Eighth Amendment Presumptive Penumbras (and Juvenile Offenders)

William W. Berry III[*]

ABSTRACT: Bright line constitutional rules tend to create unfair outcomes in close proximity to the bright line. In the context of the death penalty, such distinctions possess an entirely different level of seriousness that requires deeper reflection. This Article develops the concept of presumptive penumbras around capital constitutional bright lines and argues for its application to juvenile offenders under the Eighth Amendment. Specifically, the Article advocates, within the current constitutional rules, for a presumption against the imposition of the death penalty or juvenile life without parole in cases where the age of the offender is in proximity to—within the penumbra of—the bright line of age 18.

Part II of the Article explains the inherent problems that stem from bright line rules and how both the Constitution and the death penalty exacerbate such problems. In Part III, the Article advances a typology of "presumptive penumbras"—a tool for minimizing the problems identified in Part II. Then, in Part IV, the Article applies the concept of presumptive penumbras to bright line rules related to juvenile offenders under the Eighth Amendment. Finally, in Part V, the Article concludes by sketching out some additional potential applications of presumptive penumbras to other criminal law bright lines under the Eighth Amendment.

I. INTRODUCTION 2

II. THE PROBLEM OF BRIGHT LINE RULES 7
 A. *THE LIMITS OF BRIGHT LINES* 7
 B. *CONSTITUTIONAL COMPLICATIONS* 10

[*] Montague Professor of Law, University of Mississippi. The author would like to thank the following students from his capital punishment seminar in the Fall of 2019 that generated the lively discussion on this topic that inspired this Article: Derek Anderson, D.K. Boydstun, Bailey Brown, Jon-Paul Bushnell, Lakyn Collier, Natasha Dorcent, Akeena Edwards, Conisha Hackett, Kiara Hester, Terrence Hunter, Madeline Iles, Kaitlyn Jamison, Alan Langley, Allison Minicky, Peyton Moore, Ashley Richardson, Seqouia Smith, Erika Thomas, and Will Williams. The author would also like to thank the editors of the *Iowa Law Review* for their excellent work in preparing this Article for publication.

C. EIGHTH AMENDMENT DIFFERENTNESS 14
1. Death Penalty 15
2. Juvenile LWOP 17

III. EIGHTH AMENDMENT PRESUMPTIVE PENUMBRAS 18
A. EIGHTH AMENDMENT PENUMBRAS 21
B. EIGHTH AMENDMENT PRESUMPTIONS 24
C. PRESUMPTIVE PENUMBRAS 29

IV. PRESUMPTIVE PENUMBRAS AND JUVENILE BRIGHT LINES 32
A. WHY PRESUMPTIVE PENUMBRAS WORK FOR JUVENILES 33
B. THE NARROW APPROACH: AN AGE 19 PRESUMPTIVE PENUMBRA 34
1. Juvenile Death Penalty 34
2. Juvenile LWOP 37
C. THE BROAD APPROACH: AN AGE 25 PRESUMPTIVE PENUMBRA 39
1. Juvenile Death Penalty 40
2. Juvenile LWOP 41

V. OTHER POSSIBLE EIGHTH AMENDMENT APPLICATIONS OF PRESUMPTIVE PENUMBRAS 44
A. INTELLECTUAL DISABILITY 44
B. RAPE CRIMES 45
C. FELONY MURDER 46

VI. CONCLUSION 46

I. INTRODUCTION

Bright line constitutional rules tend to create unfair outcomes in close proximity to the bright line.[1] Strict liability crimes underscore this problem.[2]

1. *See generally* Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984) (highlighting unfair outcomes resulting from Fourth Amendment bright lines); Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127 (explaining the practical drawbacks to unworkable rules); Steven J. Mulroy, *The Bright Line's Dark Side: Pre-Charge Attachment of the Sixth Amendment Right to Counsel*, 92 WASH. L. REV. 213 (2017) (arguing against the use of a bright-line Sixth Amendment rule because it creates unfair outcomes).

2. Strict liability crimes do not require any particular mental state for conviction; commission of the criminal act is enough for guilt. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 147–53 (7th ed. 2015). Typically, such crimes are limited to public welfare crimes and are explicitly disfavored by the Supreme Court outside of that context. *See, e.g.*, United States v. U.S. Gypsum Co., 438 U.S. 422, 437–38 (1978) (explaining that statutes without a *mens rea* have a "generally disfavored status" and indicating an interpretive presumption in favor of a *mens*

Take, for instance, a speed limit of 40 miles per hour. With respect to safety, the difference between driving 39 miles per hour and 41 miles per hour seems negligible,[3] and yet, the consequence could be significant in terms of receiving a fine for speeding as opposed to being able to continue driving without being stopped.[4]

This seems to become increasingly true the more arbitrary the chosen bright line might be.[5] If the 40 mile per hour speed limit resulted from careful study of relevant data—perhaps showing a dramatically increased likelihood of an accident once a driver crossed the 40 mile per hour threshold on the particular stretch of road—then the bright line of 40 miles per hour would justify the difference in treatment of the 39 mile per hour driver and the 41 mile per hour driver.[6] On the other hand, if 40 miles per hour was arbitrarily

---

rea, even when a statute is silent); Morissette v. United States, 342 U.S. 246, 250 (1952) (reading a *mens rea* standard into a federal statute). For a deeper exploration of the presumption against strict liability crimes and strict liability, see generally Douglas N. Husak, *Varieties of Strict Liability*, 8 CANADIAN J.L. & JURIS. 189 (1995) (exploring varied types of strict liability); Arthur Leavens, *Beyond Blame*—Mens Rea *and Regulatory Crime*, 46 U. LOUISVILLE L. REV. 1 (2007) (discussing the drawbacks to distinguishing between blame and notice in analyzing *mens rea*); Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL'Y 51 (2003) (arguing that *mens rea* is an important factor in determining culpability); Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107 (providing a historical analysis of the Supreme Court's varied approach to finding a *mens rea* requirement); Frances Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933) (arguing that an exception to *mens rea* can be appropriate only for a narrow set of offenses); Kenneth W. Simons, *When Is Strict Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075 (1997) (examining the appropriate application of strict liability in criminal cases); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960) (arguing that not all strict liability statutes are irrational); and John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999) (examining potential theories for the Supreme Court's implicit *mens rea* requirement in statutory interpretation).

3. *See, e.g.*, Letty Aarts & Ingrid van Schagen, *Driving Speed and the Risk of Road Crashes: A Review*, 38 ACCIDENT ANALYSIS & PREVENTION 215, 223 (2006) (finding on average that a one percent change in speed would lead to a two percent change in injury accidents, a three percent change in severe injury, and a four percent change in fatal accidents); *see also* D.C. RICHARDS, DEP'T FOR TRANSP., RELATIONSHIP BETWEEN SPEED AND RISK OF FATAL INJURY: PEDESTRIANS AND CAR OCCUPANTS 6 (2010), https://nacto.org/wp-content/uploads/2015/04/relationship_between_speed_risk_fatal_injury_pedestrians_and_car_occupants_richards.pdf [https://perma.cc/9WJD-N97D] (exploring a similar concept in the United Kingdom).

4. One might argue that police might exercise their discretion not to stop motorists that do not significantly exceed (at least by five miles per hour) the speed limit. *See generally* Peter W. Liu & Thomas A. Cook, *Speeding Violation Dispositions in Relation to Police Officers' Perception of the Offenders*, 15 POLICING & SOC'Y 83 (2005) (exploring the use of police discretion in speeding stops). Such an exercise of discretion mirrors the presumptive penumbral concept advocated for below. *See infra* Part III.

5. To review an extensive literature challenging the ability of bright lines to eliminate arbitrary results, see generally Ofer Raban, *The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism*, 19 B.U. PUB. INT. L.J. 175 (2010); Alschuler, *supra* note 1 (same); LaFave, *supra* note 1 (same); and Mulroy, *supra* note 1 (same).

6. *See generally* RICHARDS, *supra* note 3 (summarizing such studies that could be used for the purpose of setting speed limits); Aarts & van Schagen, *supra* note 3 (same).

chosen, and 35 miles per hour or 45 miles per hour would just as easily suffice, then drawing a difference between the 39 mile per hour driver and the 41 mile per hour driver becomes less justifiable and increasingly unfair as one increases the consequence (the amount of the fine and points on the driving record).[7]

One response might be to eliminate the rule altogether to remedy the unfairness, but doing so does not solve the problem.[8] If one believes that safety relates to the vehicle speed, at some point the speed of the vehicle will become unsafe.[9] It might be 90 miles per hour or 200 miles per hour, but at some point, safety or other considerations require a rule.[10]

In the context of the death penalty, such bright line distinctions possess an entirely different level of seriousness that requires deeper reflection. Instead of the consequence being the difference between receiving a fine for speeding or not, the bright line in capital cases delineates whom the state can execute.[11]

---

7. It is certainly true that the placement of bright line rules can sometimes be arbitrary. *See generally* Leslie A. Lunney, *The (Inevitably Arbitrary) Placement of Bright Lines:* Belton *and Its Progeny*, 79 TUL. L. REV. 365 (2004) (arguing that the bright line in *New York v. Belton* is arbitrary); Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635 (2003) (arguing for an extension of the right to counsel beyond the arbitrary Sixth Amendment bright line rule); James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773 (1995) (examining the arbitrary nature of bright line rule balancing tests).

8. Indeed, there is a robust literature arguing the opposite—that bright line rules are superior to vague standards. *See, e.g.*, Louis Kaplow, *General Characteristics of Rules*, *in* 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 502, 512–13 (2000); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 140 (1991); Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J.L. & PUB. POL'Y 101, 113 (1997); Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 841 (1972); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 1021–22 (1995).

9. *See, e.g.*, RICHARDS, *supra* note 3, at 6; Aarts & van Schagen, *supra* note 3, at 215.

10. *See, e.g.*, Mohamed Abdel-Aty, Jeremy Dilmore & Albinder Dhindsa, *Evaluation of Variable Speed Limits for Real-Time Freeway Safety Improvement*, 38 ACCIDENT ANALYSIS & PREVENTION 335, 336–39 (2006); Rune Elvik, *A Restatement of the Case for Speed Limits*, 17 TRANSP. POL'Y 196, 198–201 (2010). It is of course possible to determine that, for some thoroughfares, the unsafe speed exceeds the speed capacity of the vehicles, thus making speed limits unnecessary. *See, e.g.*, Katrin Bennhold, *Impose a Speed Limit on the Autobahn? Not So Fast, Many Germans Say*, N.Y. TIMES (Feb. 3, 2019), https://www.nytimes.com/2019/02/03/world/europe/germany-autobahn-speed-limit.html [https://perma.cc/GL57-9UBZ].

11. The decision in *Roper v. Simmons* demonstrates the importance of such constitutional bright lines. After the Court barred juvenile death sentences in *Roper*, 71 sixteen- and seventeen-year-olds had their death sentences automatically commuted, accounting for two percent of the entire death row population at the time of 3,471. *The Juvenile Death Penalty Prior to* Roper v. Simmons, DEATH PENALTY INFO. CTR. [hereinafter *Juvenile Death Penalty*], https://deathpenaltyinfo.org/policy-issues/juveniles/prior-to-roper-v-simmons [https://perma.cc/B4G5-LRLN].

When the Supreme Court decided *Roper v. Simmons*[12] in 2005, the Court established one such bright line rule.[13] *Roper* held that the Eighth Amendment barred the imposition of the death penalty for juvenile offenders.[14] The rule pertained to the age of the offender at the time of the crime.[15] Individuals that were under age 18 at the time of the crime were ineligible for the death penalty.[16] Individuals who had reached their 18th birthday were eligible to receive the death penalty.[17]

Death penalty abolitionists might argue that such an approach creates an over-inclusive unfairness at the margins.[18] An offender having reached his 18th birthday could be subject to death, while an individual a few days younger would avoid the death penalty.

Death penalty advocates, by contrast, might argue that the same unfairness exists, but the problem is one of under-inclusivity, not over-inclusivity.[19] In other words, an offender a few days prior to turning 18 should be eligible for the death penalty in the same way that an 18-year-old is. Some advocates might argue for the elimination of the bright line rule altogether as a way to remedy the unfairness.[20] As indicated previously, though, some limit must exist, even if one wants to lower the limit to pre-teen offenders.[21]

---

12. Roper v. Simmons, 543 U.S. 551, 560 (2005).

13. As discussed *infra* in Section II.C.2, this bright line also impacts the availability of life-without-parole sentences under the Eighth Amendment. *See* Graham v. Florida, 560 U.S. 48, 82 (2010) (restricting the imposition of juvenile life-without-parole sentences to non-homicide crimes under the Eighth Amendment); Miller v. Alabama, 567 U.S. 460, 465 (2012) (barring the imposition of mandatory juvenile life-without-parole sentences under the Eighth Amendment).

14. *Roper*, 543 U.S. at 575.

15. *Id.* at 578.

16. *See id.*; *Juvenile Death Penalty*, *supra* note 11. Prior to the decision in *Roper*, 22 juveniles had been executed in the post-*Furman* era (since 1972), just under two percent of all executions in that time period. *Executions of Juveniles in the U.S. 1976–2005*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/juveniles/executions-of-juveniles-since-1976 [https://perma.cc/55YJ-AH23]. A total of 365 juvenile offenders have been executed since colonial times. *Id.*

17. *See Roper*, 543 U.S. at 571–73.

18. *See generally Extending* Roper*: Is 18 Too Young?*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/juveniles/extending-roper [https://perma.cc/FG5H-KF57] (reporting on a Kentucky trial court's decision that the Eighth Amendment bars executions of 18 to 20-year-olds, *Commonwealth v. Bredhold*, No. 14-CR-161, 2017 WL 8792559, at *6–7 (Ky. Cir. Ct. Aug. 1, 2017), *rev'd on justiciability grounds*, 599 S.W.3d 409 (Ky. 2020)).

19. *See generally* ROBERT BLECKER, THE DEATH OF PUNISHMENT: SEARCHING FOR JUSTICE AMONG THE WORST OF THE WORST (2013) (evaluating the death penalty and punishment system to make punishment more cleanly fit the crime); Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RSRV. L. REV. 1 (1995) (evaluating the death penalty process, the costs, and its criticisms).

20. Such an approach would contradict the human rights consensus of the rest of the world; at the time of *Roper*, the United States was the only country in the world that allowed the execution of juvenile (under 18) offenders. *Roper*, 543 U.S. at 575.

21. Prior to *Roper*, the Court had lowered the limit to age 15, after initially determining that 16 was the appropriate age for death eligibility. *See* Stanford v. Kentucky, 492 U.S. 361, 377–80

Irrespective of one's normative view of capital punishment,[22] the presence of a constitutional bright line of age 18 in this context seems arbitrary[23] and likely to create unfairness around the bright line. The finality of a death sentence demands a more flexible rule.[24]

Given the foregoing, this Article develops the concept of presumptive penumbras around constitutional bright lines and argues for its application to juvenile offenders under the Eighth Amendment. Specifically, the Article advocates, within the current constitutional rules, for a presumption against the imposition of the death penalty or life without parole ("LWOP") in cases where the age of the offender is in proximity to the bright line of age 18 at the time of the offense.

Part II of the Article explains the inherent problems that stem from bright line rules and how both the Constitution and the death penalty exacerbate such problems. In Part III, the Article advances a typology of "presumptive penumbras"—a tool for minimizing the problems identified in Part II. Then, in Part IV, the Article applies the concept of presumptive penumbras to bright line rules related to juvenile offenders under the Eighth Amendment. Finally, in Part V, the Article concludes by sketching out some

---

(1989) (drawing the line at age 15); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (plurality opinion) (drawing the line at age 16).

