling of blood more severely than the unrealized intent to do so. Our combined philosophical work has yet to generate a satisfactory account of why the realization of harm aggravates the penalty. Yet the practice persists in every legal system of the Western world. We cannot adequately explain why harm matters, but matter it does.

Id. at 82-83.

\footnote{122} Literally, "*lex talionis*" means "law of retaliation."

But what is the mode and measure of punishment which public justice takes as its principle and standard? It is just the principle of equality, by which the pointer of the scale of justice is made to incline no more to the one side than the other. It may be rendered by saying that the undeserved evil which any one commits on another, is to be regarded as perpetrated on himself.


\footnote{123} A. Von Hirsch, *Justice*, supra note 112, at 73 n.*

\footnote{124} The terminology has been adopted by von Hirsch to assist in describing the various requirements of proportionality. See A. Von Hirsch, *Crimes*, supra note 119, at 43-46.
requirement of cardinal proportionality. This is the requirement that of-
fenders whose "just deserts" are equal, in terms of the seriousness of their
crimes, receive equal punishments, and offenders whose "just deserts" are
different are punished differently.\textsuperscript{125} This kind of proportionality,
which deals with comparisons between the deserts and punishments of
different offenders, is called "ordinal" or "comparative"
proportionality.\textsuperscript{126}

If one could identify the single "just" punishment for each crime
and the person who committed it, in terms of cardinal proportionality,
and if one could design a sentencing system that would impose only such
"just" punishments, then such a system necessarily would also satisfy the
requirement of ordinal proportionality. Cardinal proportionality, how-
ever, can never be such an exact science.\textsuperscript{127} As Norval Morris has ex-
plained, we can say that certain punishments are disproportionate,
because they are either grossly severe or grossly lenient in terms of soci-
ety's view of the seriousness of the crime.\textsuperscript{128} But, at least in terms of
cardinal proportionality, we cannot say that any particular punishment is
the single "just" punishment for a given offender and crime.\textsuperscript{129} Cardinal
proportionality thus serves as a crude limiting device, not as a precise
measure of punishment.

Ordinal proportionality, on the other hand, permits us to make
more precise judgments about the "justice" or "injustice" of punishments
imposed against two or more offenders. As von Hirsch has noted, once a
given offender receives a particular punishment from within the range of
punishments that satisfy the requirement of cardinal proportionality,
then we may conclude whether the particular punishment imposed
against another offender is ordinally proportional.\textsuperscript{130} The imposition
of punishment against the first offender provides a frame of reference for
assessing the "justice" of the second offender's punishment.

\textbf{(2) The Relationship Between Cardinal and Ordinal Proportionality}

This difference in precision between the kinds of judgments we can

\textsuperscript{125} See \textit{id.} at 40. Von Hirsch calls the first half of this requirement, involving the like
treatment of like offenders, "parity," and the second half, involving the unlike treatment of
unlike offenders, "rank ordering." \textit{Id.}

\textsuperscript{126} See \textit{id.} at 40-43.

\textsuperscript{127} See \textit{id.} at 45; N. MORRIS, MADNESS AND THE CRIMINAL LAW 198 (1982).

\textsuperscript{128} Miller & Morris, Predictions of Dangerousness: Ethical Concerns and Proposed Lim-
its, 2 NOTRE DAME J.L., ETHICS & PUB. POL'Y 393, 434 (1986).

\textsuperscript{129} \textit{Id.} Morris therefore contends that, within the range of cardinally "just" punish-
ments, considerations of utility may be used to determine which particular punishment to
impose against a given offender. \textit{Id.} at 435.

\textsuperscript{130} A. VON HIRSCH, CRIMES, supra note 119, at 43-46.
make about the cardinal and ordinal proportionality of punishments might suggest that, in some fundamental way, the two kinds of proportionality are theoretically distinct. One might conclude, for instance, that cardinal proportionality involves an effort to determine, in some rough sense, the "absolute" justice of a particular punishment for a given offender and crime, wholly independent of the punishments that have been imposed against other offenders who have committed other crimes.\textsuperscript{131} One might view ordinal proportionality as involving a quite different comparative process, requiring an examination of the respective deserts and punishments of two or more offenders.\textsuperscript{132} Such an approach, treating cardinal and ordinal proportionality as theoretically distinct, has permitted Norval Morris to argue that the principles of retributive justice require only cardinally, and not ordinally, proportional punishments.\textsuperscript{133}

Despite the significant difference in precision between the kinds of judgments they entail, however, cardinal and ordinal proportionality are not theoretically distinct. In fact, both kinds of proportionality necessarily involve a comparative process. This is because the basic retributive concept of "desert" and the notion of individual responsibility on which it depends involve not merely objective facts and circumstances that can be observed and proven, but also a set of beliefs about the extent of "free will" in a fundamentally deterministic world.\textsuperscript{134}

Lloyd Weinreb, in his recent book, Natural Law and Justice, explains the impossibility of fixing desert:

Desert... is not often put to the test of specificity and even resists it. Not fixed in advance by a rule, it may take into account an unlimited range of circumstances. The \textit{lex talionis}, eye for an eye and tooth for a tooth, has nothing to recommend it as a measure of desert. It attracts us nonetheless, because its insistence on symmetry between an act and the deserved response relieves us of the burden of considering every particularity in the circumstances that might have a bearing on the actor's desert.\textsuperscript{135}

The "circumstances" that might be viewed as relevant to a given offender's desert, and therefore to the proportionality of a particular pun-

\textsuperscript{131} For example, von Hirsch speaks in terms of the "absolute" deserved penalty for a given offender and crime, under the doctrine of cardinal proportionality. \textit{Id.} at 43.

\textsuperscript{132} See id. ("Assessments of ordinal proportionality rest on familiar judgments of comparative blameworthiness. When judged in absolute, rather than comparative terms, however, the censure expressed through penal deprivation is a convention...")

\textsuperscript{133} See Morris, \textit{Punishment, Desert and Rehabilitation}, reprinted in \textit{SENTENCING} 257, 268-69 (H. Gross & A. von Hirsch eds. 1981); see also infra note 143.

\textsuperscript{134} See Kelman, \textit{supra} note 89, at 597-98 (discussing how "intentionalism" and "determinism" operate as "interpretive constructs" influencing the resolution of issues in the substantive criminal law).

\textsuperscript{135} L. WEINREB, NATURAL LAW AND JUSTICE 217-18 (1987).
ishment, go far beyond the typical criminal law "excuses" and "justifications." They include anything in the entire life history of the offender that might, in a deterministic sense, have caused the offender to act in the way that he did.\(^{136}\) How many of these circumstances should be viewed as relevant to a given offender's desert, or, to use Robert Nozick's phrase, "how far down desert will go,"\(^ {137}\) is not a judgment based on anything inherent in the term "desert." Rather, it is a judgment based on our individual and communal beliefs about the fundamental nature of human beings.\(^ {138}\)

This does not mean that we can make no judgments at all about desert. In fact, we make such judgments all of the time, and we would be denying our essential humanity if we did not.\(^ {139}\) What it does mean,

136. One commentator has suggested that the criminal law in general serves to narrow the range of inquiry into all of the various aspects of the defendant's life history, which might otherwise be viewed as relevant to the defendant's responsibility for the crime charged, by relying on certain "interpretive constructs." See Kelman, supra note 89, at 593-94, 596.


138. Weinreb distinguishes between the "constitutive" and "circumstantial" attributes of a person:

In its fullest generality, the idea of justice draws a boundary between a person and the contingent circumstances of his existence. On one side of the boundary are those attributes that are constitutive of a person as he is. Insofar as a person's conduct is traceable to such attributes, it is traceable to the person himself; and, therefore, he can justly be held responsible for it. On the other side are attributes that are not constitutive but circumstantial. Conduct traceable to attributes of this kind is not traceable to the person, any more than an event in which he was not involved at all. Accordingly, he cannot justly be held responsible.

L. WEINREB, supra note 135, at 236-37.

There is no way to justify, in logical terms, any particular dividing line between the "constitutive" and "circumstantial" attributes of a person. John Rawls, for example, takes the view that virtually none of a person's attributes should be treated as constitutive, because nearly all such attributes are fortuitous and undeserved. J. RAWLS, A THEORY OF JUSTICE 11-17 (1971); id. at 104 ("no one deserves his place in the distribution of native endowments, any more than one deserves one's initial starting place in society"). Thus, Rawls ultimately concludes that society may justly redistribute "all social values" in an effort to serve the welfare of all of its members. Id. at 60-65. Robert Nozick, at the other extreme, claims that almost all of a person's attributes and possessions should be viewed as constitutive, and that society therefore acts unjustly if it redistributes such attributes or their fruits against the will of their possessors. R. NOZICK, supra note 137, at 172.

In practice, the dividing line between the "constitutive" and "circumstantial" attributes of a person is drawn on the basis of convention and human experience, not logic. See L. WEINREB, supra note 135, at 241-49 ("Within a community at any time, some attributes will be regarded as so certainly constitutive of the person that their significance for justice is not questioned").

139. "We may decide that, so far as we are able, persons will or will not get what they deserve. But so long as we think of them as persons, who act with freedom and moral responsibility, we cannot decide that they will not deserve. They just do." L. WEINREB, supra note 135, at 215; see also A. VON HIRSCH, CRIMES, supra note 119, at 43 ("Yet such assessments—of how harmful the conduct is, how culpable the actor has been, how painful the punishment
however, is that the judgment about "how far down desert will go" in any given case must be based on a comparison, either with the entire background of our human experience, involving all of the other cases in which we have previously considered the question of desert, or with the circumstances of some other particular case. There is simply no other way to "fix" a given offender's desert.

The first kind of comparison, involving our entire experiential background, is the process by which we evaluate cardinal proportionality. Cardinal proportionality does not involve the "absolute" justice of a particular punishment, because the notion of "absolute" justice is incomprehensible, given the impossibility of "absolutely" fixing desert. Instead, cardinal proportionality involves a comparison between the offender in question and the countless other offenders whose desert we have evaluated before. As Weinreb has stated, "Unable to reason from a general principle to specific applications, we build up a picture of the world from innumerable concrete instances; we learn how to regard one case after another and extend that learning to other similar cases."¹⁴⁰ Because of the daunting nature of this task, we necessarily limit our consideration to only certain aspects of the life history of the given offender.¹⁴¹ We generalize and categorize, instead of trying to focus on all of the circumstances that make the given offender's case unique, and in doing so we reduce the offender to a member of a class. This is why the best we can do in any case, involving a given offender and crime, is to identify a range of cardinal proportionally punishments.

The second kind of comparison, involving an examination of the respective deserts and punishments of particular offenders, is the process by which we evaluate ordinal proportionality. The greater precision of our judgments about ordinal proportionality is simply a consequence of the comparative process involved. Unlike cardinal proportionality, ordinal proportionality involves a comparison between a small number of particular cases, thus permitting us to consider carefully exactly which of the myriad differences between the cases should be viewed as relevant to the offenders' deserts and punishments.¹⁴² The process of comparing

¹⁴⁰ L. WEINREB, supra note 135, at 244. On the relationship between justice and convention, Weinreb says, "Without reference to the conventions of a community, in the deep sense of the Greek nomos, the idea of justice has no specific content. It expresses the abstract, antinomic requirements of desert according to freedom and freedom according to desert." Id. at 248.

¹⁴¹ See Kelman, supra note 89, at 593-94, 596.

¹⁴² Weinreb concedes that, in what he calls "competitive situations," desert "may seem
particular offenders helps us to determine "how far down desert will go" in either case—desert cannot go any further down for one offender than it does for the other.143

143. Andrew von Hirsch and Norval Morris have disagreed about the very existence of a justice-based requirement of ordinal proportionality. Morris has argued that imposing different punishments against offenders of equal desert (he uses the term "anisonomy" to describe this situation) is not unjust, so long as both punishments are within the range of acceptable punishments defined by the requirements of cardinal proportionality. Miller & Morris, supra note 128, at 434-35. Von Hirsch agrees with Morris that cardinal proportionality establishes only broad limits on punishment, but asserts that retributive principles also impose an independent requirement of equal treatment, or ordinal proportionality. Thus, according to von Hirsch, anisonomic punishments are unjust. See von Hirsch, Selective Incapacitation Reexamined: The National Academy of Sciences' Report on Criminal Careers and "Career Criminals," 7 CRIM. JUST. ETHICS 19, 27, 28 (1988).

Both of these arguments are erroneous, although von Hirsch's conclusion about the injustice of anisonomic punishments is correct. The error stems from the assumption that "desert" has some kind of fixed meaning, and that the problem of defining a cardinaly proportional punishment is simply a problem of human inability to translate desert into an appropriate punishment. Thus, von Hirsch attributes the imprecision of cardinal proportionality to the fact that "desert . . . does not provide or purport to provide us with a unique set of anchoring points for the penalty scale." Id. at 28. Similarly, Morris concludes that there is a broad range of just punishments for a given offense because "we lack the moral calipers to say with precision of a given punishment, 'That was a just punishment.' " Miller & Morris, supra note 128, at 434.

Morris goes from this observation to the conclusion that there is nothing "unjust" about anisonomic punishments, because so long as we have a good, albeit non-desert based, reason for assigning unequal punishments, we can call such an assignment "just." Morris, supra note 133, at 257, 268-69. Von Hirsch, on the other hand, claims that Morris' definition of "justice," as including at least certain kinds of unequal treatment, works only for "simple" government-created burdens and benefits, and is inapplicable to the special context of punishment. Von Hirsch, supra, at 27-28. Thus, von Hirsch concludes, anisonomic punishments are "unjust." Id.

If both Morris and von Hirsch were correct in believing that the concept of ordinal proportionality must somehow be derived independently from the concept of cardinal proportionality, and that the "justice" or "injustice" of anisonomic punishments is therefore unrelated to cardinal proportionality, then Morris would surely be correct in asserting that anisonomic punishments could not be called "unjust" solely because they involve "unequal" treatment. As Weinreb has put it, in discussing claims of "equality," the treatment of the other person is significant only as evidence to establish one's
A helpful way of thinking about the relationship between desert and equality, and about the closely related concepts of cardinal and ordinal proportionality, is by analogy. For instance, consider the judging of a gymnastics competition. The particular score a gymnast receives for her performance can be analogized to the punishment imposed against an offender who commits a crime. And, much like the retributive theory of punishment, we could agree on a principle of “just scoring.” Under this principle a gymnast’s score should be based solely on her “just deserts,” or on a combination of the “difficulty” of her chosen routine and the quality or “worthiness” of her individual performance.\(^\text{144}\)

When the first gymnast in the competition completes her performance, the judges must decide what score to assign to that performance. One obvious problem for the judges will be to establish a correspondence between the elements of “difficulty” and “worthiness” and the ten-point scale used for scoring the performances.\(^\text{145}\) But even if we assume that the judges are given some fixed criteria for deciding the weight to be given to the various aspects of each performance, and some fixed standards for converting the “difficulty” and “worthiness” of each performance into a score between zero and ten points, the judges must still decide

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\(^\text{L. WEINREB, supra note 135, at 164-65 (1987).}\)

The problem of imprecision in cardinal proportionality, however, is not attributable solely to the punishment scale. Even if we had a clear rule for translating desert into punishment (which is at least theoretically possible—for example, if a society applied the \textit{lex talionis} in a literal fashion), we \textit{still} would be unable to determine a single “just” punishment for a given offender and crime. This is because, in a single case, there is no way to fix “desert” in a precise fashion. We can determine a given offender’s “desert,” as explained in the text, \textit{only} by a process of comparison with countless other cases.

In the end, cardinal and ordinal proportionality are much more closely related than either Morris or von Hirsch are willing to admit. Both kinds of proportionality utilize comparative processes to “fix” desert. One simply does a more effective job of “fixing” desert than the other. Thus, whether one says that a punishment is cardinally or ordinally disproportionate, one in either event is saying exactly the same thing: that the punishment is not based on the defendant’s “desert,” in whatever way we have managed to “fix” the meaning of that term.

\(^{144}\) This is analogous to the way in which “desert” depends on both harm and culpability. See supra note 121 and accompanying text.

\(^{145}\) This is analogous to the process of translating judgments about desert, in whatever way we manage to make such judgments, into a particular punishment or range of punishments. See supra note 143. In recent years, some legislatures have created sentencing commissions to implement this particular aspect of determining “just” punishments. See generally A. VON HIRSCH, K. KNAPP & M. TONRY, THE SENTENCING COMMISSION AND ITS GUIDELINES (1987) (discussing the trend toward use of “determinate” sentencing guidelines).
exactly how “worthy” the first gymnast’s performance has been.146 How will the judges decide the “worthiness” of the first performance?

The process of determining the “worthiness” of the first performance, and of then assigning a score to that performance, resembles the process of determining the range of cardinally proportional punishments for a given offender and crime. An experienced gymnastics judge evaluates the first gymnast’s performance against the background of all of the performances the judge has seen before, and thereby makes a rough judgment about the “worthiness” of the performance.147 The judge uses this rough judgment, in conjunction with the fixed scoring standards, to assign a score to the performance. The background of the judge’s experience establishes limits on the score that may “justly” be given to the first gymnast. As with cardinal proportionality, however, these “justice” limits are likely to be imprecise. Assuming, for example, that the first gymnast performed fairly well, there would be nothing inherently “unjust” about giving her a score of 6.5, or a 7.0, or a 7.5, or even an 8.0. All we can say, with any degree of certainty, is that it would be “unjust” in terms of the judge’s past experience and our principle of “just scoring,” for the judge to give the first gymnast a 4.0, or a 10.0, for a pretty good performance.

The situation changes significantly when the second gymnast completes her performance. Now the judge has a specific basis, or frame of reference, for evaluating the “worthiness” of the second gymnast’s performance. For example, if the judge ignored some facet of the first gymnast’s performance, such as the positioning of her left hand during a certain maneuver, in the course of determining the “worthiness” of the first gymnast’s performance, then the judge must also ignore the same facet of the second gymnast’s performance.148 This makes the judge’s task similar to the process of evaluating the ordinal proportionality of a particular set of punishments. Any difference in the gymnasts’ scores

146. This is analogous to the general problem of “fixing” desert. See supra notes 139-43 and accompanying text.

147. If this is the first gymnastics performance the judge has ever seen, then the choice of a score for the first gymnast will be meaningless, in terms of our principle of “just deserts”; likewise, the concept of an “absolutely” just punishment, absent some basis for comparison, is incomprehensible. Imagine, for example, a judge from an alien planet, where not only are there no gymnastics competitions, but the residents of the planet are not even capable of locomotion. Such a judge, who has never before seen a creature move, would have absolutely no basis for determining the “worthiness” of the first gymnast’s performance, and hence what score to give to the first gymnast. A score of 0.0 would be no more or less “just,” coming from our alien judge, than a score of 10.0.