22. Indeed, this Article operates within the constraints of the bright line rules adopted by the Supreme Court under the Eighth Amendment, putting aside the normative disagreements I might have with their approaches. *See generally* William W. Berry III, *Evolved Standards, Evolving Justices? The Case for a Broader Application of the Eighth Amendment*, 96 WASH. U. L. REV. 105 (2018) [hereinafter Berry, *Evolved Standards*] (arguing for the abolishment of the death penalty and juvenile LWOP sentences via a micro-level and macro-level analysis); William W. Berry III, *Life-With-Hope Sentencing: The Argument for Replacing Life-Without-Parole Sentences with Presumptive Life Sentences*, 76 OHIO ST. L.J. 1051 (2015) [hereinafter Berry, *Life-With-Hope*] (arguing for the abolition of LWOP sentences); William W. Berry III, *Unusual Deference*, 70 FLA. L. REV. 315 (2018) [hereinafter Berry, *Unusual Deference*] (arguing for the abolition of the death penalty and juvenile LWOP under the Eighth Amendment).

23. Society treats age 18 as the child-adult line in some contexts, and age 21 as the child-adult line in other contexts. *See, e.g.*, Jay Caruso, *The Government Is All over the Map on the Age of Adulthood so Why Should We Trust Them on Purchase Age for Guns?*, DALL. MORNING NEWS (Mar. 22, 2018, 11:29 AM), https://www.dallasnews.com/opinion/commentary/2018/03/22/the-government-is-all-over-the-map-on-the-age-of-adulthood-so-why-should-we-trust-them-on-purchase-age-for-guns [https://perma.cc/3Q8J-NS2B]; Jennifer Lai, *Old Enough to Vote, Old Enough to Smoke?: Why Are Young People Considered Adults at 18?*, SLATE (Apr. 23, 2013, 7:37 PM), https://slate.com/news-and-politics/2013/04/new-york-minimum-smoking-age-why-are-young-people-considered-adults-at-18.html [https://perma.cc/85AK-AWD6]. Brain science suggests that the line might be more appropriately drawn somewhere in the late 20s. *See, e.g.*, Nico U.F. Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI. 1358, 1358–59 (2010); Catherine Lebel & Christian Beaulieu, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 31 J. NEUROSCIENCE 10937, 10943–46 (2011); Adolf Pfefferbaum, Torsten Rohlfing, Margaret J. Rosenbloom, Weiwei Chu, Ian M. Colrain & Edith V. Sullivan, *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 10 to 85 Years) Measured with Atlas-Based Parcellation of MRI*, 65 NEUROIMAGE 176, 186–91 (2013).

24. *See infra* note 73 and accompanying text (explaining the concept that "death is different").

additional potential applications of presumptive penumbras to other criminal law bright lines under the Eighth Amendment.

II. THE PROBLEM OF BRIGHT LINE RULES

As indicated in the introduction, bright line rules often create unfair outcomes at the margins. This Part explores why that is the case, why the Constitution exacerbates this problem, and why the Eighth Amendment makes the problem even more significant.

A. *THE LIMITS OF BRIGHT LINES*

When articulating a legal rule, a common-law court or legislature faces a number of structural considerations beyond the mere substance of the rule.[25] The first of these lies in the clarity of the rule itself.[26] The question to ask with respect to a criminal law rule is whether the rule clearly indicates what conduct it proscribes. The Constitution bars criminal statutes that are excessively vague, such that it is unclear what behavior is illegal.[27] In addition to specificity, rules also should avoid ambiguity, and instead give rise to a single meaning, not two or more meanings.[28]

Courts and scholars refer to rules that impose clear, easily understood rules as bright line rules, because they demarcate a bright line between conduct that is permissible and conduct that is objectionable.[29] Returning to the speed limit example from above, there can be no dispute as to the meaning of a 40 mile per hour speed limit. The numerical content of the rule makes the limit clear; the only question is whether one will apply the rule as

---

25. *See generally* William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (exploring the dynamic development of statutory rules through interpretation); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (exploring the complex development of common law rules).

26. *See, e.g.*, Arvid E. Roach II, *The Virtues of Clarity: The ABA's New Choice of Law Rule for Legal Ethics*, 36 S. TEX. L. REV. 907 (1995) (highlighting the value of a clear ethics rule); Thomas Kiefer Wedeles, Note, *Fishing for Clarity in a Post-*Hubbell *World: The Need for a Bright-Line Rule in the Self-Incrimination Clause's Act of Production Doctrine*, 56 VAND. L. REV. 613 (2003) (emphasizing the need for a bright line rule to bring clarity to the self-incrimination clause).

27. *See* DRESSLER, *supra* note 2, at 43–47; Robert Batey, *Vagueness and the Construction of Criminal Statutes—Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 4 (1997). *See generally* Johnson v. United States, 135 S. Ct. 2551 (2015) (striking down a provision of the Armed Career Criminals Act as unconstitutionally vague); City of Chicago v. Morales, 527 U.S. 41 (1999) (striking down a loitering statute as too vague to guide police discretion); Timothy Endicott, *Law is Necessarily Vague*, 7 LEGAL THEORY 379 (2001) (discussing vagueness in the law).

28. Courts construe criminal statutes that are ambiguous in favor of the defendant under the rule of lenity. *See* DRESSLER, *supra* note 2, at 47–48; Batey, *supra* note 27, at 4. *See generally* Fowler v. United States, 563 U.S. 668 (2011) (Scalia, J., concurring) ("[I]n light of the rule of lenity . . . we must construe ambiguous criminal statutes in favor of the defendant."); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345 (discussing lenity in federal criminal law); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57 (1998) (discussing lenity and the interpretation of criminal statutes).

29. *See supra* notes 7–8 (citing articles that explore the nature of bright line rules).

written or conceive of a reason that the rule should not apply in the circumstance in question.[30]

Put differently, bright line rules typically lack malleability.[31] The clarity of the rule is a virtue in the ordinary case,[32] but becomes a vice in situations in which application of the rule seems unfair.[33] Indeed, there may be certain situations not envisaged by the creators of the rule that would caution against its applicability.[34] In such situations, the rule can seem arbitrary and unfair, and open the door to creating exceptions to the rule.[35]

The conundrum that arises, though, is that with each additional exception, the bright line rule becomes less bright, and more limited with each new exception.[36] The analysis then shifts from straightforward, unassailable bright line application to a question concerning whether an exception warrants a deviation from the rule. The virtue of clarity undergirding the bright line rule thus loses its value with each new exception because the applicability of the rule becomes increasingly subject to challenge.

One preliminary assessment of the strength of a bright line rule can therefore relate to the degree to which it can encompass the wide variety of situations that can arise. In many situations, it is difficult for a rule to cast such a broad scope in a manner that accounts for the variance in factual situations that arise in its application. The need for exceptions often arises at points

---

30. The question of when to make exceptions to rules can be a complicated one. *See generally* F. Neil Brady, *Rules for Making Exceptions to Rules*, 12 ACAD. MGMT. REV. 436 (1987) (discussing ethical aspects of rulemaking and exceptions to rules).

31. *See* Raban, *supra* note 5, at 176. *See generally* Mulroy, *supra* note 1 (discussing bright line rules and the Sixth Amendment); Alschuler, *supra* note 1 (discussing bright line rules and the Fourth Amendment).

32. *See* Scalia, *supra* note 8, at 1177 (explaining that the benefits of clear, categorical rules outweigh the costs of over- and under-inclusivity); *see also* Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 187 (2005) (describing Scalia's approach to formalist rules).

33. *See generally* Raban, *supra* note 5 (discussing legal ambiguity and capitalism); Mulroy, *supra* note 1 (discussing legal ambiguity and the right to counsel); Alschuler, *supra* note 1 (discussing legal ambiguity in the context of the Fourth Amendment).

34. Legal rules are notorious for creating unintended consequences. *See* Justin Sevier, *The Unintended Consequences of Local Rules*, 21 CORNELL J.L. & PUB. POL'Y 291, 293 (2011); Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT'L L. 331, 332 (2009). *See generally* DAVID SKEEL, THE NEW FINANCIAL DEAL: UNDERSTANDING THE DODD–FRANK ACT AND ITS (UNINTENDED) CONSEQUENCES (2010) (discussing the unintended consequences from the Dodd–Frank Act).

35. *See generally* Paul Marcus, *A Return to the "Bright Line Rule" of* Miranda, 35 WM. & MARY L. REV. 93 (1993) (proposing a bright line rule for *Miranda* to further its policy goals); Christopher E. Smith, *Bright-Line Rules and the Supreme Court: The Tension Between Clarity in Legal Doctrine and Justices' Policy Preferences*, 16 OHIO N.U. L. REV. 119 (1989) (highlighting the tension between the effects of a rule and contrasting views of policy).

36. *See generally* Alschuler, *supra* note 1 (discussing the exceptions to the bright-line rule of the Fourth Amendment).

where the factual scenario would contravene the rationale for the rule in its application.

For instance, some states impose a mandatory retirement age of 70 for judges.[37] The virtue of such a rule is the absence of dispute and elimination of adjudication costs as it would be clear when the rule went into effect for a particular judge. This bright line rule is easy to apply—once an individual reaches the proscribed age, they may no longer perform the job, in this case, working as a judge. The rationale for such a rule might relate to a belief that individuals decrease in physical and mental capacity as they age. Absent specific scientific support for the age ascribed to the bright line—70—the rule begins to appear arbitrary in its application, even though the general notion underlying the rule may be true for most of the population.

In other words, while many jurists may be slowing down at the bright line age, there are surely exceptions to the rule, individuals in good health that may be able to serve well beyond the bright line with no relevant diminishment in capacity. In certain situations, applying the rule would result in an undesirable outcome in which the rule would force a brilliant judge from the bench that possessed normal faculties and a career of experience. To avoid such an outcome, a category of exception would need to be created, changing the rule to allow for the exception. This would open the door, however, to the scope of the exception and the question of whether additional exceptions would be desirable as well.

An example might be that a judge should have the ability to serve a certain term of years if elected, even if that term extended beyond the judge's 70th birthday. Another exception could relate to a physical test concerning the judge's mental and physical faculties.

If the exception includes soft, non-quantitative criteria, the efficiency value of the bright line rule largely disappears. The qualitative judgment needed to ascertain the scope of the exception would have the effect of usurping the rule. The question would cease to become the age of the jurist; instead, reaching the proscribed age would trigger the application of a qualitative inquiry that would essentially function as the rule.

As such, the decision to make an exception to a bright line rule has the capacity to undermine the rule entirely, particularly as one adds exceptions of a non-bright line nature. Exacting rules then give way to balancing tests or other messy instruments that remove the clarity and predictability that the rule formerly generated.

---

37. *Mandatory Retirement*, BALLOTPEDIA, https://ballotpedia.org/Mandatory_retirement [https://perma.cc/6SRV-GBXE] (documenting the mandatory retirement ages for judges in the various states); *see also* Gregory v. Ashcroft, 501 U.S. 452, 456 (1991) (holding that Missouri's mandatory retirement age for judges did not violate the ADEA).

B. CONSTITUTIONAL COMPLICATIONS

Beyond the inherent tension related to bright line rules and their tendency to create unfair outcomes at the margins, the nature of constitutional rules adds a further level of complications relevant to the analysis.[38] Constitutional interpretation by the Supreme Court has the effect of being difficult to overrule.[39] This is because of the difficulty of amending the Federal Constitution.[40] Given the supermajority required, an overwhelming national consensus is a precondition to constitutional amendment.[41]

This political reality has given rise to an academic obsession among constitutional law professors known as the "counter-majoritarian difficulty."[42] The dilemma arises with respect to the propriety of a five-justice majority on the Supreme Court interpreting the Constitution to strike down a state or federal statute, effectively overruling the will of the people.[43] The criticisms of

---

38. *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) (detailing the history of judicial review and constitutional interpretation by the Supreme Court over the years); RONALD DWORKIN, LAW'S EMPIRE (1986) (exploring the roots of the Anglo–American legal system and producing a general theory of constitutional interpretation); H.L.A. HART, THE CONCEPT OF LAW (1961) (exploring theories of analytical jurisprudence and interpretation).

39. For instance, the canon of constitutional avoidance promotes avoiding such decisions as a result of their finality. *See, e.g.*, Philip P. Frickey, *Greetings from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CALIF. L. REV. 397, 446 (2005) ("Descriptively, the classic justifications for the canon are that it promotes judicial restraint by allowing judges to avoid the 'delicate process of constitutional adjudication' and its concomitant counter-majoritarian difficulties; it coincides with the probable congressional intent preferring the ongoing validity of some version of the statute to invalidity as the result of judicial review . . . ." (footnote omitted)).

40. *See generally* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995 (1996) (detailing the history of constitutional amendments and Article V); Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561 (1998) (discussing the constitutional amendment process and its difficulty); Theodore C. Sorensen, *The American Constitution: Basic Charter or First Draft?*, 40 ARIZ. L. REV. 709 (1998) (arguing the succinct nature of the Constitution and the difficulty associated with its amendment is the reason for its continued success).

41. *See* sources cited *supra* note 40.

42. *See generally* BICKEL, *supra* note 38 (arguing for a limited version of judicial review and discussing the "counter-majoritarian difficulty"); Barry Friedman, *The History of The Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998) (detailing the history of the "counter-majoritarian difficulty"); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002) (same); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383 (2001) (same); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000) (same); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) (same).

43. *See* sources cited *supra* note 42.

Lochner v. New York[44] from the left[45] and *Roe v. Wade*[46] from the right[47] both relate to this concern.

There is a balance, however, between the carte blanche insertion of the normative views of the individual Justices into the text of the Constitution, and the Court fulfilling its constitutional role, per *Marbury v. Madison*,[48] of engaging in judicial review and determining the meaning and scope of the Constitution.[49] Specifically, the Court's role in interpreting much of the Bill of Rights relates to protecting the political minority from a majoritarian legislative overreach that infringes on constitutional rights.[50]

This Article is agnostic on the proper scope of judicial review of particular constitutional provisions in light of the counter-majoritarian difficulty.[51] It

---

44. Lochner v. New York, 198 U.S. 45 (1905).

45. For descriptions of the negative reaction to *Lochner*, see, for example, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 44–46, 49 (First Touchstone ed. 1991) (discussing *Lochner* in the frame of judicial activism); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) (writing the Supreme Court during the New Deal Era abandoned previous jurisprudential positions and succumbed to political pressures); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14–21, 65–66 (1980) (examining *Lochner* through the lens of neutrality); GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, CONSTITUTIONAL LAW 718–23 (4th ed. 2001) (detailing various criticisms of *Lochner*); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 463–66 (14th ed. 2001); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 574–78 (2d ed. 1988); David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 373–75 (2003) (arguing "*Lochner* is one of the great antiprecedents of the twentieth century"); Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 874 (1987); and Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926) (discussing the expanded nature of judicial review).

46. Roe v. Wade, 410 U.S. 113 (1973).

47. For descriptions of the negative reactions to *Roe*, see generally Caitlin E. Borgmann, Roe v. Wade*'s 40th Anniversary: A Moment of Truth for the Anti-Abortion-Rights Movement?*, 24 STAN. L. & POL'Y REV. 245 (2013) (discussing anti-abortion activism and the "incrementalist strategy" in response to *Roe*); Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees:* Roe v. Wade *and Its Critics*, 53 B.U. L. REV. 765 (1973) (examining whether the Court should have constitutionalized abortion in *Roe*); Richard Gregory Morgan, Roe v. Wade *and the Lesson of the Pre-*Roe *Case Law*, 77 MICH. L. REV. 1724 (1979) (detailing why the author believes *Roe* was a mistake in Supreme Court jurisprudence); Lynn D. Wardle, *Rethinking* Roe v. Wade, 1985 BYU L. REV. 231 (presenting arguments for why the Court should rethink *Roe*); and Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and* Roe v. Wade, 71 WASH. & LEE L. REV. 969 (2014) (detailing abortion politics since the publication of *Roe*).

48. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

49. *See generally* Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991 (2006) (arguing that the right to judicial review is actually based on the "right to voice a grievance" or "right to a hearing"); Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275 (2002) (exploring whether a system of judicial review is necessary to protect constitutional rights).

50. *See* sources cited *supra* note 49; David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1525–39 (1992).

51. I have explored this topic elsewhere with respect to the Eighth Amendment. *See generally* Berry, *Evolved Standards*, *supra* note 22 (providing an overview of judicial review in Eighth

raises the issue here, however, because it informs the fraught nature of exploring exceptions to constitutional provisions, particularly where the Court defines such provisions within the scope of constitutional provisions written in an overly broad and open-ended way.

The Eighth Amendment provides an obvious example. There is no clear guidance of what makes a particular punishment "cruel and unusual."[52] When the Court applies this language to create categorical exclusions to certain kinds of punishments with respect to certain types of offenders or offenses, it is engaging in its constitutional role of judicial review under Article III and protecting individual offenders against the imposition of excessive criminal punishment by the legislature.[53] At the same time, however, such decisions carry great weight because there is no legislative method to overturn such decisions, and those decisions have placed restrictions on the ability to legislate.[54]

As explored below, this has interesting consequences for bright line constitutional rules, as not only are the rules themselves a creation of a court's reading and interpretation of constitutional language, but also such rules give rise to the need for exceptions at the margins, or risk unfairness. Each layer of nuance of bright line interpretation is, on the one hand, essential to the protection of individual rights while, on the other hand, establishes a permanent (barring constitutional amendment or later court reversal) constitutional rule. In short, the stakes are higher and the consequences more permanent when creating a bright line constitutional rule and adding exceptions to such a rule.

There exist two corollary concerns to the basic tension underlying the counter-majoritarian difficulty. Specifically, the twin concepts of comity and federalism become part of the analysis when the Court is considering whether

---

Amendment cases and "argu[ing] that the concerns of the counter-majoritarian difficulty with respect to deferring to the will of the people should have no bearing on the Court's application of the Eighth Amendment to state punishment practices").

52. U.S. CONST. amend. VIII.

53. This is certainly true in the Eighth Amendment context. *See generally* David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859 (2009) (discussing the Court's attempt to modernize the law in cases of cruel and unusual punishment through judicial review); Scott E. Sundby, *The True Legacy of* Atkins *and* Roper*: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 WM. & MARY BILL RTS. J. 487 (2014) (discussing the Court's efforts "to design and maintain a constitutional system of capital punishment").

54. The Court has been more willing to overrule itself in this context than perhaps in some others. *See* Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. REV. 847, 853–58 (2007). *Compare* Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (holding the Eighth Amendment does not preclude the execution of defendant with an intellectual disability), *with* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that execution of a defendant with an intellectual disability is "excessive" and violates the Eighth Amendment); *compare also* Stanford v. Kentucky, 492 U.S. 361, 371–73, 377 (1989) (holding that the Eighth Amendment does not preclude the death sentence for 16- and 17-year-old defendants), *with* Roper v. Simmons, 543 U.S. 551, 575 (2005) ("[H]olding that the death penalty cannot be imposed upon juvenile offenders.").

a state statute complies with the Constitution. Comity is a principle drawn from international law that suggests that, where possible, the Court should accord states some degree of deference.[55] This idea relates to the competing sovereignty of the state and federal governments.[56] While the federal government is clearly supreme to the states under the Constitution,[57] the concept of comity cautions the federal courts that overruling state law determinations—made by state legislatures and presumably constitutional under state constitutions—should occur with a degree of hesitancy and only when the state action clearly contravenes the Constitution.[58] The broad, open-ended nature of constitutional language gives room for adding this concern to the interpretative mix, as the vague language allows for a range of judicial interpretation.[59]

Federalism, a companion concept to comity, advances similar concerns but focuses more on the affirmative rights advanced by states in competition with federal power.[60] While according comity might mean extending a courtesy or privilege to the state, federalism implies that there is a state right that competes with or exists in the absence of federal power.[61] As with comity, federalism raises the concern in constitutional interpretation of the constitutional provision in question in such a way as to remove power from the states by imposing a constitutional limitation on state legislatures.[62]

---

55. Comity is not without its own problems. *See generally* Berry, *Unusual Deference*, *supra* note 22 (arguing that the Supreme Court should accord states less deference under the Eighth Amendment); Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443 (2007) (discussing comity and finality and the trade-off of interests between the two); Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991) (discussing the benefits and losses associated with comity).

56. *See generally* Gil Seinfeld, *Reflections on Comity in the Law of American Federalism*, 90 NOTRE DAME L. REV. 1309 (2015) (addressing comity and "the relationship between the states and the federal government"); Robert D. Sloane, *AEDPA's "Adjudication on the Merits" Requirement: Collateral Review, Federalism, and Comity*, 78 ST. JOHN'S L. REV. 615 (2004) (discussing what "it mean[s] for a state court to have 'adjudicated' a habeas petitioner's federal claim 'on the merits'"); Michael Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C. L. REV. 59 (1981) (discussing the use of comity in "cases based on whether the issues are state or federal").

57. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

58. *See* Seinfeld, *supra* note 56, at 1332–35.

59. This is true irrespective of whether one favors an originalist or living constitutionalist approach. *See* ERIC J. SEGALL, ORIGINALISM AS FAITH 171–79 (2018).

60. *See* DANIEL J. ELAZAR, EXPLORING FEDERALISM 5–11 (1987); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1428 (1987).

61. *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 501–04 (1995); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1504 (1994). *See generally* THOMAS R. DYE, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS (1990) (discussing a theory of competitive federalism based in rivalry among state and local governments).

62. *See, e.g.*, Amar, *supra* note 60, at 1517; Chemerinsky, *supra* note 61, at 501–03.

From the perspective of the individual, protecting one's individual constitutional rights should trump any concern of states' rights.[63] The concern of federalism, however, gains some traction where the constitutional provision at issue is open-ended in a way that creates the perception that the interpretation is solely a means to achieve a normative outcome.[64] In considering whether to develop and make exceptions to bright line constitutional rules, then, one must be cognizant of the competing interests of states—legislative, executive, and judicial branches—when framing the rule. Open-ended constitutional language provides the freedom to make such rules, but these implicit political limitations can bear on the legitimacy of the constitutional rule, and ultimately, its enforceability.[65]

C. Eighth Amendment Differentness

Beyond the limitations of bright line rules and the increased weight such rules carry when constitutional, the Eighth Amendment magnifies these challenges even further with respect to punishments involving death—the death penalty and LWOP (death-in-custody) sentences.[66] As explored below, the paramount nature of bright line constitutional rules developed under the Eighth Amendment thus warrants deeper examination of their application.

The concept of "differentness" has long animated the Supreme Court's Eighth Amendment jurisprudence.[67] The idea has been that certain punishments are "different" such that they warrant a higher degree of constitutional scrutiny than other punishments.[68] This provision operates

---

63. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding the "separate but equal" doctrine unconstitutional, protecting individual rights under the Fourteenth Amendment, and striking down state segregation laws).

64. This has certainly been the accusation with substantive due process. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 386 (2004); Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1093–94 (2005). The criticism loses some of its sting in light of both the broad trend of the Court to track public opinion, see generally BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009), and in light of the alternative normative agenda advanced through originalism, see generally SEGALL, *supra* note 59.

65. *See generally* Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111 (2003) (providing an in-depth analysis of the legitimacy of the Constitution); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (discussing the legitimacy of the Constitution and the legitimacy of the judiciary under the Constitution); David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800 (1986) (discussing constitutional legitimacy in two Supreme Court privacy cases).

66. *See* Berry, *Life-With-Hope*, *supra* note 22, at 1064–68.

67. *See generally* William W. Berry III, *Eighth Amendment Differentness*, 78 MO. L. REV. 1053 (2013) [hereinafter Berry, *Differentness*] (describing the Court's "differentness" doctrine as it relates to juvenile punishment).

68. *Compare* Atkins v. Virginia, 536 U.S. 304, 319–21 (2002) (applying heightened scrutiny in a capital case), *with* Lockyer v. Andrade, 538 U.S. 63, 66–68, 77 (2003) (applying a lower standard of gross disproportionality in a non-capital case).

almost like a trigger for a "strict scrutiny" type of constitutional analysis, with the Court applying its evolving standards of decency analysis to such cases.[69] The differentness concept[70] has thus resulted in the expansion of the Eighth Amendment with respect to capital cases[71] and juvenile LWOP cases.[72]

1. Death Penalty

The Court has long articulated the maxim that "death is different."[73] This means that capital cases received heightened constitutional scrutiny based on their uniqueness.[74] The Court has recognized two rationales for the differentness of the death penalty.[75] First, the death penalty is unique in its severity.[76] There is no more serious punishment than capital punishment because the State kills the offender.[77] Second, the death penalty is unique in

---

69. *See generally* Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365 (2009) (comparing the Court's use of "evolving standards" in the Eighth Amendment context to the to the due process clauses of the Fifth and Fourteenth Amendments).

70. I have argued for the expansion of the differentness concept with respect to the kinds of offenders who are different (such as elderly and veterans) and the kinds of crimes that are different (such as LWOP). *See* Berry, *Differentness*, *supra* note 67, at 1074–75, 1079–80.

71. *See* Moore v. Texas, 137 S. Ct. 1039, 1051–53 (2017); Hall v. Florida, 572 U.S. 701, 723–24 (2014); Kennedy v. Louisiana, 554 U.S. 407, 446–47, *modified*, 554 U.S. 945 (2008); Roper v. Simmons, 543 U.S. 551, 578–79 (2005); *Atkins*, 536 U.S. at 321; Enmund v. Florida, 458 U.S. 782, 801 (1982); Coker v. Georgia, 433 U.S. 584, 597–600 (1977).

72. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 736–37 (2016); Miller v. Alabama, 567 U.S. 460, 481, 489 (2012); Graham v. Florida, 560 U.S. 48, 82 (2010).

73. *See* Furman v. Georgia, 408 U.S. 238, 290 (1972) (Brennan, J., concurring) (discussing the consequences of human fallibility in inflicting the death penalty, where "the finality of death precludes relief"). Justice Brennan's concurrence in this case is apparently the origin of the Court's "death is different" capital jurisprudence. *See id.* at 286 ("Death is a unique punishment in the United States."); *see also* Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 118 (2004) (discussing the Court's death-is-different jurisprudence and requesting additional "procedural safeguards when humans play at God"); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan as the originator of this line of argument).

74. *See generally* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009) (describing the "two-track approach" to sentencing and arguing for its abandonment); Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death,"* 34 OHIO N.U. L. REV. 861 (2008) (distinguishing between capital and non-capital sentencing systems).

75. *See infra* notes 76–79 and accompanying text.

76. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 604–05 (1978) (plurality opinion) (stating that death is qualitatively and profoundly different from other penalties); Woodson v. North Carolina, 428 U.S. 280, 287 (1976) (plurality opinion) (distinguishing the penalty of death as "unique and irreversible").

77. Some, including me, have argued that LWOP may be more severe than capital punishment in certain situations, but the broader consensus remains that the death penalty is the most severe punishment a state can impose. *See* Berry, *Life-With-Hope*, *supra* note 22, at 1064–68.

its irrevocability.[78] Once the state kills an inmate, there is no way to undo that action—it cannot revoke the punishment if the inmate is later exonerated.[79] These two concepts—severity and irrevocability—make the death penalty different.[80]

The effect of this differentness doctrine is to accord the "different" punishment—the death penalty—heightened scrutiny such that its rules can place greater limitations on the use of the death penalty. The differentness doctrine has resulted in a mini-proliferation of bright line categorical rules limiting the use of the death penalty.[81] Specifically, these rules place limitations on the use of the death penalty in felony murder cases,[82] and bar its use for rape[83] and child rape[84] crimes as well as for juvenile offenders[85] and intellectually disabled offenders.[86]

Non-juvenile, non-homicide crimes, by contrast, receive almost no scrutiny under the Eighth Amendment.[87] The "not different" cases do not

---

78. *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (noting that because "death is not reversible," DNA evidence that the convictions of numerous persons on death row are "unreliable" is especially alarming); Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) ("[T]he death sentence is unique in its severity and in its irrevocability."); Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability."); *Woodson*, 428 U.S. at 305 (stating "[d]eath . . . differs . . . from life imprisonment" because of "its finality").

79. Innocence has increasingly been demonstrated to be a problem in capital cases, with more than 165 inmates on death row subsequently being released after a determination of their innocence. *See Innocence*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/innocence [https://perma.cc/ZN3M-TX82]. There is also evidence that innocent inmates have been executed. *See, e.g.*, David Grann, *Trial by Fire*, NEW YORKER (Aug. 31, 2009), https://www.newyorker.com/magazine/2009/09/07/trial-by-fire [https://perma.cc/BLR5-W62W]; *What if Troy Davis Was Innocent?*, AMNESTY INT'L (Sept. 20, 2012), https://www.amnestyusa.org/what-if-troy-davis-was-innocent [https://perma.cc/R4TP-GEC7].

80. *See supra* notes 76–79 and accompanying text.

81. *See infra* text accompanying notes 82–88.

82. Tison v. Arizona, 481 U.S. 137, 158 (1987); Enmund v. Florida, 458 U.S. 782, 797 (1982).

83. Coker v. Georgia, 433 U.S. 584, 598–600 (1977).

84. Kennedy v. Louisiana, 554 U.S. 407, 434–47, *modified*, 554 U.S. 945 (2008).

85. Roper v. Simmons, 543 U.S. 551, 578–79 (2005).

86. Moore v. Texas, 137 S. Ct. 1039, 1044 (2017); Hall v. Florida, 572 U.S. 701, 704–05 (2014); Atkins v. Virginia, 536 U.S. 304, 321 (2002).

87. *See* Lockyer v. Andrade, 538 U.S. 63, 66, 77 (2003) (affirming on habeas review two consecutive sentences of 25 years to life for stealing approximately $150 of videotapes, where defendant had three prior felony convictions); Ewing v. California, 538 U.S. 11, 18, 30–31 (2003) (affirming sentence of 25 years to life for stealing approximately $1,200 of golf clubs, where defendant had four prior serious or violent felony convictions); Harmelin v. Michigan, 501 U.S. 957, 961, 994 (1991) (affirming sentence of LWOP for first felony offense of possessing 672 grams of cocaine); Solem v. Helm, 463 U.S. 277, 279, 281–84 (1983) (reversing a sentence of LWOP for presenting a no account check for $100, where defendant had six prior felony convictions); Hutto v. Davis, 454 U.S. 370, 370–72 (1982) (per curiam) (affirming two consecutive sentences of 20 years for possession with intent to distribute and distribution of nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263, 264–66, 285 (1980) (affirming life with parole sentence for felony theft of $120.75 by false pretenses where defendant had two prior

violate the Eighth Amendment unless the sentencing outcomes are "grossly disproportionate," a sentencing outcome found only once by the Supreme Court.[88] As such, there are no bright line rules under the Eighth Amendment in non-capital, non-juvenile cases.

2. Juvenile LWOP

In 2010, the Supreme Court expanded its differentness principle to juvenile offenders in *Graham v. Florida*, where it barred the imposition of LWOP sentences on juvenile offenders for non-homicide crimes.[89] The Court subsequently explained, if "'death is different,' children are different too."[90] The Court's conceptualization of juvenile offenders as different related this time to the type of offender, not the type of offense.[91] In particular, the Court has found that juvenile offenders possess both a diminished level of culpability[92] and an enhanced potential for rehabilitation.[93]

Recent brain science studies have substantiated the Court's understanding that juvenile offenders possess a decreased culpability in light

---

convictions); *see also* Barkow, *supra* note 74, at 1146–47 ("In noncapital cases, . . . the Court has done virtually nothing to ensure that the sentence is appropriate.").

88. *Solem*, 463 U.S. at 279, 281–84.

89. Graham v. Florida, 560 U.S. 48, 82 (2010); *see also* William W. Berry III, *More Different than Life, Less Different than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After* Graham v. Florida, 71 OHIO ST. L.J. 1109, 1123–35 (2010) (arguing that LWOP is a "different" kind of punishment); Cara H. Drinan, Graham *on the Ground*, 87 WASH. L. REV. 51, 61–64 (2012) (examining the implications of the *Graham* decision).

90. Miller v. Alabama, 567 U.S. 460, 481 (2012). *Miller* explained "that children are constitutionally different from adults for purposes of sentencing." *Id.* at 471. *See generally* CARA H. DRINAN, THE WAR ON KIDS: HOW AMERICAN JUVENILE JUSTICE LOST ITS WAY (2018) (discussing the systemic issues around juvenile punishment *Miller* began to address).

91. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 732–33 (2016); *Miller*, 567 U.S. at 481; *Graham*, 560 U.S. at 79; Berry, *Differentness*, *supra* note 67, at 1055–56.

92. *Miller*, 567 U.S. at 471–72 ("Because '[t]he heart of the retribution rationale' relates to an offender's blameworthiness, 'the case for retribution is not as strong with a minor as with an adult.'" (quoting *Graham*, 560 U.S. at 71)); *Graham*, 560 U.S. at 68 ("[J]uvenile offenders cannot with reliability be classified among the worst offenders." (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005))); *Roper*, 543 U.S. at 569–70 (explaining that as compared to adults, juveniles have "[a] lack of maturity and an underdeveloped sense of responsibility'"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed"); Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion) ("The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.").

93. *Miller*, 567 U.S. at 471 ("[A] child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'" (quoting *Roper*, 543 U.S. at 570)); *Graham*, 560 U.S. at 68 ("Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." (quoting *Roper*, 543 U.S. at 570)); *Roper*, 543 U.S. at 570 ("From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.").

of their incompletely developed brain capacity and ability to exert self-control.[94] As such, the Court found that it was improper to ascribe the same level of culpability to defendants under the age of 18 at the time of the crime.[95] In addition, the age of the offenders led to the Court's conclusion that the capacity for rehabilitation exceeded that of adult offenders, justifying the differentness of juvenile offenders.[96]

The consequence of juvenile differentness, to date, has been to limit the imposition of LWOP sentences on juvenile offenders in certain situations.[97] As with the death penalty, the bright line differentness rules adopted by the Court in this situation are particularly serious in that they establish or deny eligibility for a type of death sentence—life without parole.[98]

Taking the death penalty and juvenile LWOP together, what differentness means for bright line constitutional rules is that there should be even greater care when developing and delineating the scope of such a rule because of its consequences. Developing a constitutional rule and its exceptions in this context means drawing a line delineating who will be eligible for the death penalty, or alternatively, who will be eligible to receive a sentence condemning him to die in prison.

In light of these challenges, this Article advances the concept of presumptive penumbras as a tool to mitigate against unfair outcomes at the margins of these bright line constitutional rules. In particular, it endeavors to eliminate the arbitrariness resulting from temporal line drawing based on offender age.

III. EIGHTH AMENDMENT PRESUMPTIVE PENUMBRAS

The concept of a penumbra with respect to a constitutional provision relates to a broader conception of a rule that includes the figurative shadow that a rule casts. Most famously used in *Griswold v. Connecticut* to develop a substantive due process right to use contraception from an ephemeral notion

---

94. *See* Elizabeth Cauffman & Laurence Steinberg, *Emerging Findings from Research on Adolescent Development and Juvenile Justice*, 7 VICTIMS & OFFENDERS 428, 432–34 (2012); Dosenbach et al., *supra* note 23, at 1359–60; Lebel & Beaulieu, *supra* note 23, at 10943–46; Pfefferbaum et al., *supra* note 23, at 186–91; Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1014–17 (2003).

95. *See supra* text accompanying note 92.

96. *See supra* text accompanying note 93.

97. Montgomery v. Louisiana, 136 S. Ct. 718, 732–36 (2016) (applying *Miller* retroactively and emphasizing the differentness of juvenile LWOP sentences); *Miller*, 567 U.S. at 465 (barring mandatory juvenile LWOP sentences); *Graham*, 560 U.S. at 82 (barring juvenile LWOP for non-homicide crimes).

98. *See, e.g.*, Berry, *Life-With-Hope*, *supra* note 22, at 1068–81 (arguing for the abolition of LWOP sentences); William W. Berry III, *The Mandate of* Miller, 51 AM. CRIM. L. REV. 327, 329 (2014) (describing LWOP sentences as "death-in-custody sentences").

of privacy, penumbras draw a halo around a particular idea to allow it to encompass something adjacent to the initial idea.[99]

Literally, a penumbra is a kind of shadow—"[t]he partially shaded outer region of the shadow cast by an opaque object."[100] To be sure, many provisions of the Constitution are opaque in nature. Certainly the Eighth Amendment proscription of "cruel[101] and[102] unusual"[103] punishments does not offer a clear tool by which to separate constitutional from unconstitutional punishments.[104] Once the Court creates a constitutional rule under the Eighth Amendment, the penumbra would be any "shadow" cast by the rule—any reasonable extension that captures the inherent meaning or conception underpinning the rule.[105]

---

99. Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965). *Griswold* famously found "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id.* at 484.

100. *Penumbra*, LEXICO, https://www.lexico.com/en/definition/penumbra [https://perma.cc/3GEZ-5Z65].

101. The definition of "cruel" under the Eighth Amendment often relates to the idea of disproportionality or excessiveness, but also might correspond to the purposes of punishment in the evolving standards of decency test. *See* William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 106–10 (2011) [hereinafter Berry, *Promulgating Proportionality*]; John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 468 n.167 (2017) (arguing the former).

102. Even the conjunction possesses a degree of opacity, or ambiguity, as scholars have demonstrated. *See* Samuel L. Bray, *"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 VA. L. REV. 687, 689–90 (2016); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel* and *Unusual?*, 87 WASH. U. L. REV. 567, 572 (2010); Stinneford, *supra* note 101, at 444; *see also* William W. Berry III, *Cruel State Punishments*, 99 N.C. L. REV. (forthcoming 2020) (manuscript at 7–9) (on file with author) (interpreting the meaning of the word "and").

103. The term "unusual" can mean rare. *See* Furman v. Georgia, 408 U.S. 238, 311 (1972) (White, J., concurring). Or it can refer to rarely used and evolving over time. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1815 (2008). It can also refer to the objective prong of the evolving standards of decency test. *See* Berry, *Promulgating Proportionality*, *supra* note 101, at 111–12.

104. Even Justice Scalia's originalist conception that the line should correspond to the punishments used at the time of the adoption of the Constitution ignores the constitutional history, which shows that the framers intended the Eighth Amendment to evolve over time. *See* Stinneford, *supra* note 103, at 1742, 1824. The Supreme Court's early Eighth Amendment cases shared this sentiment. Trop v. Dulles, 356 U.S. 86, 99–101 (1958) (plurality opinion) (articulating the concept of evolving standards of decency); Weems v. United States, 217 U.S. 349, 373 (1910) ("Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions.").

105. *See infra* Part IV. This idea can apply in a number of contexts with respect to constitutional language. *See generally* Michael Burgess, *The Penumbra of Federalism: A Conceptual Reappraisal of Federalism, Federation, Confederation and Federal Political Systems*, *in* ROUTLEDGE HANDBOOK OF REGIONALISM AND FEDERALISM 45–59 (John Loughlin, John Kincaid & Wilfried Swenden eds., 2013) (exploring the penumbras in the construction and reconstruction of federal concepts); Glenn Harlan Reynolds, *Second Amendment Penumbras: Some Preliminary Observations*, 85 S. CAL. L. REV. 247 (2012) (discussing penumbras in the context of the Second Amendment);

In constitutional interpretation, the idea of penumbras becomes particularly useful when defining the scope of under-enforced constitutional rights.[106] Often, the scope of a particular constitutional right remains unknown in practice until challenged by a litigant such that the Court has to define its reach. For instance, one cannot really determine whether a particular punishment contravenes the Eighth Amendment unless the State imposes the punishment, the sentenced individual challenges the punishment, and the Supreme Court draws a constitutional line with respect to the punishment.

The canon of constitutional avoidance demonstrates how the under-enforced constitutional rights can receive protection where the scope of the right has not received complete definition from the Supreme Court, or alternatively addressed the hard cases that fall adjacent to the bright line rule.[107] When a close factual question arises adjacent to the bright line constitutional rule with respect to one interpretation of a statute, the avoidance canon counsels choosing the other interpretation so as to avoid the constitutional line drawing.[108] In effect, then, the canon gives a penumbral effect to the constitutional rule—any statute that could contravene the right or anything close to it must be read so as not to infringe on the right in question.[109]

A penumbral reading of a constitutional bright line could have a similar effect, with the reading giving a broader scope to the rule than its text

---

William Schwartz, *The Penumbra of State Regulation of Unfair Labor Practices*, 38 B.U. L. REV. 553 (1958) (reviewing cases under the Taft–Hartley Act and their implications on state and federal regulation).

106. Indeed, this is one of the justifications for the using the canon of constitutional avoidance to not reach constitutional questions. *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1593–99 (2000) (highlighting the importance of resistance norms as a means to give effect to under-enforced constitutional provisions). *See generally* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006) (exploring the same idea within the context of the executive branch); William W. Berry III, *Criminal Constitutional Avoidance*, 104 J. CRIM. L. & CRIMINOLOGY 105 (2014) [hereinafter Berry, *Avoidance*] (exploring a similar idea).

107. *See* sources cited *supra* note 106.

108. *See* Skilling v. United States, 130 S. Ct. 2896, 2928 (2010); Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring); Murray v. Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). The prudence of this approach has been the subject of much discussion. *See, e.g.*, Morrison, *supra* note 106, at 1189–96; Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816–17 (1983); H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313, 1316–18 (2006); Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 749 (1992); Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 578 (1992); Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 72–74; Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1945–47 (1997); Young, *supra* note 106, at 1585.

109. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988); United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916).

provides on its face. As with the avoidance canon, the rationale for such an approach would relate to the value of according under-enforced constitutional rights to individual defendants until the Court further defines the rule in the close cases.[110]

As explained below, the value of penumbras is that they extend protection beyond the constitutional bright line rule within a reasonable radius of the initial bright line, rather than requiring another case to delineate the exact scope of the constitutional line and its possible scope—a "common law"-like process that could take years or even decades to unfold.[111] Rather than allow unjust outcomes to remain at the edge of bright line constitutional rules, the presumptive penumbral approach seeks to extend under-enforced rights until the Court elects to further clarify the scope of the bright line rule with respect to possible exceptions in hard cases at the margins.

A. *Eighth Amendment Penumbras*

In the context of the Eighth Amendment, the Supreme Court has articulated a number of categorical exceptions to the Eighth Amendment—circumstances where particular kinds of punishments constitute per se violations of the Eighth Amendment.[112] In the death penalty context, the Eighth Amendment bars the imposition of death sentences on juvenile offenders[113] and intellectually disabled offenders.[114] It likewise bars capital punishment for rape[115] and child rape.[116] The Court has also placed restrictions on death sentences for felony murder—restricting its use to cases where the defendant is a major participant in the crime and exhibits a mental

110. The proliferation of cases under the Fourth Amendment might make such a penumbral approach less necessary, see generally Alschuler, *supra* note 1, but with the Eighth Amendment, the dearth of cases suggests such an approach is not only plausible but perhaps necessary, see Berry, *Evolved Standards*, *supra* note 22, at 150–52.

111. Indeed, the Supreme Court did not decide a categorical exclusion question under the Eighth Amendment for a period of over ten years between its decisions in *Penry v. Lynaugh* and *Stanford v. Kentucky* (1989), and its decision in *Atkins v. Virginia* (2002). *See* Berry, *Evolved Standards*, *supra* note 22, at 149–50; *see also infra* note 145 and accompanying text (discussing the Court's approach in *Furman v. Georgia*).

112. These exceptions relate to certain applications of the death penalty and juvenile LWOP. *See* Berry, *Evolved Standards*, *supra* note 22, at 121–27. In the modern era, *Furman v. Georgia* is the only case where some Justices voted for the per se abolition of a particular punishment in its entirety—the death penalty—but only two Justices voted this way. Furman v. Georgia, 408 U.S. 238, 314–74 (1972) (Marshall, J., concurring); *id.* at 257–310 (Brennan, J., concurring).

113. Roper v. Simmons, 543 U.S. 551, 578–79 (2005).

114. Moore v. Texas, 137 S. Ct. 1039, 1053 (2017); Hall v. Florida, 572 U.S. 701, 724 (2014); Atkins v. Virginia, 536 U.S. 304, 321 (2002).

115. Coker v. Georgia, 433 U.S. 584, 599–600 (1977).

116. Kennedy v. Louisiana, 554 U.S. 407, 446–47, *modified*, 554 U.S. 945 (2008).

state of reckless indifference.[117] In the juvenile LWOP context, the Eighth Amendment bars juvenile LWOP for non-homicide crimes.[118] Finally, the Eighth Amendment forbids the imposition of mandatory death sentences[119] and mandatory juvenile LWOP sentences.[120]

To accord these provisions penumbral value, one might consider what shadows these rules cast and what additional rights might also need to fall under the rule to give it its full value. The purpose of such an approach would be to provide the constitutional right with a scope consistent with its normative purpose, even if not directly expressed.

For instance, the Court struck down the use of the death penalty for child rape offenses in *Kennedy v. Louisiana*.[121] The Court's reasoning related to the idea—from *Coker v. Georgia*[122]—that the death penalty was a disproportionate punishment for a non-homicide crime.[123]

A penumbral reading of that constitutional right might extend to other non-homicide crimes, even if they were not directly at issue in that case.[124] This would mean that a death sentence imposed for a non-homicide crime such as armed robbery might be unconstitutional in light of the penumbra cast by *Kennedy*.[125] This reading would be appropriate as a guide to legislatures considering the appropriateness of a statute imposing the death penalty for armed robbery of a government-owned facility.[126]

The value of the penumbral reading of the constitutional right would thus be to accord the Constitution this scope without a state having to engage in unconstitutional behavior—by passing the armed robbery death penalty

117. Tison v. Arizona, 481 U.S. 137, 158 (1987). *Tison v. Arizona* partially overruled the Court's decision in *Enmund v. Florida*, where the Court had proscribed the imposition of felony murder under the Eighth Amendment where the defendant aided and abetted "but who d[id] not himself kill, attempt to kill, or intend that a killing take place." Enmund v. Florida, 458 U.S. 782, 782 (1982). For an interesting telling of the harrowing facts of the *Tison* case, see generally JAMES W. CLARKE, LAST RAMPAGE: THE ESCAPE OF GARY TISON (1988).

118. Graham v. Florida, 560 U.S. 48, 82 (2010).

119. Woodson v. North Carolina, 428 U.S. 280, 307 (1976) (plurality opinion); Roberts v. Louisiana, 428 U.S. 325, 375–76 (1976).

120. Miller v. Alabama, 567 U.S. 460, 489 (2012).

121. *Kennedy*, 554 U.S. at 446–47.

122. Coker v. Georgia, 433 U.S. 584, 599–600 (1977).

123. *Kennedy*, 554 U.S. at 446–47.

124. The decision in *Kennedy* implied as much, suggesting that non-homicide crimes against individuals were not punishable by death. *See id.* at 437. The Court, however, left open the possibility that the Eighth Amendment might apply to certain non-homicide crimes against the State. *Id.* (explaining that death could be a constitutional punishment for "crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State").