148. This is analogous to the process of determining “how far down desert will go.” See supra notes 135-38 and accompanying text.
must, in order to satisfy our principle of "just scoring," be justified in terms of either a difference in the "worthiness" of the performances, or in their "difficulty," if the content of the two routines was different. Although it would not be inherently "unjust" for the judge to assign any score between 6.5 and 8.0 to the first gymnast's performance, it undoubtedly would violate our principle of "just scoring" for the judge to give the second gymnast the same score as the first, if the second gymnast's performance was less "worthy" than that of the first.\textsuperscript{149} Alternatively, if the two performances were exactly the same in terms of their "difficulty" and "worthiness," surely we would insist that the judge give both gymnasts the same score.\textsuperscript{150}

The gymnastics analogy highlights both aspects of the relationship between cardinal and ordinal proportionality. First, the analogy illustrates the theoretical connection between the two concepts, both of which necessarily involve comparative judgments. This theoretical connection suggests that a retributive theory of punishment must incorporate both kinds of proportionality. Second, the analogy emphasizes the point that, although cardinal and ordinal proportionality involve similar comparative processes, it is generally much more difficult to determine whether a particular punishment is cardinally proportional than it is to determine whether a series of punishments satisfies ordinal proportionality.

(3) The State of the Debate on a Ban

The difference in precision between judgments based on cardinal and ordinal proportionality explains why the opponents of a ban on the juvenile death penalty have missed the mark, thus far, with their argument from retributive justice. By focusing on the cardinal proportionality aspect of retributive justice, opponents of a ban effectively concede the point before the debate begins. Even assuming that a murder is serious enough to merit the death penalty as a matter of retributive justice, a life sentence would in most cases also be within the broad range of cardinally proportional punishments for such a crime, because it would not be "grossly lenient" in relation to the seriousness of the crime.\textsuperscript{151} In fact, it

\textsuperscript{149} This is a consequence of the ordinal proportionality requirement of "rank-ordering." See supra note 125.

\textsuperscript{150} This is a consequence of the ordinal proportionality requirement of "parity." See supra note 125. Another common way of looking at the situation is to say that, although there is nothing inherently "unjust" about the fact that a particular judge gives uniformly high or low marks, it is "unjust" if the judge does not give such high or low marks consistently to all of the gymnasts in the competition.

\textsuperscript{151} But see Markman & Cassell, Protecting the Innocent: A Response to the Bedau-
is very difficult to conclude that the imposition of a life sentence for even a particularly heinous murder committed by a juvenile violates the requirement of cardinal proportionality. Thus, the advocates of a ban on the juvenile death penalty have the upper hand, if the debate is cast solely in terms of cardinal proportionality.

Despite this weakness in the cardinal proportionality argument against a "bright line" ban on the juvenile death penalty, however, the ordinal proportionality argument is quite strong. It is hard to deny that, to use the oft-quoted language from *Furman v. Georgia*, the imposition of the death penalty against Ricky Tison but not against Raymond, under the hypothetical facts described above, would be as "arbitrary" and "freakish" as being struck by lightning. The only difference between the two brothers that could explain the life-and-death difference in punishments, by hypothesis, would be the accident of birth that Ricky appeared a year before Raymond was born. Moreover, in light of the Bentley-Craig case, it does not strain credulity to assert that comparative injustice is certain to result from the proposed "bright line" ban on the juvenile death penalty based on chronological age.

The problem with using age as a "bright line" in the juvenile death penalty cases is that age, standing alone, is not the reason why it is at least arguably unjust to impose the death penalty on many juveniles. Rather, age is simply a "proxy" for a combination of factors such as maturity, judgment, responsibility, and the capability to assess the possible consequences of one's conduct. The absence of these qualities ar-

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*Radelet Study, 41 STAN. L. REV. 121, 158 & n.224 (1988); Van den Haag, Comment on John Kaplan's "Administering Capital Punishment," 36 U. FLA. L. REV. 193, 193 (1984) ("[D]oing justice requires capital punishment as the only appropriate retribution for some crimes. . . . [S]ome crimes deserve no less."); 152. 408 U.S. 238, 295, 309 (1972) (Stewart, J., concurring). 153. The case could be made even more troubling, albeit less likely to occur, by hypothesizing that Ricky and Raymond Tison were adoptive brothers, and that Ricky was just one day over the age of eighteen when the crime was committed, while Raymond was one day under the age of eighteen. 154. See supra text accompanying notes 106-10. 155. See Kelman, supra note 89, at 599 & n.16 (explaining that rules "will inevitably be both over- and underinclusive," including, for example, the use of chronological age to define the crime of statutory rape). 156. See Fare v. Michael C., 442 U.S. 707, 734 n.4 (1979) (Powell, J., dissenting) ("Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully 'street-wise,' hardened criminals, deserving no greater consideration than that properly accorded all persons suspected of crime."); Feld, supra note 21, at 230-31 ("The traditional distinction between 'treatment' as a juvenile and 'punishment' as an adult is based on an arbitrarily drawn line that has no criminological significance other than its legal consequences. . . . [C]hildren are constantly maturing; they are not irresponsible children one day and responsible adults the next, except as a matter of law.");
guably renders many juvenile murderers insufficiently culpable to deserve the death penalty. If age corresponded perfectly to the combination of relevant factors, then its use as a "bright line" would not be problematic. Because age is not a "perfect" proxy, however, its use as a "bright line" necessarily produces ordinal disproportionality, or comparative injustice.

Acknowledging the existence of comparative injustice does not provide us with a solution to the problem posed by the pending juvenile death penalty cases. Instead, the foregoing discussion leaves two important questions unanswered. The first question is whether the principles of retributive justice are constitutionally significant under the eighth amendment, so that the Supreme Court must consider the impact of cardinal and ordinal proportionality on its decision in the pending cases. In section III, I address this question and show that the Court has already incorporated basic retributive principles, including cardinal and ordinal proportionality, into its modern-day eighth amendment jurisprudence.

Assuming that the principles of retributive justice are constitutionally significant under the eighth amendment, the second question is what should be done about comparative injustice. That is, does the mere existence of comparative injustice under a given capital sentencing system mandate remedial action, and if so, what kind of remedy is the most appropriate in terms of retributive justice? In section IV, I explain why, in at least some capital sentencing contexts, a certain amount of comparative injustice simply must be tolerated, while in other contexts, such as in the context of the juvenile death penalty, considerations of comparative injustice compel the choice of one sentencing system over another.

III. The Supreme Court, Principles of Retributive Justice, and Eighth Amendment Jurisprudence

In Gregg v. Georgia, the Supreme Court upheld the Georgia death penalty statute against a facial constitutional challenge, concluding that the death penalty can be justified in terms of "two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." In recent years, the Court has largely ignored the deterrence issue,

Note, supra note 20, at 61-64; cf. Tribe, Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles, 39 LAW & CONTEMP. PROBS. 8, 10 (1975) ("To assume that this seven-year-old is unfit to vote, to work, to choose his or her own school, simply because most persons of like age have certain characteristics is to condemn by association.").

preferring to defer to legislative judgments concerning the controversial question whether the death penalty deters potential murderers. Instead, the Court has relied increasingly on the basic principles of retributive justice to evaluate whether the death penalty, either in a single case or in an entire category of cases, constitutes "cruel and unusual punishment" under the eighth amendment. This reliance on retributive principles, and particularly on the concepts of cardinal and ordinal proportionality, can be observed in at least three lines of Supreme Court decisions. These three lines of cases involve the application of certain punishments to certain classes of defendants, the use of certain kinds of aggravating factors in sentencing, and the role of discretion in capital sentencing.

In capital cases like Enmund v. Florida, Tison v. Arizona, and Thompson v. Oklahoma as well as in noncapital cases like Solem v. Helm, the Court has applied the principle that the eighth amendment requires at least a rough correspondence between "the punishment imposed and the defendant's blameworthiness." Restated, a punishment must be cardinally proportional to the crime. In Enmund, for instance, the Court prohibited imposition of the death penalty against nontrig-german felony-murderers who do not "kill, attempt to kill, or intend that a killing take place or that lethal force will be employed," a standard the Court modified in Tison. In Thompson, in the course of reversing the juvenile defendant's death sentence, the plurality stressed the need for punishment to relate to "the personal culpability of the criminal defendant." Similarly, in Helm the Court held that even a prison sentence must comport with the dictates of cardinal proportionality, rejecting the notion that a recidivist could receive life in prison without possibility of parole for committing a series of nonviolent offenses.

158. See, e.g., Gregg, 428 U.S. at 186 (joint opinion of Stewart, Powell, and Stevens, JJ.) ("The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.").
163. Id. at 825 (O'Connor, J., dissenting).
164. Id. at 797 (majority opinion).
Coker v. Georgia is perhaps the most noteworthy example of the Court's use of cardinal proportionality to exclude an entire category of offenders from eligibility for the death penalty. In Coker, a plurality of the Court concluded that the death penalty is a disproportionate and therefore unconstitutional punishment for those who rape, but do not kill. Significantly, the plurality did not even seriously discuss the possibility that deterrence considerations alone might justify the death penalty for rapists who do not kill. Thus, Coker provides some support for the proposition that cardinal disproportionality, at least in the special context of the death penalty, "trumps" all other concerns and is a sufficient basis, standing alone, for invalidating a class of death sentences.

The Court has also dealt with the concept of proportionality in a second line of eighth amendment cases involving not the exclusion of entire categories of defendants from death penalty eligibility, but rather individual claims that a particular state relied upon an aggravating circumstance, statutory or otherwise, that failed to relate to the culpability, and hence the "just deserts," of the particular defendant. Thus, in Godfrey v. Georgia a plurality of the Court declared that an aggravating circumstance must be "rational" in order to satisfy the eighth amendment three-part inquiry to determine whether a particular prison sentence would be cardinal proportionally to a particular crime. The first part of the inquiry involved an examination of "the gravity of the offense and the harshness of the penalty." Id. at 290-91. The second and third parts of the inquiry involved comparisons between the prison sentence imposed in the particular case and the sentences imposed "on other criminals in the same jurisdiction" for other crimes and "for commission of the same crime in other jurisdictions," respectively. Id. at 291-92. The Court's adoption of this three-part framework in Helm illustrates the close relationship, described in the preceding section, between cardinal and ordinal proportionality.

169. Id. at 598 (plurality opinion) (White, J.). Justice White's opinion in Coker, while technically only a plurality opinion, should properly be viewed as a majority opinion. See supra note 33.
170. The plurality referred to deterrence considerations in a single sentence in a footnote. Coker, 433 U.S. at 592 n. 4.
171. "Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment even though it may measurably serve the legitimate ends of punishment and therefore is not invalid for its failure to do so." Id. But see Enmund v. Florida, 458 U.S. 782, 797-801 (1982) (apparently treating issue of defendant's individual culpability, and hence cardinal proportionality of death penalty for defendant's crime, as merely one "prong" in a two-part analysis of the constitutionality of the sentence). See generally J. Dressler, supra note 120, at 38-40 (discussing inconsistency between Coker and Enmund analyses).
172. 446 U.S. 420, 433 n.16 (1980) (plurality opinion) (Stewart, J.) ("An interpretation of [Georgia's 'outrageously or wantonly vile, horrible or inhuman' aggravating circumstance] so as to include all murders resulting in gruesome scenes would be totally irrational."). Justice Stewart's opinion in Godfrey is still another "false" plurality opinion entitled to the weight normally given a majority opinion. See supra note 33.
ment. In other words, the aggravating circumstance must serve to narrow the class of all murderers and single out those who are to be executed in a manner that is "principled"173 and not "arbitrary and capricious."174

More recently, in Booth v. Maryland175 the Court elaborated on the views expressed in Godfrey, holding that aggravating circumstances must be tied directly to the culpability of the defendant, and cannot be based on harm that was caused inadvertently. The Booth Court struck down Maryland's use of a "victim impact statement" at the sentencing hearing in capital cases, finding such statements, at least in most cases, "wholly unrelated to the blameworthiness of a particular defendant."176 The Court explained that "a defendant's level of culpability depends not on fortuitous circumstances such as the composition of . . . [the] victim's family, but on circumstances over which he has control."177

The opinions in Godfrey and Booth do not clearly identify whether the Court used cardinal or ordinal proportionality as the basis for evaluating the justice of the death sentences at issue in the two cases. Indeed, the use of an aggravating circumstance unrelated to the defendant's culpability implicates both concerns. It treats the defendant differently from other defendants of equal culpability, thus violating ordinal proportionality, and it also creates a risk that the defendant will receive a cardinally disproportionate death sentence. Under the standard for evaluating cardinal proportionality set forth in Tison v. Arizona,178 however, the death sentence in the Booth case was probably valid. Therefore, the Booth

173. Godfrey, 446 U.S. at 433.
174. Id. at 428 (quoting Gregg v. Georgia, 428 U.S. 153, 195 n.46 (1976)).
176. Id. at 2534.
177. Id. at 2534 n.7 (quoting People v. Levitt, 156 Cal. App. 3d 500, 516, 203 Cal. Rptr. 276, 287 (1984)). There is a great deal of tension between the holdings in Coker and Booth. The Coker plurality viewed the consequences of a defendant's wrongful conduct, namely, the question whether or not the rapist's victim dies, as absolutely dispositive of the question of death-eligibility under the eighth amendment, even though such consequences might be beyond the control of the defendant. See Coker v. Georgia, 433 U.S. 584, 598 (1977) (plurality opinion) (White, J.). For example, no matter how much a particular rapist might wish his victim to die, and no matter how far he might go to carry out this wish, if the victim does not die the rapist may not receive a death sentence. This view is inconsistent with the position taken by the Booth majority, that the consequences of a defendant's wrongful conduct are relevant to death-eligibility only to the extent the defendant both intends and has control over the occurrence of such consequences. See Booth, 107 S. Ct. at 2533-34. Booth suggests, in contrast to Coker, that fortuitous events unrelated to the defendant's intent can have no bearing on eligibility for the death penalty.
Court appears to have relied on ordinal, rather than cardinal, proportionality to strike down the death sentence in that case.

In *Tison*, the Court held that a defendant who does not kill, but who is convicted of murder under the felony-murder doctrine, and who both acts as a "major participant" in the felony and manifests a "reckless indifference to the value of human life," may receive the death penalty providing all of the other requirements for such a punishment are satisfied.\(^\text{179}\) The *Tison* Court, in short, established a culpability "floor" for purposes of applying the eighth amendment's cardinal proportionality requirement: so long as a defendant is at least a "major participant" in a felony that results in death, even though the defendant does not actually kill, and so long as the defendant is at least "reckless" with respect to the value of human life, and so long as at least one valid statutory aggravating circumstance is present,\(^\text{180}\) and so long as no mitigating factors are present, then the death penalty is a cardinally proportional punishment.\(^\text{181}\)

In light of the culpability "floor" established in *Tison*, the death sentence in *Booth* was probably within the broad range of cardinally proportional punishments for the particular crime at issue. In *Booth*, the defendant was convicted of committing a premeditated murder in which he was the actual killer.\(^\text{182}\) Moreover, Booth was directly responsible, rather than vicariously responsible as in the case of the Tison brothers, for the existence of the statutory aggravating circumstance found by the sentencing jury, namely, the fact that the murder was committed during the course of a robbery.\(^\text{183}\) Finally, it is doubtful that whatever mitigat-

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\(^{179}\) *Id.* at 1688.

\(^{180}\) In *Tison*, the aggravating circumstance was that the murders were committed in a "heinous, cruel and depraved manner" by Gary Tison and Randy Greenawalt. The Court did not address the question whether the eighth amendment bars the attribution of aggravating circumstances involving the manner of killing to a defendant who does not actually kill. *See id.* at 1682 n.2; *id.* at 1689 n.3 (Brennan, J., dissenting).


\(^{182}\) John Booth was convicted of the double murder of an elderly couple, Irving and Rose Bronstein, but received the death penalty only for the murder of Mr. Bronstein. The jury found Booth guilty of first-degree murder, based on both premeditation and felony-murder theories, and also found Booth to be the principal in the first degree with respect to Mr. Bronstein's murder. *Booth v. State*, 306 Md. 172, 182, 507 A.2d 1098, 1103 (1986), *rev'd*, 107 S. Ct. 2529 (1987). The jury found Booth's accomplice, Willie Reid, to be the principal in the first degree with respect to Mrs. Bronstein's murder. *Id.* at 182 n.1, 507 A.2d at 1103 n.1.

\(^{183}\) *Id.* at 182, 507 A.2d at 1103.
ing factors existed in *Booth* could be more significant than the extremely disruptive family background of the Tison brothers.\textsuperscript{184}

Consequently, the Court's decision in *Booth* must have stemmed from the belief that, even among defendants who all "deserve" to die in terms of cardinal proportionality, a state must nevertheless distribute the death penalty in a manner that comports with ordinal proportionality. That is, the state must base the difference in punishment between those death-eligible murderers who receive the death penalty and those who do not on a difference in the "just deserts" of the respective murderers. If the state relies, even in part, on an aggravating circumstance that does not relate directly to the defendant's culpability, then the death sentence will be "unjust" in comparison to the punishment in other murder cases involving defendants of equal desert, and therefore must be invalidated under the eighth amendment.

The third line of cases in which the Court has incorporated retributive principles into its eighth amendment jurisprudence is the line of cases dealing with capital sentencing discretion. The Court has long acknowledged that improper exercises of sentencing discretion can produce unjust, and unconstitutional, death sentences. The Court's 1972 decision in *Furman v. Georgia*,\textsuperscript{185} striking down the Georgia death penalty statute on eighth amendment grounds, was such a case. Although the *Furman* Court did not indicate whether the results of unguided sentencing discretion violated cardinal or ordinal proportionality, some of the language in the opinions, and particularly the references to the administration of the Georgia death penalty as "arbitrary" and "freakish," seems more consistent with the case-by-case comparative approach that is inherent in the concept of ordinal proportionality.\textsuperscript{186}

The Court's decision in *McCleskey v. Kemp*,\textsuperscript{187} properly viewed, also supports the premise that cardinal and ordinal proportionality are essential components of modern-day eighth amendment jurisprudence. The defendant in *McCleskey*, a black man who had received a death sentence for the murder of a white police officer, challenged the facial constitutionality of the Georgia capital sentencing system on the ground that killers of whites were more likely to receive death sentences than killers

\begin{footnotes}
\item[184] Among the mitigating circumstances considered by the sentencing jury were that the defendant was a victim of "Child Neglect" and lacked a "Strong Father Image." *Id.* at 221, 507 A.2d at 1123. The Maryland court also noted that "[t]he jury could properly consider... that Booth had no remorse and thereby reduce the weight to be given to the mitigating factors which the jury had found did exist." *Id.* at 210, 507 A.2d at 1117-18.
\item[185] 408 U.S. 238 (1972).
\item[186] *Id.* at 295 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring).
\end{footnotes}
of blacks. In that case, the Court recognized that some ordinal disproportionality, or comparative injustice, is inevitable in any sentencing system. The McCleskey Court, however, did not hold that such comparative injustice is not an evil. Rather, the Court in effect determined that none of the available alternative approaches to capital sentencing would be more “just” than the guided discretionary approach employed in Georgia. Whether or not one agrees with the Court’s assessment of this balance, the McCleskey decision is consistent with the view that the eighth amendment incorporates the concepts of cardinal and ordinal proportionality.