125. *See id.*

126. Note that such a crime would generally be thought to be against an individual, but could be considered against the State, depending on what was purloined. A penumbral approach would accord the defendant the right to be protected from a death sentence until the Court clarified this bright line further.

statute and then sentencing a defendant to death under that statute. For the right to receive its full confirmation, the Court would then have to take the appeal of a challenge to the armed robbery death statute to then strike it down under the Eighth Amendment. The right—to be free from a death sentence for armed robbery because it would be a cruel and unusual punishment—is clearly under-enforced without a statute and a case striking down that statute, which would give credence to a penumbral reading of *Kennedy*.

The penumbral concept does have limits, however, related to the shadow cast by the underlying decision. This extension to recognize under-enforced constitutional rights that lie adjacent to the line drawn by the Supreme Court seems to have legitimate justification, but the justification diminishes as one moves to the edge of (or even beyond) the shadow of the initial decision.

Consider the Court's decision in *Graham v. Florida*, where the Court barred the use of juvenile LWOP sentences in non-homicide cases. The reasoning of the Court coupled the diminished culpability of the criminal act[127] with the diminished culpability of the juvenile offender and his potential for rehabilitation.[128] A penumbral extension to cover all juvenile LWOP offenses would likely be beyond the shadow.[129] The Court's decision in *Graham* did not rule out the possibility of a future ban on juvenile LWOP sentences,[130] but also did not suggest or intimate in any way that its limit on non-homicide crimes as the basis for the Eighth Amendment restriction would also extend to homicide crimes.[131] Imposing a categorical ban on juvenile LWOP may be a good idea,[132] but it probably falls outside of the penumbra of the decision in *Graham*, and accordingly would require a new constitutional rule.

Having explained the concept and scope of penumbras of constitutional bright line rules under the Eighth Amendment, the next part of the analysis explores the concept of Eighth Amendment presumptions before suggesting

---

127. Graham v. Florida, 560 U.S. 48, 69 (2010) ("Serious nonhomicide crimes 'may be devastating in their harm . . . but "in terms of moral depravity and of the injury to the person and to the public," . . . they cannot be compared to murder in their "severity and irrevocability."'" (alterations in original) (quoting *Kennedy*, 554 U.S. at 438)).

128. *See id.* at 68.

129. *But see infra* Section IV.C (discussing how such an expansion could work to protect the constitutional right in question).

130. Indeed, the Court stated as much in *Miller v. Alabama*. Miller v. Alabama, 567 U.S. 460, 479 (2012) ("By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. Because that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger.").

131. *See Graham*, 560 U.S. at 62–83.

132. *See* Berry, *Evolved Standards*, *supra* note 22, at 143–44 (arguing that the state legislative and judicial response to *Miller* provides a basis for the abolition of juvenile LWOP). *See generally* DRINAN, *supra* note 90 (arguing for the abolition of juvenile LWOP as part of the process of ending the justice system's "war on kids").

how the two concepts together create a workable model for using and applying bright line constitutional rules.

B. *Eighth Amendment Presumptions*

Categorical exceptions can raise problems related to the counter-majoritarian difficulty. Closely decided Supreme Court cases have the potential to unfairly undermine state legislative decision-making, and more broadly, the will of the people.[133] Justice Antonin Scalia was particularly sharp in his counter-majoritarian criticism in the first two of a series of cases beginning in 2002—*Atkins v. Virginia* and *Roper v. Simmons.*

In *Atkins*, Scalia's dissent argued that the Court's decision and differentness jurisprudence more generally simply reflected the normative preference of the majority of the Court substituting its views for those of state legislatures. He wrote:

> Today's decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.[134]

Similarly, in his dissent in *Roper*, Scalia expanded the same criticism. Quoting Alexander Hamilton, he accused the majority of substituting its will for the legislative will.[135] He chided the Court for its use of the evolving standards of decency doctrine, including bringing its own judgment to bear on the constitutionality of the juvenile death penalty.[136] He explained, "[t]he Court thus proclaims itself sole arbiter of our Nation's moral standards—and

---

133. *See supra* Section II.B.

134. Atkins v. Virginia, 536 U.S. 304, 337–38 (2012) (Scalia, J., dissenting).

135. Roper v. Simmons, 543 U.S. 551, 607–08 (2005) (Scalia, J., dissenting) ("In urging approval of a constitution that gave life-tenured judges the power to nullify laws enacted by the people's representatives, Alexander Hamilton assured the citizens of New York that there was little risk in this, since '[t]he judiciary . . . ha[s] neither FORCE nor WILL but merely judgment.' But Hamilton had in mind a traditional judiciary, 'bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.' Bound down, indeed. What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was *wrong*, but that the Constitution *has changed*." (alterations in original) (citation omitted) (quoting THE FEDERALIST NO. 78, at 465, 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

136. *Id.*; *see also* Coker v. Georgia, 433 U.S. 584, 603 (1977) (Powell, J., concurring) (originating this part of the evolving standards of decency test).

in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures."[137]

This criticism loses force, however, when one considers the majoritarian basis for the categorical exceptions under the Eighth Amendment.[138] These decisions result from an application of the Court's evolving standards of decency doctrine.[139] The first part of the analysis—an examination of objective indicia—requires the Court to look at the current national practices of legislatures to determine the majority view with respect to the punishment in question.[140] In *Atkins v. Virginia*, for instance, the Court found a national consensus against the use of the death penalty to execute intellectually disabled offenders, with 30 states barring the practice.[141] In *Roper v. Simmons*, the Court similarly found a consensus against the use of the juvenile death penalty, with 30 states barring the practice.[142] In *Kennedy v. Louisiana*, the Court likewise found a consensus against the use of the death penalty for the crime of child rape, with 44 states barring the practice.[143]

While the majoritarian basis for the evolving standards of decency mitigates much of the counter-majoritarian problem, it still closes the door on state legislatures. When the Court decides that a particular categorical

137. *Roper*, 543 U.S. at 608 (Scalia, J., dissenting).

138. To be fair, part of Justice Scalia's criticism related to his dispute with respect to how to count the states. In *Atkins*, 30 out of the 50 states barred the execution of intellectually disabled offenders, establishing a consensus against the practice. *Atkins*, 536 U.S. at 313–16. Justice Scalia argued that the 12 states that had abolished the death penalty altogether should not count meaning that only 18 of the 38 death penalty states had abolished the execution of intellectually disabled offenders. *Id.* at 341–45 (Scalia, J., dissenting). In *Roper*, the same breakdown existed, with 30 states barring the juvenile death penalty, but only 18 of the 38 of the death penalty states barring juvenile death sentences. *Roper*, 543 U.S. at 608–09 (Scalia, J., dissenting).

139. *See generally* Berry, *Evolved Standards*, *supra* note 22 (demonstrating a series of applications of the evolving standards of decency doctrine).

140. *Atkins*, 536 U.S. at 311–12; *see Roper*, 543 U.S. at 560–61; Berry, *Evolved Standards*, *supra* note 22, at 116–18. Initially, the Court relied on jury verdicts and state statute counting to determine the consensus, see *Coker*, 433 U.S. at 593–98, but have also emphasized both the direction of change and international standards, *Roper*, 543 U.S. at 566–67. *See generally* David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539 (2001) (suggesting a moderate practice of using comparative constitutional law).

141. *Atkins*, 536 U.S. at 313–17. The Court's first uses of this doctrine were in *Coker*, 433 U.S. at 593, and *Enmund v. Florida*, 458 U.S. 782, 789–93 (1982).

142. *Roper*, 543 U.S. at 564.

143. Kennedy v. Louisiana, 554 U.S. 407, 423, *modified*, 554 U.S. 945 (2008). It is certainly possible to make similar arguments concerning the death penalty generally, with 21 states abolishing it and four more states currently suspending its use. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. (May 31, 2019), https://files.deathpenaltyinfo.org/legacy/documents/FactSheet.pdf [https://perma.cc/46LU-XUTV]. The same is true for juvenile LWOP, with 28 states having either banned juvenile LWOP or have no prisoners serving juvenile LWOP. *States That Ban Life Without Parole for Children*, CAMPAIGN FOR THE FAIR SENT'G OF YOUTH (Feb. 24, 2020) [hereinafter FAIR SENTENCING], https://www.fairsentencingofyouth.org/media-resources/states-that-ban-life [https://perma.cc/TMX9-H6TX]. For a further exploration of these arguments, see generally Berry, *Evolved Standards*, *supra* note 22.

exception should apply, there is no remedy for the states, barring the Court changing its mind.[144] This means that the legislatures have no chance to remedy their constitutional defect.

Even so, creating categorical exceptions is not the only way to apply the Eighth Amendment. One approach would be the one adopted by the Court in *Furman*, where it found that a particular state punishment—the use of the death penalty—violated the Eighth Amendment, but only as applied.[145] Specifically, *Furman* found[146] that the use of the death penalty, giving unguided jury discretion at capital sentencing, resulted in outcomes so arbitrary and random as to be a cruel and unusual punishment.[147] Because the Court's decision related to the states' actions as applied, the states had an opportunity to remedy the constitutional flaws of their statutes.[148] Four years after *Furman*, the Court considered the constitutionality of several of these statutes, upholding some of them.[149]

Another approach the Court could adopt to avoid the finality of categorical exceptions and encourage inter-branch communication between

---

144. Interestingly, both *Atkins* and *Roper* were reversals of prior decisions by the Court not to grant a categorical exception. Penry v. Lynaugh, 492 U.S. 302 (1989*), overruled by Atkins*, 536 U.S. 304; Stanford v. Kentucky, 492 U.S. 361 (1989), *overruled by Roper*, 543 U.S. 551. Part of the justification for these reversals related to the evolving standards of decency doctrine, which evolves over time. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) (establishing the principle of evolving standards). *See generally* Berry, *Evolved Standards*, *supra* note 22 (describing the doctrine of evolving standards of decency and possible extensions); Ryan, *supra* note 54 (exploring stare decisis under the Eighth Amendment and the death penalty).

145. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam).

146. The Court's *per curiam* opinion offered little in terms of explanation, but each of the nine Justices wrote separately, four in dissent. This means that it is difficult to synthesize what *Furman* really held, beyond the application of the death penalty currently constituted a violation of the Eighth Amendment.

147. Justice Potter Stewart likened the arbitrary and random nature of the death penalty to "being struck by lightning." *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring).

148. Indeed, almost 40 states rushed to pass new capital statutes in response to the *Furman* decision. *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 267 (2002) (asserting that "*Furman* . . . touched off the biggest flurry of capital punishment legislation the nation had ever seen"); LEE EPSTEIN & JOSEPH F. KOBYLKA, THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY 72, 85 (1992); MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 284–91 (1973); Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 4–5 (2007); Jonathan Simon, *Why Do You Think They Call It CAPITAL Punishment? Reading the Killing State*, 36 LAW & SOC'Y REV. 783, 795 (2002) ("Few other decisions of the Supreme Court have ever received a more rapid legislative response."); *Death Penalty Has Been Restored by 13 States*, N.Y. TIMES, May 10, 1973, at 18 (listing states that restored death penalty in 1973 legislative session); *The Death Penalty Gets a Big Push*, U.S. NEWS & WORLD REP., Mar. 26, 1973, at 70.

149. *See* Gregg v. Georgia, 428 U.S. 153, 206–07 (1976) (upholding Georgia's new capital statute); Proffitt v. Florida, 428 U.S. 242, 276–77 (1976) (upholding Florida's new capital statute); Jurek v. Texas, 428 U.S. 262, 276 (1976) (upholding Texas' new capital statute). *But see* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion) (striking down North Carolina's new capital statute); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (striking down Louisiana's new capital statute).

the Court and the legislature would be to use constitutional presumptions.[150] The idea of a presumption is to establish a default outcome that can be rebutted in certain circumstances. It operates as a thumb on the scale in the direction of a particular outcome. This framing allows the Court to create a rule that establishes a norm, but still allows for an exception when unusual or extreme facts warrant such a diversion from the norm. This is contrary to a rule-exception dynamic of the common law, where the Court creates a rule and then articulates an exception.[151] The value of the presumption approach as opposed to the rule-exception approach is that the rule maintains its integrity while also maintaining flexibility. More than semantics, this distinction communicates the strength of the rule but keeps it from being unfair at the margin.

The speed limit example from earlier in the Article is instructive. Suppose a man is driving his wife to the hospital while she is in labor, and is driving 55 miles per hour in a 40 mile per hour zone. If using the rule-exception approach, a court would either impose the rule as written and sanction the driver for breaking the rule, or write an exception to the rule, such that the speed limit would apply to everyone not driving someone in labor. The common law extensions of the rule would then require more nuance with respect to the exception and its scope. What if the wife was having Braxton–Hicks contractions? How fast can the husband drive in this situation without recourse? Does it matter if labor has just begun? Does it matter how far away the hospital is located?

A presumptive approach, on the other hand, would allow the court to consider whether disobeying the rule was acceptable in the given situation. The presumption would be that the rule would be enforced, but the driver would have the opportunity to explain why, in the particular situation, it was a reasonable choice to ignore the rule.

In the presumptive case, the rule does not lose its strength, because there are not a series of judicially-created exceptions that undermine its authority. Instead, the court maintains the discretion to not apply the rule in a situation involving unusual facts without having to create an exception that applies to other situations. In every case, the presumption would be that the rule applies, but allows the discretion to not apply the rule when it becomes unfair at the margins.

Certainly, this kind of approach is common in constitutional interpretation. The strict scrutiny and rational basis categories of substantive

150. I have proposed a holistic approach to using presumptions in this context elsewhere. *See generally* William W. Berry III, *Eighth Amendment Presumptions: A Constitutional Framework for Curbing Mass Incarceration*, 89 S. CAL. L. REV. 67, 67 (2015) ("[A]rgu[ing] for the development of a series of Eighth Amendment presumptions—guiding principles that would govern the punishment practices of legislatures without excluding them from the conversation.").

151. *See generally* Holmes, *supra* note 25 (exploring the complex development of common law rules).

due process[152] and equal protection work in this way.[153] When the Court uses a rational basis standard of review, it treats it as a thumb on the scale in favor of upholding the statute in question.[154] Constitutionality becomes the presumed outcome, and will be the outcome absent a strong showing that there is no legitimate reason supporting the passage of the law in question.[155]

Strict scrutiny review works in the same way in the opposite direction.[156] The presumption in such review is that the law in question infringes upon a protected area of individual rights.[157] The Court essentially presumes unconstitutionality under strict scrutiny unless the state can show that its interest is compelling and its infringement is narrowly tailored—in other words, the exception to the presumption of unconstitutionality.[158]

Show-cause hearings also work in a similar fashion.[159] When courts require litigants to "show cause" to avoid a particular action by the court, the presumption is that the court will undertake the action without a showing that its presumed course of action is unfair or excessive in light of the new facts presented by the litigant.[160]

---

152. *See, e.g.*, Matthew Coles, Lawrence v. Texas *& the Refinement of Substantive Due Process*, 16 STAN. L. & POL'Y REV. 23, 27–37 (2005); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 498–501 (1997); Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 992–1001 (2006).

153. *See generally* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007) (discussing ways to reduce ambiguity and vagueness in strict scrutiny); Martha I. Morgan, *Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review*, 17 GA. L. REV. 77 (1982) (discussing strict scrutiny analysis after a state designates a right as "fundamental"); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (analyzing federal courts' use of strict scrutiny between 1990–2003).

154. *See, e.g.*, Edward L. Barrett, *The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications*, 68 KY. L.J. 845, 852–53 (1979); Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 401–03 (2016); Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1633–47 (2016).

155. *See* sources cited *supra* note 154.

156. *See, e.g.*, Fallon, *supra* note 153, at 1268–73; Morgan, *supra* note 153, at 77–79; Winkler, *supra* note 153, at 794–98.

157. *See* sources cited *supra* note 156.

158. *See* sources cited *supra* note 156.