The Court has also observed that too little sentencing discretion in capital cases can produce unjust, and unconstitutional, death sentences. This was the situation in Lockett v. Ohio and in Eddings v. Oklahoma, in which the Court required that a sentencer consider all potential mitigating evidence offered by the defendant. An absence of sentencing discretion also motivated the Court in Sumner v. Shuman to reject an attempt by the state of Nevada to create a mandatory death penalty for the special class of defendants who commit murder while serving a life term in prison. In sum, cases like Lockett, Eddings, and Shuman are based on the importance of doing individualized justice, which in turn seems to reflect, as did Furman, the Court’s reliance

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188. Id. at 1763.
189. “Apparent discrepancies in sentencing are an inevitable part of our criminal justice system.” Id. at 1777.
190. The very fact that the McCleskey Court felt compelled to justify at length the existence of discretion in capital sentencing, see id. at 1777-78, is proof that comparative injustice in sentencing results was viewed by the Court as an evil. If the Court had taken Professor Morris’ position that anisonomic punishments are not “unjust,” see supra note 143, then the Court would have had no difficulty at all in dismissing McCleskey’s claim. See also McCleskey, 107 S. Ct. at 1778 n.36 (“The Baldus study in fact confirms that the Georgia system results in a reasonable level of proportionality among the class of murderers eligible for the death penalty.”).
191. Id. at 1778 (“Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious.”); id. at 1781 (“As we have stated specifically in the context of capital punishment, the Constitution does not ‘place[e] totally unrealistic conditions on its use.’”) (quoting Gregg v. Georgia, 428 U.S. 153, 199 n.50 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).
192. What makes McCleskey a hard case is precisely the fact that the ordinal disproportionality of Georgia’s capital sentencing results was demonstrated in such a convincing fashion. See id. at 1763-64 (describing “sophisticated statistical studies” conducted by David Baldus of the University of Iowa, and his colleagues); id. at 1766 n.7 (assuming, for purposes of deciding case, that Baldus study is statistically valid).
196. See, for example, Lockett, 438 U.S. at 605, in which the Court stated:
on the case-by-case comparative process for evaluating ordinal proportionality.\textsuperscript{197}

In all of these lines of cases, the Court has incorporated principles of retributive justice, including the concepts of cardinal and ordinal proportionality, into its eighth amendment jurisprudence. Because cardinal and ordinal proportionality are not theoretically distinct, and because both kinds of proportionality involve comparative processes, it may not be possible to determine whether a particular eighth amendment case turns on cardinal or ordinal proportionality. For the same reasons, however, it is not important to resolve that issue.

What is important is that the Court views the principles of retributive justice as constitutionally significant under the eighth amendment. Given the constitutional significance of these principles, the advocates of a "bright line" ban on the juvenile death penalty must demonstrate why such a ban should be adopted, in spite of the fact that such a ban conflicts with fundamental eighth amendment values.

**IV. "Bright Lines" and Rebuttable Presumptions in the Context of the Juvenile Death Penalty**

As argued in sections II and III, the use of chronological age as a "bright line," for purposes of imposing a ban on the juvenile death penalty, will produce comparative injustice, and such injustice is constitutionally significant under the eighth amendment. In this section, I discuss how the Court might respond to this comparative injustice in the pending juvenile death penalty cases. In the course of the discussion, I explain why, in at least some capital sentencing contexts, a certain amount of comparative injustice must be tolerated, while in other con-

\textsuperscript{197} The Court's decision in Pulley v. Harris, 465 U.S. 37, 53 (1984), that the eighth amendment does not require a state court to conduct "comparative proportionality review" as part of its capital sentencing system, is not inconsistent with the view that ordinal proportionality is an essential component of the Court's eighth amendment jurisprudence. Pulley was a procedural decision, not a substantive one—the Court declined to order the states to adopt one particular procedure for enhancing ordinal proportionality, but did not in any way suggest that the underlying value of comparative justice in capital cases was unimportant under the eighth amendment. To the extent the Pulley Court failed to find the presence of "occasional \ldots aberrational outcomes" constitutionally dispositive, \textit{id}. at 54, the case simply represents another example of the Court's recognition that no capital sentencing system is perfect. \textit{See supra} note 191; \textit{infra} note 199.
texts, such as in the context of the juvenile death penalty, considerations of comparative injustice compel, in retributive terms, the choice of one sentencing system over another.

It would be a mistake to assume that the existence of comparative injustice under a particular sentencing system must be viewed as intolerable and must therefore lead to a holding of constitutional invalidity of the sentencing system in question. In fact, as the Court has recognized on several occasions, comparative injustice, in either the capital or the non-capital sentencing context, cannot be eliminated completely. This is a natural consequence of what has been called the "dilemma of discretion," and might also be called the "paradox of proportionality." Ordinal proportionality requires an individualized, discretionary approach to sentencing, because bright line rules, virtually by definition, treat dissimilar cases, involving defendants whose crimes differ in terms of either harm or culpability, in a similar fashion. Bright line rules, in other words, virtually always operate in direct violation of the concept of ordinal proportionality. Yet even so-called "guided" sentencing discretion, given inherent human fallibility, necessarily creates a risk that ordinarily, and perhaps even cardinally, disproportionate sentences will be imposed in at least some cases.

The single exception to the general rule that bright lines violate ordinal proportionality is where a bright line defines a class of defendants all

198. This is precisely the view that prevails among many who advocate the abolition of the death penalty. These commentators argue that the inevitability of ordinal disproportionality, or comparative injustice, in the context of a punishment as severe and irreversible as the death penalty, is a compelling argument for abolition. See, e.g., J. MURPHY, supra note 117, at 237-44; Radin, supra note 114, at 1155; Tribe, supra note 156, at 26 n.64.

199. See McCleskey v. Kemp, 107 S. Ct. 1756, 1777 (1987) ("Apparent disparities in sentencing are an inevitable part of our criminal justice system."); Zant v. Stephens, 462 U.S. 862, 884 (1983) ("there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death'") (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion) (Burger, C.J.)).

200. Radin, supra note 114, at 1148-55.

201. Even von Hirsch, who believes that "presumptive sentences" should be established to govern most sentencing decisions, agrees that the sentencer must have discretion to deviate from the "presumptive sentence" in particular cases. A. VON HIRSCH, JUSTICE, supra note 112, at 98-101.


203. See Furman v. Georgia, 408 U.S. 238, 255-56 (1972); A. VON HIRSCH, JUSTICE, supra note 112, at 101 ("Any scheme—with more discretion or less—will lead to some inequities. Standards will operate arbitrarily in some instances, just as discretion risks disparities and bias.").
of whom justly deserve to be on one side or the other of the line. Thus, it would not be unjust to use a bright line to impose a mandatory death penalty if all defendants in the relevant class were more culpable than the most culpable of the defendants who do not, or cannot, receive the death penalty.204 Similarly, it would not be unjust to use a bright line to ban the death penalty for a class of defendants if all defendants in the relevant class were less culpable than the least culpable of the defendants who can, and do, receive the death penalty.205 These kinds of perfect bright lines, however, are relatively rare, and the use of chronological age for purposes of banning the juvenile death penalty does not involve such a perfect bright line.206

Although the Supreme Court cannot avoid the paradox of proportionality in the juvenile death penalty cases, the Court can deal with the paradox. In particular, the Court can resolve disputes about the relative "justice" of different sentencing systems, as in the juvenile death penalty cases, by following a three-step process. First, the Court should identify the magnitude of the risk of improper exercises of sentencing discretion. If this risk is relatively insignificant, then a bright line rule, which by its very nature treats at least some unlike cases alike, probably would produce more injustice than a guided discretionary sentencing system. Second, if the risk of improper exercises of sentencing discretion is significant, the Court should look for feasible ways to reduce the risk while preserving at least some discretion.207 Third, if there is no feasible way to reduce a proven, significant risk of improper exercises of sentencing discretion, the Court should balance the injustice created by the guided discretionary sentencing system against the injustice that would be created by the adoption of a bright line rule, taking into account the
relative strength of the interests at stake.\textsuperscript{208} Only if, on balance, the bright line rule would produce less injustice than a guided discretionary approach can such a rule be an appropriate choice in retributive terms.\textsuperscript{209}

Applying this three-step process to the juvenile death penalty cases leads to the conclusion that the principles of retributive justice compel the Supreme Court to reject the proposed bright line ban on the juvenile death penalty. In fact, the juvenile death penalty cases represent such poor candidates for line-drawing that the Court may not even need to reach the third step of the process.

The first step of the process requires an inquiry into whether there is a significant risk of the improper exercise of sentencing discretion in capital cases involving juvenile murderers. Certainly some risk exists, as it does in all sentencing systems based on exercises of discretion by fallible human beings. Is this risk, however, significant?

Although advocates of a ban on the juvenile death penalty assert that the risk of ordinally or cardinally disproportionate death sentences is significant,\textsuperscript{210} they do not present any empirical evidence to support their assertion. In this way, the juvenile death penalty cases are very different from the situation the Supreme Court faced in \textit{McCleskey}.\textsuperscript{211} In \textit{McCleskey}, the challenge to Georgia's guided discretionary capital sentencing system was supported by persuasive empirical evidence that the system produced significant ordinal disproportionality.\textsuperscript{212} Even in the face of such evidence, the Court ultimately concluded that no better alternative was available.\textsuperscript{213}

In the juvenile death penalty cases, however, the underlying assertion that the current guided discretionary capital sentencing system produces injustice remains unproven.\textsuperscript{214} Without proof of this assertion, the Supreme Court may well find the resolution of the juvenile death penalty


\textsuperscript{209} See A. \textsc{von} \textsc{hirsch}, \textit{Justice}, \textit{supra} note 112, at 101 ("The most one can do is find a reasonable mix—to allow some degree of discretion structured by standards.").

\textsuperscript{210} See, e.g., Thompson v. Oklahoma, 108 S. Ct. 2687, 2689-99 (1988) (plurality opinion) (Stevens, J.) (arguing that juveniles are insufficiently culpable to deserve the death penalty); V. \textsc{streib}, \textit{supra} note 2, at 38 (arguing that selection of juveniles to receive the death penalty is "arbitrary" and "capricious").

\textsuperscript{211} 107 S. Ct. 1756 (1987); \textit{see supra} notes 187-92 and accompanying text.

\textsuperscript{212} 107 S. Ct. at 1763-64 (discussing "sophisticated statistical studies" conducted by David Baldus of the University of Iowa and colleagues); \textit{id.} at 1766 n.7 (accepting, for purposes of deciding case, statistical validity of Baldus study).

\textsuperscript{213} \textit{id.} at 1781.

\textsuperscript{214} None of the opinions in the \textit{Thompson} case, for example, contained any substantive
cases, in retributive terms, relatively simple: Why adopt a bright line rule that will inevitably produce ordinal disproportionality, or comparative injustice, in the absence of proof that the current sentencing system produces significant injustice?

Moreover, even if the assertion about the risk of unjust death sentences for juveniles under the current sentencing system is valid, this is not sufficient to establish the retributive case for a bright line prohibition of the juvenile death penalty. Instead, under step two of the aforementioned three-step process, the question becomes whether there are any feasible alternatives to a bright line approach that can significantly reduce the risk of improper exercises of sentencing discretion, without eliminating completely the discretion that is so essential to individualized justice and ordinal proportionality.

The dissenters in *Thompson v. Oklahoma*\(^ {215}\) suggested just such a compromise between the extremes of too much sentencing discretion and too little, although they did not appear to rest their suggestion on retributive principles. As Justice Scalia wrote at the beginning of his dissenting opinion: “I might even agree with the plurality’s conclusion if the question were whether a person under 16 when he commits a crime can be deprived of the benefit of a rebuttable presumption that he is not mature and responsible enough to be punished as an adult.”\(^ {216}\)

empirical evidence concerning either the cardinal or ordinal proportionality of death sentencing decisions in cases involving juvenile murderers.

The assertion about disproportionate results in juvenile cases may actually be counterintuitive. Sentencers in capital cases involving juvenile murderers may well be even more likely than sentencers in other capital cases to take their sentencing responsibilities seriously. Thus, it may well be true that, under the current guided discretionary capital sentencing system, only the very worst of juvenile murderers will actually receive the death penalty. See Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 IND. L.J. 757, 781 (1986) (authored by Lawrence A. Vanore). Unfortunately, in the absence of empirical study of this issue, such intuitive judgments are all we have to rely upon.

One might reasonably ask whether, as a theoretical matter, the challengers or the defenders of the current capital sentencing system should bear the burden of producing this kind of empirical information. Given the Supreme Court's rejection of recent facial constitutional challenges to capital punishment, however, it is clear that, from a practical standpoint, the challengers bear this burden. The legislative judgments that underlie the choice of a guided discretionary system will be presumed valid unless, and until, the challengers can demonstrate otherwise. Cf. Markman & Cassell, *supra* note 151, at 146-47 (arguing that those who seek to change existing death penalty law on the basis of the risk of executing innocent persons “bear the burden of... producing credible evidence” that such risk is significant).


216. *Id.* at 2712 (Scalia, J., dissenting). A colleague of the author, Alexander Tanford, has suggested that a better way to improve exercises of sentencing discretion in capital cases involving juvenile murderers would be to increase the size of the jury by one member for every month the juvenile murderer is under the age of 18, while requiring a unanimous verdict in
Should the Court become convinced that juvenile murderers are at risk of receiving an unjust death sentence, due to improper exercises of sentencing discretion, then the Court should follow Justice Scalia’s suggestion and adopt one or more presumptions with respect to the age of the murderer in capital cases. In Stanford v. Kentucky, for example, a case involving a seventeen-year-old murderer, the Court could hold that murderers who are below the age of eighteen must be presumed to lack sufficient maturity to receive the death penalty. This presumption would be subject to rebuttal by the state, in which case the unusually mature seventeen-year-old murderer could receive the death penalty. Beyond the age of eighteen, the law would operate as it already does: immaturity or lack of culpability, as evidenced indirectly by the murderer’s youth, can be presented as a factor in mitigation of punishment, to be weighed by the sentencer without benefit of a presumption one way or the other.

Similarly, in Wilkins v. Missouri, a case involving a sixteen-year-old murderer, the Court could adopt a rebuttable presumption with respect to murderers who are below the age of seventeen. Should the Court feel that sixteen-year-old murderers warrant more special treatment, the presumption could incorporate a heightened standard of proof. This heightened standard of proof could require the state to prove the unusual maturity of a particular sixteen-year-old murderer by “clear and convincing evidence” or even “beyond a reasonable doubt.”

If the Supreme Court decides that the capital sentencing system for...
juveniles needs to be improved, a presumption-based system would be the best way to accomplish this improvement.223 A pair of constitutional rulings in the juvenile death penalty cases that establish rebuttable presumptions, rather than bright lines, would provide greater guidance to the sentencer than the current guided discretionary system, and would thereby tend to reduce the risk of improper exercises of sentencing discretion.224 At the same time, a pair of rulings based on rebuttable presumptions would preserve some sentencing discretion and thereby avoid the serious comparative justice consequences of a bright line rule. In the final analysis, a presumption-based system would help to achieve ordinally proportional sentencing results, or results that depend on the "personal culpability of the criminal defendant"225 rather than on irrelevant or only partially relevant factors like chronological age.

V. Line-Drawing and the Death Penalty

There are several areas within the context of death penalty law in which the Supreme Court has approved the use of a bright line rule. These areas, however, differ fundamentally from the context of the juvenile death penalty. Previously, whenever line-drawing has been approved by the Court in a capital case, the bright line has been drawn carefully so as to correspond perfectly with the very characteristics that made imposition of the death penalty "unjust" in the particular case. These perfect bright lines do not implicate comparative justice concerns in the same way that the proposed bright line ban on the juvenile death penalty does.

A. Line-Drawing in Mitigation of Punishment: Acceptable "Bright Lines" and Imperfect "Proxies"

In 1977, just one year after the constitutional resuscitation of the death penalty in 

Gregg v. Georgia,226 the Supreme Court was faced with the question whether it is constitutional to impose the death penalty against a defendant who commits rape, but does not kill. In 

Coker v.

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223. Cf. Tribe, supra note 156, at 31-35 (discussing use of rebuttable presumptions in other contexts including age distinctions).
224. For general discussions of the efficacy of various kinds of jury instructions, including presumptions and instructions about evidentiary standards, see A. ELWORK, B. SALES & J. ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982); Wissler et al., On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt, 9 LAW & HUM. BEHAV. 37 (1985).
Georgia, a plurality of the Court concluded that the answer to this question is no. The *Coker* plurality drew a bright line: the eighth amendment bars the death penalty for rape.

Five years later, in *Enmund v. Florida*, the Court faced an issue similar to the one presented in *Coker*. In *Enmund*, the question was whether it is constitutional to impose the death penalty against a felony-murderer who did not "kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." The Court, by a five to four vote, held that the answer is no. Again, the Court drew a bright line: the eighth amendment bars the death penalty for felony-murderers who do not kill, absent a heightened form of culpability or *mens rea*.

In 1987, the Court revisited the *Enmund* issue. In *Tison v. Arizona*, a different five-member majority of the Court held that the *Enmund* line had been misdrawn. Instead of limiting the death penalty to intentional felony-murderers, the *Tison* Court held that the eighth amendment requires only major participation in the underlying felony plus a state of mind the Court described as "reckless indifference to the value of human life." Thus, while the *Tison* Court enlarged the group eligible for the death penalty, it did so by moving the *Enmund* bright line.

Finally, in *Ford v. Wainwright* the Court faced the question whether it is constitutional to execute a defendant who is sane at the time of the crime and the trial, but insane at the time of execution. The Court, after noting that no state permits such an execution as a matter of state law, held that the answer to the constitutional question is no. Once more the Court drew a bright line: the eighth amendment bars execution of those who are insane at the time of execution.

In *Coker, Enmund, Tison, and Ford*, the Court drew bright lines and said, in effect: "No defendant who is on the other side of this line may be put to death." These bright lines were justifiable because in each case the bright line defined a class of defendants *none of whom* could be said, in retributive terms, to deserve to receive the death penalty, or to be executed, for their crimes. To put it another way, in each of the afore-

229. *Id.* at 797.
230. *Id.* at 801.
232. *Id.* at 1685.
234. *Id.* at 408-10.
235. As the *Coker* plurality put it:
mentioned cases, the Court drew a bright line that corresponded precisely to the very characteristics that made the death penalty inappropriate, in retributive terms, for the class of relevant defendants.