159. Show-cause orders appear in a wide variety of legal matters. *See, e.g.*, Gerard J. Clark, *The Two Faces of Multi-Jurisdictional Practice*, 29 N. KY. L. REV. 251, 251–54 (2002); Jordan Kobritz & Jeffrey Levine, *The Show-Cause Penalty and the NCAA Scope of Power*, 3 ARIZ. ST. U. SPORTS & ENT. L.J. 29, 33, 37–45 (2013); Bernard Schwartz, *Jurisdiction to Determine Jurisdiction in Federal Administrative Law*, 38 GEO. L.J. 368, 380 (1950).

160. *See, e.g.*, Pamela Koza & Anthony N. Doob, *Some Empirical Evidence on Judicial Interim Release Proceedings*, 17 CRIM. L.Q. 258, 258 (1975) (describing reforms in the Bail Reform Act and the "show cause" requirement); Douglas J. Behr, *Did You Forget to Say You're Sorry? Litigating a Show Cause Hearing for a Physician's DEA Registration*, 9 QUINNIPIAC HEALTH L.J. 99, 109 (2005).

C. PRESUMPTIVE PENUMBRAS

Having outlined the concepts of penumbras and presumptions, this theoretical approach seeks to marry the two ideas in the context of constitutional interpretation. Presumptive penumbras create a presumption that anything near the constitutional line will protect the constitutional right in question.

The penumbra—the shadow of the rule—encompasses the area around the bright line, extending the bright line in the direction of protecting the individual constitutional right. It covers cases that are adjacent to, but not over, the line. The idea of the penumbra, as discussed above, is to encompass the close cases at the margins, where the values inherent in the constitutional rule would counsel coverage, given the lack of fundamental difference from such cases and those within the bright line rule.

In conjunction with this penumbra, the presumptive piece of this construct establishes a rebuttable reading that accords deference to the penumbra. Cases falling outside of the constitutional line, but inside the penumbra receive the constitutional protection absent a showing that the constitutional right should not extend to cover the individual in the particular case in question.

The value of the presumptive penumbra approach stems from its ability to avoid requiring courts, legislatures, and executive branch officials from making hard decisions concerning unusual facts that fall slightly outside the bright line rule protecting individual rights. If the facts are close enough, the decision-maker should protect the right at issue unless there is a real reason not to accord such constitutional rights.

While the discussion to this point has focused on judicial decision-making, the presumptive penumbral idea can extend to legislatures and the executive branch of government.[161] Within the legislature, the presumption should be to avoid legislating up to the edge of the constitutional right in question. Instead, the presumption should be against such action, without a strong countervailing reason for doing so. The legislature ought to, generally, recognize a penumbra around constitutional bright line rules articulated by the Supreme Court. Giving credence to a halo effect around such rules mitigates the inter-branch tension between the legislative and the executive branches of government. The alternative of legislating up to the edge of the constitutional bright line (or even over it) is to invite the Court to intervene again to reset the constitutional rule, make an exception to it, or otherwise expand it. From the perspective of legislative and judicial resources, this seems both inefficient and counterproductive.

One example under the Eighth Amendment concerning the according of value to a presumptive penumbra would be in the response of states to the

161. For examples of how this might work in other contexts, see Morrison, *supra* note 106, at 1210; and Young, *supra* note 106, at 1581.

Court's decisions in *Graham v. Florida*[162] and *Miller v. Alabama*,[163] which restricted the ability to use juvenile LWOP sentences for non-homicide crimes and as a mandatory sentence for particular crimes.[164] After these cases, and *Miller* in particular, states have moved to eliminate juvenile LWOP sentences, both legislatively[165] and judicially[166] under state constitutions. The holdings in *Miller* and *Graham* disfavored juvenile LWOP sentences in certain contexts, but the states extended the presumptive penumbra in such a way as to create space beyond the bright line Eighth Amendment limits established by the Court.[167] Indeed, the decision-makers in this example went beyond the scope of the penumbra to establish a new bright line.

The executive branch also sometimes has the ability to accord presumptive penumbral protections to constitutional bright lines. The most obvious example, perhaps, occurs with the clemency power of state governors[168] who can commute death sentences.[169] One presumptive

---

162. Graham v. Florida, 560 U.S. 48, 62 (2010).

163. Miller v. Alabama, 567 U.S. 460, 489 (2012).

164. *See generally* Drinan, *supra* note 89 (discussing ways legislatures and courts can implement changes in juvenile LWOP sentencing after *Graham*); John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535 (2016) (examining the history of juvenile LWOP sentencing); FAIR SENTENCING, *supra* note 143; Josh Rovner, *Juvenile Life Without Parole: An Overview*, SENT'G PROJECT (Feb. 25, 2020), https://www.sentencingproject.org/publications/juvenile-life-without-parole [https://perma.cc/4J2W-P8G8].

165. *See* FAIR SENTENCING, *supra* note 143; Rovner, *supra* note 164. Since *Miller*, 18 states and the District of Columbia have abolished juvenile LWOP, with all but three doing so through legislation. *See infra* note 166. The states are: Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Nevada, New Jersey, North Dakota, South Dakota, Texas, Utah, Vermont, West Virginia, and Wyoming. *See* FAIR SENTENCING, *supra* note 143; Rovner, *supra* note 164; Amy Gina Kim, State-by-State Abolition of Juvenile Life Without Parole Sentences in the United States Since *Miller v. Alabama* (2012), (Jan. 2019) (M.A. thesis, Columbia University), https://academiccommons.columbia.edu/doi/10.7916/d8-qd3r-7k09 [https://perma.cc/2RRW-7NHE].

166. *See generally* State v. Sweet, 879 N.W.2d 811 (Iowa 2016) (abolishing juvenile LWOP); Diatchenko v. Dist. Att'y, 1 N.E.3d 270 (Mass. 2013), *superseded by statute*, MASS. GEN. LAWS ANN. ch. 279, § 24 (West 2014), *as recognized in* Commonwealth v. Watt, 484 Mass. 742 (Mass. 2020) (abolishing juvenile LWOP; superseded by a state statute codifying the ban); State v. Bassett, 428 P.3d 343 (Wash. 2018) (abolishing juvenile LWOP under the state constitution).

167. *See supra* notes 165–66 and accompanying text; Berry, *Evolved Standards*, *supra* note 22, at 129–33, 143–50.

168. Note that some states delegate this power to a separate board to review. *See Clemency Procedures by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/clemency/clemency-by-state [https://perma.cc/8EA6-WUBR]. In 12 states, the governor has the sole authority; in five states, the governor has no part in the clemency process. *Id.*

169. Although rare in many jurisdictions, there is a history of commutations of death sentences. *See, e.g.*, George Ryan, Governor of Ill., I Must Act, Address at Northwestern University College of Law (Jan. 11, 2003), *in* AUSTIN SARAT, MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION 163–80 (2005) (commuting all of the death row inmates in Illinois); David Stout, *Maryland Governor Declares Moratorium on Executions*, N.Y. TIMES (May 9, 2002), https://www.nytimes.com/2002/05/09/national/maryland-governor-declares-moratorium-on-executions.html

penumbral example of this could be the decision to commute the death sentence of an inmate that falls outside the scope of intellectual disability proscribed in *Atkins*,[170] but nonetheless demonstrates diminished capacity in some way.[171] Clemency provides a way for the executive branch to accord a constitutional right to an offender with some mental deficiencies even if the individual does not quite cross the bright line constitutional rule that can remain murky in its application.[172]

These presumptive penumbras also make sense in the context considered in this Article because they further the values and reach of the Eighth Amendment.[173] The most explicit of these rights is the right to human dignity.[174] Repeatedly highlighting this concept as the basic one underlying

---

[https://perma.cc/69FD-MQU9] (reporting on Maryland Governor Parris Glendening's commutation of the death penalty); *Statements from Governors Imposing Moratoria on Executions*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/statements-from-governors-imposing-moratoria-on-executions [https://perma.cc/4KQH-KAHB] (detailing why the "[g]overnors of California, Pennsylvania, Washington, Colorado, and Oregon" have put a halt to executions).

170. With each state choosing its own standard, drawing the line for death eligibility continues to be problematic. *See* Hall v. Florida, 572 U.S. 701, 724 (2014) (striking down the Florida standard); Moore v. Texas, 137 S. Ct. 1039, 1053 (2017) (striking down the Texas standard). *See generally* John H. Blume, Sheri Lynn Johnson, Paul Marcus & Emily Paavola, *A Tale of Two (And Possibly Three)* Atkins*: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393 (2014) (examining lower courts' use of the categorical ban in *Atkins*); Natalie Cheung, *Defining Intellectual Disability and Establishing a Standard of Proof: Suggestions for a National Model Standard*, 23 HEALTH MATRIX 317 (2013) (proposing a new standard of proof and uniform analysis for determining the intellectual disability of a defendant); Christopher Slobogin, *Scientizing Culpability: The Implications of* Hall v. Florida *and the Possibility of a "Scientific Stare Decisis*,*"* 23 WM. & MARY BILL RTS. J. 415 (2014) (discussing the implications of the Court's use of clinical definitions of intellectual disability in *Hall*).

171. Atkins v. Virginia, 536 U.S. 304 (2002); *see* discussion *infra* Part V. Indeed, an overwhelming majority of individuals executed in 2019 fit this profile. *The Death Penalty in 2019: Year End Report*, DEATH PENALTY INFO. CTR. (Dec. 17, 2019), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2019-year-end-report [https://perma.cc/K6P3-LUM5]. At least 19 of the 22 prisoners who were executed had one or more of the following impairments: significant evidence of mental illness (nine); evidence of brain injury, developmental brain damage, or an IQ in the intellectually disabled range (eight); or chronic serious childhood trauma, neglect, and/or abuse (13). *Id.*

172. *See* Cheung, *supra* note 170, at 338–42; Blume et al., *supra* note 170, at 396–400.

173. *See generally* William W. Berry III & Meghan J. Ryan, *Eighth Amendment Values*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 61, 61–75 (Meghan J. Ryan & William W. Berry III eds., 2020) [hereinafter Berry & Ryan, *Values*] (discussing the values of the Eighth Amendment and how they help in its interpretation).

174. As the Court explained in *Trop v. Dulles*:

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.

the Eighth Amendment,[175] the Court has indicated that it undergirds the categorical exceptions to the Eighth Amendment it has made.[176] According a prisoner his constitutional rights under the Eighth Amendment through the use of presumptive penumbras seems consistent with the value of respecting his dignity.[177]

In addition, the value of proportionality under the Eighth Amendment adds credence to such an approach.[178] A presumptive penumbral approach under the Eighth Amendment would reinforce the proportionality in sentencing that the bright line categorical rule seeks to achieve. Allowing difficult facts to result in disproportionate outcomes adjacent to the bright line rule would have the effect of undermining the rule.

Finally, the Eighth Amendment value of non-arbitrariness adopted in *Furman v. Georgia* supports a presumptive penumbral approach to Eighth Amendment bright line rules.[179] To the extent that presumptive penumbras can avoid arbitrary results occurring from factual scenarios falling barely outside of Eighth Amendment bright lines, this approach would reinforce the values articulated by *Furman*.[180]

IV. PRESUMPTIVE PENUMBRAS AND JUVENILE BRIGHT LINES

Having explained the concept of presumptive penumbras, this Part seeks to explore its application to the bright line constitutional rules involving juvenile offenders under the Eighth Amendment. Specifically, these rules concern the ban on imposing the death penalty on juvenile offenders, and the restrictions on imposing juvenile LWOP as a mandatory sentence and in non-homicide crimes. Before examining two potential applications of

---

Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion); *see* Berry & Ryan, *Values*, *supra* note 173, at 62–63; Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 662–64 (2008); Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2140 ("[T]he [U.S.] Supreme Court regularly relies on dignity . . . in the Eighth Amendment context of cruel and unusual punishments.").

175. *See, e.g.*, Hall v. Florida, 572 U.S. 701, 708 (2014); Brown v. Plata, 563 U.S. 493, 510 (2011); Hope v. Pelzer, 536 U.S. 730, 738 (2002); Thompson v. Oklahoma, 487 U.S. 815, 836 (1988) (plurality opinion); *Trop*, 356 U.S. at 100.

176. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 420, *modified*, 554 U.S. 945 (2008); Roper v. Simmons, 543 U.S. 551, 560 (2005); *Atkins*, 536 U.S. at 311–12.

177. *See supra* notes 173–74 and accompanying text.

178. *See, e.g.*, Richard S. Frase, *Punishment Purposes and Eighth Amendment Disproportionality*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT, *supra* note 173, at 101, 101–17; Berry, *Promulgating Proportionality*, *supra* note 101, at 106–13; Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 600–04 (2005); Stinneford, *supra* note 103, at 1740–41; Berry & Ryan, *Values*, *supra* note 173, at 66–72.

179. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam); Berry & Ryan, *Values*, *supra* note 173, at 71–72.

180. *See* sources cited *supra* note 179.

the presumptive penumbral approach under the Eighth Amendment, it is beneficial to explain why this application is particularly appropriate given the nature of juvenile offenders and bright line rules.

A. Why Presumptive Penumbras Work for Juveniles

Juveniles are different.[181] Research into juvenile development over the past decade has increasingly demonstrated that juveniles do not possess the same capacity to resist impulses that adults do.[182] In fact, the brain science estimates that one does not reach full adult capacity until one reaches his or her late 20s.[183]

As such, using minute temporal differences as a tool to draw constitutional bright lines that make death or LWOP an available sentence creates a set of problems in application. Using a few weeks as the basis of separating young adult and juvenile offenders reflects a largely arbitrary approach to sentencing, particularly given that the bright line the scientific literature would draw is closer to age 25 or even 27.[184]

The penumbral approach allows flexibility within a particular age range, such that individual cases near the bright line constitutional rule receive heightened scrutiny. This flexibility allows a more nuanced approach to prevail in individual cases—whether through prosecutorial, legislative, or judicial decision-making—by granting a presumptive protection to individuals that fall adjacent to, but not within, the applicable constitutional bright line.

This case-by-case approach under a presumptive penumbra, as opposed to requiring another bright line categorical rule, also has some grounding in the Court's jurisprudence. In *Graham*, for instance, Chief Justice Roberts argued for the adoption of a case-by-case approach instead of adopting a categorical rule.[185] Concurring in the outcome, Roberts nonetheless suggests that a categorical rule is unnecessary and intimates that a case-by-case approach is preferable.[186] As he noted, the Court's non-capital cases circumscribe the ability of the Court to substitute its judgment for state court criminal convictions, but does allow for intervention in the extreme case.[187] He also emphasized that, while juveniles are generally less culpable, this is not always the case.[188]

The presumptive penumbral approach would provide such flexibility without sacrificing the categorical rule. Individuals in proximity to the rule

181. *See supra* notes 90–98 and accompanying text.

182. *See* Steinberg & Scott, *supra* note 94, at 1013.

183. *See* Cauffman & Steinberg, *supra* note 94, at 432, 445.

184. *See supra* note 94 and accompanying text.

185. Graham v. Florida, 560 U.S. 48, 86 (2010) (Roberts, C.J., concurring).

186. *Id.*

187. *Id.* at 88.

188. *Id.* at 88–90.

would receive the presumption of the constitutional right, but as described, that presumption could be overcome on a case-by-case basis without sacrificing the categorical rule. This approach would track the underlying reasoning in Roberts' opinion—preventing an unjust outcome in an individual case, while at the same time preserving the constitutional bright line rule, without change or exception.

The presumptive penumbral approach also opens the door for softer actions that do not even require a Supreme Court decision. Prosecutors, wary of a strict scrutiny-type presumptive penumbra, might elect not to prosecute to the edge of the bright line. Similarly, juries might choose not to sentence up to the edge of the bright line in light of the presumption. As mentioned above, legislators also might decide not to legislate within the presumed scope of the penumbra. Finally, governors might grant clemency in cases that fall within the presumptive penumbra in light of the arbitrariness arising from the application of the bright line rule.

Having explained why presumptive penumbras might be a good idea for Eighth Amendment juvenile bright line rules, this Article next offers two possible applications—a narrow one extending the penumbra to age 19 and a broad one extending the penumbra to age 25.

B. The Narrow Approach: An Age 19 Presumptive Penumbra

There are two kinds of bright line juvenile rules under the Eighth Amendment—the juvenile death penalty and juvenile LWOP. Presumptive penumbras can strengthen the individual constitutional rights inherent in each situation.

1. Juvenile Death Penalty

In *Roper v. Simmons*, the Supreme Court held that the imposition of the death penalty on a juvenile offender constituted a cruel and unusual punishment.[189] The Court applied this rule to offenders under the age of 18 at the time of the commission of the crime.[190]

Using its evolving standards of decency analysis, the Court explored both an objective and a subjective basis for its constitutional rule.[191] The objective basis explored the current use of the juvenile death penalty and found that it had become a disfavored practice in the United States.[192] The Court counted the state legislatures, and found that only 20 states allowed the imposition of

189. Roper v. Simmons, 543 U.S. 551, 578–79 (2005).

190. *Id.*

191. *Id.* at 561, 572–75. *See generally* Berry, *Evolved Standards*, *supra* note 22 (noting that the Supreme Court frequently utilizes majoritarian considerations as to what views of the appropriateness of capital punishment are currently availing, along with a subjective consideration of the severity of individual offenders' crimes).

192. *Roper*, 543 U.S. at 564–67.

juvenile death sentences.[193] In addition, the direction of change—the number of states that had recently abolished the juvenile death penalty or were considering doing so—was clearly in the direction of abolition and supported the Court's conclusion that the evolving standards of decency had evolved to a point where such a practice had become cruel and unusual.[194] Further buffering the Court's position was its comparison of the United States with the world, and its finding that the United States was the only country that allowed juvenile executions at the time.[195]

The subjective consideration of the Court focused on the degree to which the purposes of punishment justified the imposition of the death penalty for juvenile offenders.[196] With respect to the purpose of retribution, the Court concluded that juvenile offenders, as a group, possessed a diminished level of culpability with respect to adult offenders based on their age and immaturity in development.[197] With respect to the purpose of deterrence, the Court reasoned that the lack of emotional maturity and development meant that juvenile death sentences were less likely to deter, as juvenile crimes often resulted from a lack of self-control.[198]

The constitutional rule, then, is that individuals under the age of 18 at the time of the crime they commit are ineligible for the death penalty.[199] This is a bright line rule that is clear in its application. At the margins, however, one can see how it can be arbitrary and give rise to unfair outcomes. The difference between an offender who has been 18 years old for a week at the time of the relevant crime and one who turns 18 a week after the relevant crime seems non-material and certainly not a fair line for dividing those who can receive the death penalty from those who cannot.

Removing the rule seems unwise, as there must be some line where execution would be an inappropriate punishment for an offender based on their age. Indeed, prior to *Roper*, the Supreme Court had set the age at 15.[200]

At the same time, there also does not seem to be any particular magic to age 18. Society does attach other significance to the age, including making it the age of adulthood, according individuals the right to vote at age 18, and

---

193. *Id.* at 564.
194. *Id.* at 565–67.
195. *Id.* at 575.
196. *See id.* at 560–64, 571–74.
197. *Id.* at 571.
198. *Id.* at 571–72.
199. *Id.* at 572–75, 578–79.
200. *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (drawing the line at 15 years old); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (plurality opinion) (drawing the line at 16 years old).

allowing individuals to join the military at that age.[201] The age could just as easily be 17 or 19 or somewhere in between.

Given the likelihood of seemingly arbitrary outcomes at the margins —the closer an individual is to 18 whether not yet reaching it or just passing it—the situation becomes appropriate to apply the concept of presumptive penumbras to the bright line constitutional rule. As indicated above, the point of this approach is to alleviate the tension related to possible arbitrary or unfair outcomes at the margins by allowing flexibility without requiring the creation of exceptions.

Applying the presumptive penumbra approach to the rule in *Roper*, a court would prohibit the imposition of the death penalty on any offender under the age of 18, but presumptively disfavor the imposition of the death penalty on any offender under the age of 19.[202] In practice, then, the state would have to show cause why any 18-year-old should receive the death penalty in a given case.

Extending a presumptive line to age 19 would give the Eighth Amendment proscription against executing juvenile offenders a penumbral effect—it would eliminate almost all executions of individuals *around* the constitutional line. This would mitigate the arbitrariness of the line drawing, and encourage treating similarly-aged individuals similarly with respect to the constitutional rule of *Roper*.

At the same time, the presumptive approach would allow for the imposition of the death penalty on an 18-year-old in a particularly egregious case, one strong enough to overcome the presumption. One could imagine, for instance, a serial killer or an individual that killed multiple children in a particularly cruel way perhaps overcoming the presumption against execution of 18-year-old offenders. In the overwhelming majority of cases, as with strict scrutiny review, a court would not allow the imposition of a death sentence on an 18-year-old offender.

In practice, this presumptive penumbral approach could work in several ways, but perhaps the best approach would be to require a finding by the jury that the case overcomes the presumption against execution. This would involve a jury instruction and an explanation of the concept of presumptions at the sentencing hearing prior to the sentencing decision. The jury would have to find that the facts were egregious in such a way as to overcome the presumption against the availability of the death penalty.

201. *See supra* note 23 and accompanying text. Alcohol consumption is the one obvious exception to the rule. *See* National Minimum Drinking Age Act of 1984, 23 U.S.C. § 158 (2018).

202. The initial proposal here is a one-year penumbra, partially in light of the conservative majority on the Supreme Court. This Article does explore a broader penumbral approach at the end of Part IV. *See infra* Section IV.C.

The Sixth Amendment, in light of the Supreme Court's decisions in *Ring v. Arizona*[203] and *Hurst v. Florida*,[204] would likely mandate that the jury make such a finding, as it would be precedent to the imposition of the death penalty. These cases are part of the line of cases resulting from the Court's decision in *Apprendi v. New Jersey*, where it held that the Sixth Amendment right to trial by jury required that the jury find any fact, other than a prior conviction, which increased the maximum possible sentence.[205] Applying *Apprendi*, the Court held in *Ring* that capital sentences required a jury finding with respect to the underlying aggravating factors required for a death sentence.[206] *Hurst* broadened *Ring* by requiring a jury to make the dispositive finding of all facts needed for a death sentence, including weighing the aggravating and mitigating factors.[207]

In light of these precedents, it would also be possible to require the judge to make a ruling on the presumption prior to the decision of the jury, with the judge's decision being precedent to the jury decision. The constitutional requirement here would be that the jury makes the final determination.[208] Under the Sixth Amendment, the jury has to make any decision that increases the available punishment, but it would not foreclose a judicial decision that a death sentence was unavailable based on the application of a presumptive penumbra.[209]

2. Juvenile LWOP

A second place where the 18-year-old bright-line rule applies under the Eighth Amendment is with respect to juvenile LWOP. In *Graham v. Florida*, the Court barred the imposition of juvenile LWOP in non-capital cases.[210] Similarly, in *Miller v. Alabama*, the Court barred the imposition of mandatory juvenile LWOP sentences.[211]

As discussed above, *Graham* cemented the idea from *Roper* that juveniles were "different," and thus entitled to heightened scrutiny under the Eighth

---

203. Ring v. Arizona, 536 U.S. 584, 597–609 (2002).

204. Hurst v. Florida, 136 S. Ct. 616, 620–24 (2016).

205. Apprendi v. New Jersey, 530 U.S. 466, 491–97 (2000). Under the Court's reasoning, the fact that increased the possible sentence was, by definition, part of the crime, not merely a consideration at sentencing. *Id.*; *see* Joseph L. Hoffmann, Apprendi v. New Jersey*: Back to the Future?*, 38 AM. CRIM. L. REV. 255, 257–58 (2001); Kyron Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L.J. 387, 388–89 (2002); Nancy J. King & Susan R. Klein, Apprendi *and Plea Bargaining*, 54 STAN. L. REV. 295, 302–03 (2001).

206. *Ring*, 536 U.S. at 597–609.

207. *Hurst*, 136 S. Ct. at 620–24; *see* Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing After* Hurst, 66 UCLA L. REV. 448, 464–68 (2019).

208. *See Apprendi*, 530 U.S. at 474–97; Hessick & Berry, *supra* note 207, at 451.

209. *See Apprendi*, 530 U.S. at 476; Hessick & Berry, *supra* note 207, at 461–62.

210. Graham v. Florida, 560 U.S. 48, 82 (2010).

211. Miller v. Alabama, 567 U.S. 460, 489 (2012).

Amendment.[212] The Court applied its evolving standards of decency doctrine to find juvenile LWOP punishments to be disproportionate in cases of non-homicide crimes.[213] In doing so, the Court found an objective consensus against the imposition of such punishments, before bringing its own subjective judgment to bear to find that none of the purposes of punishment justified juvenile LWOP as a sentence for a non-homicide crime.[214]

The Court followed a similar approach in *Miller* in holding that the Eighth Amendment barred the mandatory imposition of juvenile LWOP sentences.[215] Marrying reasoning from *Woodson v. North Carolina*—which barred the mandatory death penalty[216]—with its decision in *Graham*, the Court in *Miller* found that the characteristics of juvenile offenders, including their potential for rehabilitation, and the similarity of LWOP to the death penalty, required an individualized sentencing determination prior to the imposition of a juvenile LWOP sentence.[217]

As with the death penalty, the line of age 18 in juvenile LWOP cases creates arbitrary outcomes with really serious consequences. An offender a week after his 18th birthday in a homicide would be eligible for a LWOP sentence; an offender two weeks younger would not. As with the juvenile death penalty, the bright line of age 18 creates an arbitrary line that does not reflect significant differences between individuals approaching the line from either side. And a LWOP sentence, while not the death penalty, is a kind of death sentence, as offenders will never leave state custody before death.[218] The stakes are equally as high as with the death penalty.[219]

In light of the similar concerns, a presumptive penumbral approach likewise makes sense for juvenile LWOP sentences. For non-homicide crimes,

---

212. *Graham*, 560 U.S. at 68–75.

213. *Id.* at 71.

214. *Id.* at 71–74.

215. *Miller*, 567 U.S. at 489.

216. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); *see also* Roberts v. Louisiana, 428 U.S. 325, 332–33 (1976) (discussing *Woodson* and mandatory death penalty statutes).

217. *Miller*, 567 U.S. at 487–89.

218. It is certainly true that one is more likely to get a death sentence reversed than a non-capital sentence. *See, e.g.*, Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 809 (2009) ("For the vast majority of the more than two million people now incarcerated in America, the Great Writ is a pipe dream." (footnote omitted)); John H. Blume, Sheri Lynn Johnson & Keir M. Weyble, *In Defense of Noncapital Habeas: A Response to Hoffman and King*, 96 CORNELL L. REV. 435, 462 (2011) ("Surely a life-without-parole sentence matters enough to at least *consider* whether it should be eligible for habeas relief."); Nancy J. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 FED. SENT'G REP. 308, 317 (2012) ("Depending upon the availability of evidence, the prospects for success, the likelihood that the petitioner will remain incarcerated anyway on other charges, and other factors, the state may choose to proceed with the new trial, sentencing, or appeal, abandon the charge, or simply negotiate a settlement to a lesser charge or sentence.").

219. *See* Berry, *Life-With-Hope*, *supra* note 22, at 1068.

the Court's decision in *Graham* creates the bright line rule barring anyone under the age of 18 from receiving an LWOP sentence.[220] Using a presumptive penumbral approach, the presumption would be against anyone under the age of 19 at the time of the crime from receiving a sentence of LWOP for a non-homicide crime.

As with the death penalty, this presumption would be rebuttable, but would be a strong thumb on the scale against 18-year-olds receiving LWOP sentences, adjacent to the rule barring those under 18 from receiving LWOP sentences. This penumbra would gradually separate age in such a way that a few weeks alone would not be the difference between a death-in-custody sentence and a life with the possibility of parole sentence.

With respect to the Court's other Eighth Amendment categorical exclusion from *Miller v. Alabama*, the presumptive penumbral approach would similarly create a presumption against the imposition of mandatory LWOP sentences on offenders under the age of 19 at the time of the crime.[221] As with the other examples, the bright line constitutional rule would prevent imposition of mandatory sentences on those under 18, and the presumptive penumbral approach would caution strongly against imposition of mandatory LWOP on 18-year-olds without extenuating circumstances.

The effect of the penumbral presumptions in both cases involving bright line juvenile LWOP sentences would be to ensure that a trivial difference of a few weeks or even months did not create a monumental difference in sentencing outcome of a LWOP sentence as opposed to a life with the possibility of parole sentence. This approach insulates individuals close to the line from the effect of minute temporal differences, but also preserves flexibility for the court in extreme cases where the more serious sentence has a greater justification.[222]

C. The Broad Approach: An Age 25 Presumptive Penumbra

Given the brain science with respect to juveniles, it is worth considering expanding the presumptive penumbral approach beyond the narrow one-year presumptive penumbra proposed in Section IV.B. As discussed, the current brain science suggests that one's brain is not completely developed until one reaches his or her late 20s.[223]

---

220. Graham v. Florida, 560 U.S. 48, 74 (2010).

221. *Miller*, 567 U.S. at 470.

222. While some would welcome the imposition of LWOP sentences, my personal view is that they should be eliminated, but that is beyond the scope of this Article. *See generally* Berry, *Life-With-Hope*, *supra* note 22 (arguing for the abolition of LWOP sentences).

223. *See supra* note 94 and accompanying text.

1. Juvenile Death Penalty

In light of this developing brain science, it would be reasonable to extend the penumbra to the age of 25.[224] This would mean a presumption against death sentences for offenders under the age of 25 at the time of the offense. The practical effect would be to move the death penalty even further toward extinction.[225] Again, this would not mean that juries could never sentence someone under age 25 to the death penalty, but it would require the state to overcome a presumption against such a sentence.

A separate benefit of this broader presumptive penumbral approach in capital cases would be to encourage consistency in capital sentencing. The continued wild variation in the imposition of the death penalty has extended for five decades since the Supreme Court first grappled with it in *Furman v. Georgia*.[226] Creating a presumption against those under 25 from receiving the death penalty would almost impose a general presumption against the death penalty, as most homicide offenders are under age 25.

The core concern of the majority in *Furman* related to the arbitrary and largely random imposition of the death penalty, caused by the wide disparity in jury sentencing outcomes. The Court affirmed the safeguards adopted by the Georgia legislature in *Gregg*, as they purportedly would narrow the class of murderers facing the death penalty.[227] The first of these safeguards was the adoption of aggravating circumstances as a prerequisite to a death sentence, and the weighing of such factors by the jury against mitigating circumstances.[228] The second safeguard adopted required the state supreme court to engage in comparative proportionality review in order to eliminate disparity in jury verdicts.[229] This approach required the Court to compare a death sentence

---

224. Others have advocated adjusting the categorical rules with respect to juveniles or otherwise shifting the sentencing calculus with respect to juvenile offenders. *See, e.g.*, Michael Barbee, Comment, *Juveniles are Different: Juvenile Life Without Parole After* Graham v. Florida, 81 MISS. L.J. 299, 320–24 (2011); Allison A. Bruff, *The Juvenile Discount*, 54 CRIM. L. BULL. 829, 829 (2018).

225. *See generally* BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE (2017) (explaining, empirically, how the death penalty fell in popularity based on a variety of factors, including: better lawyering, DNA evidence and the increase in exonerations, and increase in LWOP sentences).

226. Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

227. Gregg v. Georgia, 428 U.S. 153, 196–97 (1976).

228. *Id.* at 163–66. *Lockett v. Ohio* mandates consideration of all relevant mitigating factors. 438 U.S. 586, 608 (1978). In that case, the Supreme Court struck down an Ohio statute under the Eighth Amendment for limiting consideration of mitigating evidence to statutorily enumerated categories of mitigating evidence. *Id.* at 608-09.