The four cases, in other words, involved so-called "perfect" line-drawing. In Coker, for example, it was the very fact that the defendants had not killed their respective victims when they raped them that made the death penalty unjust. In Enmund and in Tison, it was precisely the defendant's relative lack of culpability with respect to the victim's death that made the death penalty unjust. The fourth case, Ford v. Wainwright, also involved a precise "fit" between the Court's bright line and the principles of retributive justice, although it might not appear to do so at first glance. In Ford, Justice Powell's crucial separate opinion provided the special definition of "insanity," for eighth amendment purposes, that caused the Court's bright line based on insanity to correspond precisely to the very characteristics that make execution of the "insane" necessarily unjust. As Justice Powell explained:

[O]ne of the death penalty's critical justifications, its retributive force, depends on the defendant's awareness of the penalty's existence and purpose. . . . Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.237

The juvenile death penalty issue differs fundamentally from the kinds of issues raised in Coker, Enmund, Tison, and Ford. In the juvenile death penalty context, chronological age is not the very characteristic that renders the death penalty necessarily inappropriate, in retributive terms, for the entire class of relevant defendants. Instead, age is only a "proxy," and an imperfect one at that, for a combination of factors that renders the death penalty an unjust punishment for some juvenile mur-

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. . . . We have the abiding conviction that the death penalty . . . is an excessive penalty for the rapist who, as such, does not take human life. Coker v. Georgia, 433 U.S. 584, 598 (1977) (plurality opinion) (White, J.). The Enmund Court said much the same thing: "Enmund 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 Enmund the culpability of those who killed the [victims]. This was impermissible under the Eighth Amendment." Enmund v. Florida, 458 U.S. 782, 798 (1982). Likewise, the Ford Court wrote, "[W]e may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life." 477 U.S. 399, 409 (1986).

237. Id. at 421-22 (Powell, J., concurring in part and concurring in the judgment).
derers. These factors, noted previously, include immaturity, poor judgment, lack of responsibility, and inability to evaluate carefully the possible consequences of one's conduct.\textsuperscript{238}

Age is an imperfect proxy because, as even the advocates of a bright line admit, not all juveniles fit the model of the immature, easily influenced "child" who may not, in retributive terms, deserve the death penalty. For example, the Thompson plurality wrote of the issue in decidedly qualified terms:

[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults.\textsuperscript{239}

Because chronological age is only an imperfect proxy for the combination of factors truly relevant to a juvenile murderer's culpability, it is clear that at least some members of the class of juvenile murderers do not properly, as a matter of "just deserts," belong on the "death-ineligible" side of the line. This is particularly true as one approaches the presumptively "mature" age of eighteen.\textsuperscript{240} Thus, to the extent that age fails to reflect accurately the combination of factors that is truly relevant to the retributive justice of imposing the death penalty, a bright line based on age will produce ordinal disproportionality and comparative injustice.

During the modern death penalty era, the Supreme Court has never accepted the argument that the eighth amendment bars the death penalty for any particular class of defendants defined solely in terms of an imperfect-proxy bright line. When the defendants in the juvenile death penalty cases request the adoption of such an imperfect bright line, based on chronological age, they ask the Court to take an unprecedented step in the modern-day jurisprudence of the eighth amendment.

B. Line-Drawing in Aggravation of Punishment: The Use of Overinclusive and Underinclusive "Bright Lines"

As described above, the Supreme Court has never upheld a bright line ban on the death penalty unless such a ban perfectly described the very characteristics that made the death penalty inappropriate, in retrib-


\textsuperscript{239} Id. at 2698 (emphasis added) (footnote omitted) (quoting Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (quoting Bellotti v. Baird, 443 U.S. 622, 635 (1979))).

\textsuperscript{240} See supra note 156.
utive terms, for the entire relevant class of defendants. Arguably, however, the Court has approved "imperfect" line-drawing by mandating the use of aggravating circumstances. That is, the states arguably use imperfect bright lines each time they create a class of death-eligible defendants.

For example, not all murderers who kill in the course of committing another felony are so culpable as to deserve the death penalty. Yet, in the majority of death penalty jurisdictions, a murder committed in the course of another felony renders the defendant eligible for the death penalty. A similar point can be made about such aggravating circumstances as killing for pecuniary gain and killing while lying in wait.


It might be argued that the use of these "overinclusive" aggravating circumstances creates comparative injustice, just as would the adoption of a mitigating bright line in the juvenile death penalty cases.

A closer look, however, reveals that such "overinclusive" aggravating circumstances are not, in fact, analogous to mandatory mitigating factors that serve to bar imposition of the death penalty. Unlike the mandatory mitigating factors in Coker, Enmund, Tison, and Ford, and unlike the proposed age limit in the juvenile death penalty cases, aggravating circumstances are merely permissive. By definition, aggravating circumstances merely place a defendant within the class of death-eligible defendants who will be subjected to the discretion of the sentencer. The sentencer need not impose the death penalty on the death-eligible defendant. Thus, in theory, the problem of overinclusiveness in the legislative line-drawing represented by the statutory list of aggravating circumstances can be corrected by appropriate exercises of sentencing discretion.244 Moreover, whenever a state has attempted to use an aggravating circumstance as a mandatory, rather than a permissive, factor in imposing the death penalty, the Supreme Court has held that such a mandatory factor violates the eighth amendment.245

Even if a state's list of aggravating circumstances is not overinclusive, another possible source of injustice remains. A state's list of aggravating circumstances may be underinclusive. For instance, a state's death penalty statute may fail to provide for some class of murderers who are, in reality, more culpable than those murderers who are statutorily eligible for the death penalty. This arguably might create a problem


244. See McCleskey v. Kemp, 107 S. Ct 1756, 1777 (1987) ("it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'build[d] discretion, equity, and flexibility into a legal system'") (quoting H. KALVEN & H. ZEISEL, THE AMERICAN JURY 498 (1966)).

of ordinal disproportionality just as serious as the problem created by using chronological age as a bright line barring imposition of the death penalty.

Perhaps surprisingly, it appears that most states have largely avoided the problem of underinclusiveness in their statutory lists of aggravating circumstances, through the use of broad, descriptive qualifying terms. Of the thirty-six states with valid death penalty statutes, twenty-two include within their lists of aggravating circumstances the fact that the murder was especially "heinous," "atrocious," "cruel," "outrageously or wantonly vile," "horrible," "inhuman," "exceptionally brutal," or involved "depravity of mind." Two states do not use aggravating circumstances as such, but instead use their substantive definitions of capital murder to identify the class of murderers eligible for the death penalty. One of those states also includes within its statutory scheme a factor similar to the so-called "wanton, vile, and heinous" aggravating circumstance.

These "catch-all" aggravating circumstances help reduce, although perhaps not eliminate, the problem of underinclusiveness by permitting

246. The 36 death penalty jurisdictions are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. See Thompson v. Oklahoma, 108 S. Ct. 2687, 2695 n.26 & 2696 n.30 (1988) (plurality opinion) (Stevens, J.) (compiling and listing all 36 death penalty statutes). Vermont has a death penalty statute, but the statute has never been amended to conform to the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), and is hence constitutionally invalid. See Thompson, 108 S. Ct. at 2695 n.29. Massachusetts also has a death penalty statute, but it has been declared invalid under the state constitution. Id. at 2694 n.25.


249. See Va. Code Ann. § 19.2-264.2 (1988) (directing sentencer to consider whether "conduct in committing the offense for which [defendant] stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim").
the state to treat as death-eligible those defendants who commit particularly heinous murders that do not happen to fall within one of the more specific aggravating categories. The fact that only thirteen out of the thirty-six jurisdictions with valid death penalty statutes omit such a "catch-all" factor is some evidence of a legislative belief that such a factor is essential to a truly "fair" or "just" death penalty system.  

Moreover, even in the states that do not include an explicit "catch-all" aggravating circumstance, it would be wrong to assume that the statutes are seriously underinclusive. Even if a state identifies only a small number of aggravating factors, and fails to include a "catch-all" factor, it is at least possible that the state's list includes all of the factors that make certain murders the "worst" of all murders. And there is some evidence of a legislative effort to remedy the problem of underinclusiveness. In Indiana, for example, recent amendments have increased the statutory list of aggravating circumstances to twelve factors, while in Maryland the list now includes ten factors, some with several subsections.

To the extent that a state's death penalty statute is underinclusive, the statute is vulnerable to criticism on the basis of ordinal disproportionality. Whether such disproportionality is enough to support an eighth amendment challenge to the statute is less certain. A legislature is empowered to consider a wider range of concerns than is appropriate for the Supreme Court, whose role is limited to interpreting the Constitution. As noted previously, the Court has largely confined itself, in the death penalty area, to resolving retributive justice issues. A legislature may have greater leeway than the Court in relying upon other values. For example, a legislature could perhaps justify excluding from death-eligibility murderers who use poison, on the view that such murders are so rare in the particular state that they need not trigger the unique deterrent of the death penalty, despite the comparative injustice such an exclu-

253. It is the legislatures, the elected representatives of the people, that are "constituted to respond to the will and consequently the moral values of the people." Furman v. Georgia, 408 U.S. [238, 383 (1972) (Burger, C.J., dissenting)]. Legislatures also are better qualified to weigh and "evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts," Gregg v. Georgia, 428 U.S. [153, 186 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).]
254. See supra notes 157-97 and accompanying text.
sion might produce.255

In any event, whether underinclusive death penalty statutes are unconstitutional or merely unjust, the existence of such statutes does not justify creating additional injustice through the adoption of an imperfect bright line on the mitigation side. Instead, before the Court adopts such a bright line as a matter of constitutional law, advocates of a "bright line" must demonstrate why its benefits will outweigh the comparative injustice that will result from its adoption.