229. *Gregg*, 428 U.S. at 204–05. *See generally* William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687 (2012) [hereinafter Berry, *Practicing*] (discussing the Court's use of proportionality and arguing for a more robust use of relative proportionality in Eighth Amendment cases).

on appeal to prior cases to determine if it was consistent with capital sentencing by other juries.[230]

As pointed out by Justice Breyer in his dissent in *Glossip v. Gross*, these safeguards have been largely illusory, and have generally failed to serve their intended purpose of separating the worst of the worst cases from other homicides.[231] The aggravating factors used by most states tend to be so broad that they fail to meaningfully narrow the class of murderers facing the death penalty as required by *Gregg v. Georgia*.[232]

As Justice Stevens pointed out in his dissent to the denial of certiorari in *Walker v. Georgia*, states also largely ignore the other core safeguard of *Gregg* —comparative proportionality review, conducting it in an illusory manner that seldom, if ever, reverses disproportionate cases.[233] States compare the case on appeal only to other cases that received the death penalty, and the comparison rarely consists of anything more than finding similar aggravating circumstances.[234]

Given the increased bar required by the penumbral presumption, such an approach would create a vastly improved filtering process and provide a welcome alternative to the failed safeguards of *Gregg*. The presumption would be against the imposition of the death sentence (assuming the offender was under age 25), meaning that the state would bear the burden of demonstrating that the case at issue constituted the worst of the worst. Using the model explained above, the state would have to convince both the court and the jury that the case was exceptional in a way that could overcome the presumption against the death penalty. The difference between a strict scrutiny-type limitation and an open-ended list of aggravating factors that could encompass almost any homicide would become quite significant, and create a helpful tool to ensure that only the worst homicides, if any, received the death penalty.

2. Juvenile LWOP

With respect to juvenile LWOP sentences, an expanded penumbral presumption to age 25 would have a similar effect in reducing LWOP sentences in non-homicide cases and as a mandatory sentence. The strong presumption in non-homicide cases involving offenders under the age of 25 would be that they would not receive LWOP sentences. This makes sense, as imposing LWOP sentences in non-homicide cases seems excessive anyway.[235]

---

230. *See* sources cited *supra* note 229.

231. Glossip v. Gross, 135 S. Ct. 2726, 2759–64 (2015) (Breyer, J., dissenting).

232. *Id.* at 2755–56*; see* Berry, *Practicing, supra* note 229, at 705.

233. Walker v. Georgia, 555 U.S. 979, 979–85 (2008) (mem.) (Stevens, J., dissenting to denial of certiorari).

234. *Id.*; *see* Berry, *Practicing, supra* note 229, at 705.

235. *See* Berry, *Life-With-Hope, supra* note 22, at 1074.

To overcome this presumption, the state would need to demonstrate the necessity of an LWOP sentence for the under-25 offender, as opposed to the typical assumption that any such sentence is available at the whim of a court.[236] Finding the unusually culpable non-homicide crime that warrants a death-in-custody sentence will be difficult if the court applies this approach seriously, thus reducing the number of excessive non-homicide LWOP sentences under the Eighth Amendment.[237]

The expanded juvenile presumptive penumbra would operate in the same way under the Court's categorical exception in *Miller*, which barred mandatory juvenile LWOP sentences. Here, offenders under age 25 would be presumptively ineligible for mandatory LWOP sentences. As discussed in *Miller*, a part of the criticism of mandatory LWOP sentences related to the need for individualized decision-making at sentencing involving a case with a death-in-custody sentence.[238]

As with the death penalty, the expanded presumptive penumbral approach with respect to juvenile LWOP would help cure one of the most significant problems with LWOP—the wide and inconsistent range of LWOP sentences across and within state jurisdictions.[239] Currently, over 50,000 offenders serve LWOP sentences.[240] It is the largest death-in-custody prison population in the history of the world.[241]

The crimes committed vary widely across inmates.[242] Some are products of alternative sentences to the death penalty.[243] In those cases, one can at least understand some connection between the death-in-custody sentence and

---

236. LWOP continues to be an issue in the United States, not only because of the volume of such sentences, but also because of the wide range of criminal behavior (often non-violent) that can lead to such sentences. *See id.* at 1059; Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences*, SENT'G PROJECT (May 3, 2017), https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences [https://perma.cc/MD8A-2QKF]. *See generally* MARC MAUER & ASHLEY NELLIS, THE MEANING OF LIFE: THE CASE FOR ABOLISHING LIFE SENTENCES (2018) (documenting the United States' use of life sentences and the negative impact it has on those sentenced as such and society at large).

237. *See* Berry, *Life-With-Hope*, *supra* note 22, at 1083.

238. Miller v. Alabama, 567 U.S. 460, 475 (2012); Lockett v. Ohio, 438 U.S. 586, 604–05 (1978); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion). *See generally* William W. Berry III, *Individualized Sentencing*, 76 WASH. & LEE L. REV. 13 (2019) (arguing for an extension of individualized sentencing for all felony cases).

239. *See* Berry, *Life-With-Hope*, *supra* note 22, at 1062–63. *See generally* MAUER & NELLIS, *supra* note 236 (highlighting the disparities in sentencing between jurisdictions).

240. *Id.* at 7.

241. A total of over 200,000 individuals are serving LWOP or virtual life sentences (over 50 years), making up one in seven prisoners. *Id.* at 2. The United States has four percent of the world's population, but over 40 percent of the world's life imprisonment population. *Id.* at 6.

242. *Id.* at 9.

243. *See, e.g.*, *Life Without Parole*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/sentencing-alternatives/life-without-parole [https://perma.cc/J8EP-SHEB]. Some states make LWOP the mandatory sentencing alternative to the death penalty. *Id.*

the crime committed—a first-degree/aggravated murder.[244] Other LWOP sentences, though, have resulted more from a decision by the state to abolish parole, as opposed to some legislative decision that the crime in question warranted such a draconian sentence.[245] Indeed, many of the crimes assumed to allow release after ten to 15 years as life with parole sentences have suddenly became much harsher LWOP sentences with the abolition of parole.[246]

This is certainly true with respect to the federal system, where thousands of repeat drug offenders serve LWOP sentences.[247] The difference in conduct between a premeditated first-degree murder and a third conviction for trafficking drugs does not lead to the conclusion that both should receive LWOP sentences. There should be closer attention paid to the imposition of LWOP sentences, instead of it being a mandatory alternative to the death penalty or a mandatory consequence of a repeat non-violent offense.

The presumptive penumbral approach, if extended to age 25, will capture the vast majority of LWOP cases, and counsel against the imposition of LWOP sentences in non-homicide cases, and as a mandatory sentence. In doing so, this approach will provide a modicum of consistency related to proportional sentencing that does not currently exist in the state or federal system.

If the Eighth Amendment presumptive penumbra requires heightened proof to overcome the presumption against LWOP sentences in non-homicide cases, for instance, most non-homicide LWOP sentences will rightfully disappear. This will be equally true for mandatory LWOP sentences, where the defendant will actually receive his day in court and the court will

---

244. For felony murder crimes, this may be less true. *See generally* Guyora Binder, Brenner Fissell & Robert Weisberg, *Capital Punishment of Unintentional Felony Murder*, 92 NOTRE DAME L. REV. 1141 (2017) (discussing death penalty sentences for co-felons who do not kill); William W. Berry III, *Capital Felony Merger*, 111 J. CRIM. L. & CRIMINOLOGY (forthcoming 2021) (arguing for felony murder to merge into first-degree murder in capital cases based in part on diminished culpability).

245. *See, e.g.*, Jorge Renaud, *Grading the Parole Release Systems of All 50 States*, PRISON POL'Y INITIATIVE (Feb. 26, 2019), https://www.prisonpolicy.org/reports/grading_parole.html [https://perma.cc/Q2M7-FQ9A].

246. *See id.*

247. *See, e.g.*, ACLU, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 5, 38 (2013), https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf#page=24 [https://perma.cc/E8A2-X9AC]; U.S. SENT'G COMM'N, LIFE SENTENCES IN THE FEDERAL SYSTEM 1, 3 (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf [https://perma.cc/YH6K-YDF4]; Christopher Ingraham, *It's Not Just Alice Marie Johnson: Over 2,000 Federal Prisoners Are Serving Life Sentences for Nonviolent Drug Crimes*, WASH. POST (June 6, 2018, 3:44 PM), https://www.washingtonpost.com/news/wonk/wp/2018/06/06/its-not-just-alice-marie-johnson-over-2000-federal-prisoners-are-serving-life-sentences-for-nonviolent-drug-crimes [https://perma.cc/R4X8-ENYC].

have to evaluate the mandatory sentence in question in light of the defendant's personal characteristics.[248]

V. Other Possible Eighth Amendment Applications of Presumptive Penumbras

So far, this Article has focused on a simple example of a constitutional bright line rule—the age of 18 as the basis for limiting the Eighth Amendment—to demonstrate the utility and value of presumptive penumbras as a tool to mitigate unfairness in close cases. In this Part, the Article progresses to examine the next logical Eighth Amendment applications —intellectually disabled offenders, rape crimes, and felony murders —sketching out how such applications might work. The paltry number of categorical bright line rules in the Eighth Amendment limits the ability to apply the presumptive penumbral typology to other punishments without new categorical exceptions.

A. *Intellectual Disability*

In *Atkins v. Virginia*, the Supreme Court created a categorical, bright-line exception to the imposition of the death penalty, barring its imposition against intellectually disabled offenders under the Eighth Amendment.[249] Using the evolving standards of decency test, the Court assessed its objective criterion for legislative use of the death penalty for such offenders.[250] The Court found a national consensus against executing intellectually disabled offenders.[251] The Court also found, in bringing its own subjective judgment to bear, that executing intellectually disabled offenders did not satisfy any of the purposes of punishment.[252]

The Court in *Atkins*, however, left the definition of intellectual disability up to the states, which has resulted in confusion in its application.[253] Two times since *Atkins*, the Supreme Court has reversed state implementation of the *Atkins* rule as a violation of the Eighth Amendment.[254] In *Hall v. Florida*, the Court struck down Florida's scheme because it centered only on the

248. The Court's reasoning in *Montgomery* certainly should be part of this calculation. Montgomery v. Louisiana, 136 S. Ct. 718, 732–37 (2016) (reasoning that "*Miller* announced a substantive rule of constitutional law" and concluding that LWOP is disproportionate for the vast majority of juvenile offenders).

249. *See* Atkins v. Virginia, 536 U.S. 304, 318–21 (2002). The Court used the language "mentally retarded" which has become disfavored over time, and replaced by "intellectual disability." *See, e.g.*, Change in Terminology: "Mental Retardation" to "Intellectual Disability," 78 Fed. Reg. 46,499, 46,499–46,502 (2013) (to be codified at 20 C.F.R. pt. 404, 416).

250. *Atkins*, 536 U.S. at 321.

251. *Id.* at 316.

252. *Id.* at 318–20.

253. *See supra* note 170 and accompanying text.

254. *See* Moore v. Texas, 137 S. Ct. 1039, 1052–53 (2017); Hall v. Florida, 572 U.S. 701, 723 –24 (2014).

inmate's IQ number, and did not consider other evidence of intellectual disability.[255] In *Moore v. Texas*, the Court struck down the Texas scheme because it relied upon outdated standards that ignored advances in mental health since prior to *Atkins*.[256]

While not a purely quantitative standard, the presumptive penumbra approach could remedy the confusion surrounding *Atkins*.[257] Specifically, the Court could create a bright line presumptive IQ number, while still allowing for evidence of qualitative mitigating factors in determining who might be eligible for the death penalty. As with *Roper*, this line would extend the protection of the constitutional bright line of intellectual disability to eliminate the possibility of a death sentence for individuals on the margin.

B. Rape Crimes

Another possible bright line presumptive penumbra under the Eighth Amendment, as discussed above, could relate to the application of the death penalty to non-homicide crimes. In *Coker v. Georgia*, the Supreme Court held that the death penalty was an unconstitutionally disproportionate penalty for rape.[258] Similarly, in *Kennedy v. Louisiana*, the Court barred the death penalty as a punishment for child rape under the Eighth Amendment.[259] Both of these decisions used the evolving standards of decency doctrine described previously.[260]

In *Kennedy*, the Court indicated in dicta that non-homicide crimes against individuals would likely be ineligible for the death penalty, but that crimes against the state—treason, espionage, terrorism, and drug kingpin activity —might be subject to the death penalty.[261] A reasonable presumptive penumbral approach could be to impose a penumbral presumption against the death penalty in cases involving non-homicide crimes.[262]

Without a homicide, the imposition of death for any of these crimes generally seems disproportionate—consistent with similar reasoning in *Coker* and *Kennedy*—and imposing a presumptive penumbra would not foreclose a death sentence in the extreme or unusual case. This presumptive penumbral approach would thus prevent the Court from having to address such a case unless it was the unusual non-homicide case that suggested a death sentence

---

255. *Hall*, 572 U.S. at 723–24.

256. *Moore*, 137 S. Ct. at 1053.

257. *See supra* note 170 and accompanying text.

258. Coker v. Georgia, 433 U.S. 584, 597–600 (1977).

259. Kennedy v. Louisiana, 554 U.S. 407, 421, *modified*, 554 U.S. 945 (2008).

260. *Id.* at 419–21; *Coker*, 433 U.S. at 603 (Powell, J., concurring in part and dissenting in part); *see* Berry, *Evolved Standards*, *supra* note 22, at 121–24.

261. *Kennedy*, 554 U.S. at 437; *see supra* note 124 and accompanying text.

262. With respect to terrorism, for instance, this issue would only arise if there was such an act that did not involve a homicide.

would be an appropriate response such that it could overcome a presumption against such an outcome.

C. FELONY MURDER

Finally, the Court has carved out a limitation to the imposition of death sentences in felony murder cases. Its initial decision on this issue, *Enmund v. Florida*, created a serious limitation, requiring that the defendant either kill or intend to kill in order to be eligible for the death penalty.[263] In a subsequent case, *Tison v. Arizona*, the Court narrowed the categorical exclusion, requiring only that the defendant be a major participant in the crime, and possessed a mental state of reckless indifference to human life.[264]

A presumptive penumbral approach to felony murder might be more difficult to implement than other categorical rules, both because the categorical exception itself is narrow, and because it is completely qualitative in nature. One approach would be to cast the penumbra at the *Enmund* standard, requiring both a higher act and intent threshold to be eligible for felony murder.[265] This would still allow for a death sentence in a case like *Tison* that involved unusual facts (with the sons being held liable for the acts of the father they set free from prison), but set the standard at a more reasonable place for the lion's share of the cases.[266] In other words, where a defendant did not kill or intend to kill, the defendant would be presumed ineligible for the death penalty, but that presumption could be overcome in cases with egregious facts where the defendant was a major participant and exhibited extreme recklessness.

VI. CONCLUSION

This Article has sought to address the problem of bad outcomes arising under bright line rules in the context of the Eighth Amendment's categorical exemptions to the death penalty and juvenile LWOP sentences. Specifically, it has argued for the adoption of presumptive penumbras as a tool that mitigates against unfair outcomes in individual cases while still preserving the integrity of constitutional rules. After advancing this typology for addressing this common problem, the Article proposed two different bright line approaches in cases involving juvenile offenders—a narrow approach presumptive penumbras set at age 19 and a broad approach presumptive penumbras set at age 25. Finally, the Article concluded by sketching out other possible applications of the presumptive penumbral typology under the Eighth Amendment.

---

263. Enmund v. Florida, 458 U.S. 782, 801 (1982).

264. Tison v. Arizona, 481 U.S. 137, 157–58 (1987); *see supra* note 117 and accompanying text.

265. *Enmund*, 458 U.S. at 801.

266. *Tison*, 481 U.S. at 157–58; *see supra* note 117 and accompanying text.