VI. Line-Drawing and Age in Other Contexts

Bright lines based on age appear throughout the law in such areas as voting, driving, gambling, marriage, and military and jury service. Naturally, questions arise as to whether these other age-based bright lines create similar serious problems of comparative injustice. In this section, I demonstrate that although other age-based bright lines exist, the problems of comparative injustice in such other contexts are far less serious than in the death penalty context.

There are at least four important reasons why these other kinds of bright lines based on chronological age are different from the kind of bright line proposed in the juvenile death penalty cases. First, punishment issues, unlike other issues involving the distribution of governmental benefits or burdens, involve the placing of blame, and therefore implicate comparative justice considerations to a much greater extent than do other issues. As Andrew von Hirsch has explained:

Punishment is different from economic goods, taxes, or other government-generated benefits or burdens. The difference is that it has censure as part of its defining characteristics. In an institution which thus involves praising or blaming, the requirement of equal treatment becomes much stronger. Unequal treatment would imply that the recipients are of unequal praiseworthiness or blameworthiness. 256

Von Hirsch offers the example of competing for a grant and competing

255. "[D]eterminations of appropriate sentencing considerations are 'peculiarly questions of legislative policy.'" Booth v. Maryland, 107 S. Ct. 2529, 2539 (1987) (White, J., dissenting) (quoting Gregg v. Georgia, 428 U.S. 153, 176 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)). Similarly, in the context of the juvenile death penalty, a legislature, unlike the Supreme Court, may well have broader power to act. For example, it might decide that as a matter of public policy, it would be a good idea to send a "symbolic message" about the special value of the lives of young people. To accomplish this, it might enact a bright line ban on the juvenile death penalty. By acting in this way, a legislature has made a judgment that the value of such a "symbolic message" outweighs the retributive justice concerns implicated by such a ban.

256. Von Hirsch, supra note 143, at 27.
for a prize. With a grant, it might be appropriate for the grantor to take into account "nonretributive" concerns, such as who can generate more interest in the project, even when these concerns might result in the awarding of the grant to the less "worthy" competitor. A prize, on the other hand, is designed to reward the most "worthy" competitor. Therefore, it would be unjust to consider who can do more good with the prize money.

Although von Hirsch's example illustrates the difference between "benefit" and "praise," the same point can be made with respect to the difference between "burden" and "blame," or "punishment." Given the relationship between "praise" or "blame," on the one hand, and "desert," on the other hand, it is much more important to act in conformity with the concept of ordinal proportionality, or comparative justice, when the matter involves either praise or blame than when it involves "mere" governmental benefits or burdens.

The second difference between a ban on the juvenile death penalty and other kinds of age limits is that, even if one could identify some other context in which comparative justice mattered just as much as in the context of punishment, this would not necessarily mean that use of a bright line based on age would be equally unjust in such a context. Age is generally used as a "proxy" for some combination of other factors, such as maturity and good judgment, that are relevant to the issue in question. Age may simply be a better "proxy" for the relevant combination of factors in some other context than it is in the context of the juvenile death penalty, thus making its use as a proxy more easily justified in terms of comparative justice. For example, age may correspond more closely with the factors that are relevant to military service, such as physical maturity, than it does with those factors relevant to culpability for criminal conduct.

Third, and perhaps most importantly, the relative costs and benefits of using an individualized, case-by-case approach to resolve the issue in question represents a crucial distinction between the juvenile death penalty context and virtually every other context in which age limits have been imposed. It would be absurd to suggest that, because some unusually mature seventeen year olds are treated unjustly by a minimum voting age of eighteen, we should require an individualized determination of

257. See id. at 27-28; see also A. von Hirsch, Crimes, supra note 119, at 41 (comparing graduate assistantships to fellowships).

258. "Our cases sensibly suggest that constitutional rules relating to the maturity of minors must be drawn with an eye to the decision for which the maturity is relevant." Thompson v. Oklahoma, 108 S. Ct. 2687, 2718 n.5 (1988) (Scalia, J., dissenting).
every seventeen year old's right to vote. The costs of holding such individualized hearings would greatly outweigh whatever injustice might be produced by the use of a bright line minimum voting age.\textsuperscript{259} The same point can be made about virtually every other age limit under the law, such as the minimum ages for driving, gambling, marriage, and military and jury service.

In the context of the juvenile death penalty, however, the situation is quite different. First, the number of cases requiring individualized resolution is very small.\textsuperscript{260} Second, the importance of ensuring "just" results is very great.\textsuperscript{261} These two factors lead to the conclusion that, unlike in virtually every other context involving bright line age limits, the benefits, in terms of retributive justice, of requiring an individualized, case-by-case determination of the maturity of every juvenile murderer facing a death sentence greatly outweigh the administrative costs of such a case-by-case approach.

Fourth, and finally, in such contexts as voting, driving, drinking, gambling, and marriage, there is a "rough" justice in saying to a juvenile, "I realize that you may be just as mature as an older person, and therefore just as qualified to engage in whatever specific behavior is at issue. The chronological age limit is arbitrary, and operates unjustly in your particular case. But this is a bright line that you will eventually cross, just as everyone has who came before you in terms of age. Therefore, you must wait your turn, and eventually you too will be allowed to vote, drive, drink, gamble, and marry." Many bright lines based on age, although justifiable primarily on the basis of administrative efficiency, nonetheless operate with this kind of rough equality. Such rough equality may be acceptable, at least where we are less than confident that we can correctly resolve the issue in question, on a case-by-case basis, without incurring prohibitive costs.

As a general matter, however, a defendant is, and can be, subjected to the death penalty decision only once. Thus, it does no good to say to the eighteen year old who receives the death penalty, "I realize the seven-


\textsuperscript{260} Ironically, this is one of the very arguments made by the plurality in Thompson to support the adoption of a bright line ban on the juvenile death penalty. See Thompson, 108 S. Ct. at 2697 (plurality opinion) (Stevens, J.).

\textsuperscript{261} As the Court has stated, there is a "qualitative difference between death and any other permissible form of punishment," and this difference leads to "'a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.'" Zant v. Stephens, 462 U.S. 862, 884-85 (1983) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).
teen year old who committed the same crime as you did is as mature as you are, but he cannot receive the death penalty solely because of his chronological age. Someday he, too, will be eighteen years old, and he can then receive the death penalty.” The fact is that the seventeen year old most likely will never be in the same position as the eighteen year old. Rather, the seventeen year old will serve a life sentence or some other lengthy prison term, and even if released from prison will probably never again commit a crime that might subject him to the death penalty.262 The rough equality that obtains in such contexts of voting, driving, drinking, gambling, and marriage is absent in the death penalty context.

For these reasons, the use of age as a bright line in the juvenile death penalty context is quite different from the use of age to draw bright lines in other contexts. The analogies to the minimum ages for driving, voting, gambling, marriage, and military and jury service are inappropriate and misleading. The nature of punishment generally, and of the death penalty in particular, should make one particularly wary about the use of age, or any other “imperfect” proxy, as a bright line.

Conclusion

During the 1988 Term, the Supreme Court will attempt to resolve the constitutionality of the juvenile death penalty. In the pending juvenile death penalty cases of High v. Zant,263 Wilkins v. Missouri,264 and Stanford v. Kentucky,265 the Court will attempt to decide whether the states may continue to use the current, guided discretionary capital sentencing system for juvenile murderers; whether the eighth amendment compels instead the adoption of a bright line prohibition of the juvenile death penalty based on chronological age; or whether a brand new, alternative sentencing system for juvenile murderers is constitutionally required.

The Court may choose to rely on any one of several grounds in deciding the constitutional issue raised in these cases. But if the Court is at

262. “[J]uvenile murderers tend to be model prisoners and have a very low rate of recidivism when released.” V. STREIB, supra note 2, at 37; see also Vitiello, Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent v. United States, 26 DE PAUL L. REV. 23, 32-34 (1976) (discussing juveniles’ amenability to treatment).


all serious about the suggestion, expressed in death penalty cases like *Coker v. Georgia*, 266 *Enmund v. Florida*, 267 *Tison v. Arizona*, 268 and *Booth v. Maryland*, 269 that retributive justice is the benchmark for deciding the constitutionality of a challenged aspect of a capital sentencing system, then the Court's decision in the juvenile death penalty cases should not be difficult. In view of the perils of line-drawing, the Court should either retain the current system or adopt a set of rebuttable presumptions based on age. By so ruling, the Court can preserve the sentencing discretion that is essential to satisfying the requirement of ordinal proportionality.

There may be good reasons for adopting bright lines in at least some sentencing contexts. Sometimes bright lines completely remedy problems of comparative injustice, because they "perfectly" reflect the very characteristics that render a given sentence unjust for a given class of offenders and crimes. Additionally, bright lines may represent the best response to sentencing situations in which an individualized, case-by-case approach to resolving the relevant issue would be prohibitively costly. Moreover, bright lines may be a superior alternative to discretionary sentencing systems that produce significant injustice and that cannot be improved in any feasible way.

None of these justifications for a bright line approach to sentencing exists, however, in the pending juvenile death penalty cases. Consequently, although the "paradox of proportionality" may present the Court with extremely difficult choices in some death penalty cases, the appropriate choice is clear in the juvenile death penalty cases.

The principles of retributive justice compel the conclusion that the Supreme Court should reject the proposed bright line ban on the juvenile death penalty based on chronological age. Only through retention of the current guided discretion approach to capital sentencing of juveniles, or through some modification which preserves sentencing discretion, can the ends of retributive justice best be served.

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