

Bright Lines in Juvenile Justice*

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I. Introduction

If justice means getting what you deserve, then it seems as though ideal justice should give everyone just what he deserves—an ideal theory of justice should get the answers right. Unless you ask the United States Supreme Court. In a series of cases relating to juvenile punishment—*Roper v. Simmons* (2005), *Graham v. Florida* (2010), and *Miller v. Alabama* (2012)—the Court gradually restricted the kinds of punishments juveniles may receive.¹ The Court established and gradually strengthened *bright-line rules*, categorical rules which use age as an imperfect proxy for culpability. Because this results in the underpunishment of some juveniles, it guarantees that ideal outcomes are impossible.² The dissenters in these cases argued that bright-line rules make it harder for us to achieve justice. We

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¹In federal law, juveniles are those who are under 18 years of age (although different states have different rules). A fourth case, *Montgomery v. Louisiana* (2016), did not establish a new sentencing rule, but held that *Miller* applies retroactively.

²That is, the decisions result in underpunishment relative to current norms in the judicial system about what punishments are appropriate for fully culpable offenders. This leaves open the question of whether our existing schemes of punishment are themselves too harsh.

should instead make *case-by-case judgments*: we should do as much as we possibly can to ensure that each individual gets what he deserves.

The implications of this split don't just matter for how we punish juveniles; they also matter for how we think about justice more generally. Each time we institute a bright-line rule, we ensure that justice will not be done—that someone will not get what she deserves, or not receive what she's owed, or not be treated fairly. We might think, then, that bright lines are solely a part of our *non-ideal* theory of justice; they're only there to help us achieve whatever's next best when ideal justice is out of reach.

But that's not true. Ideal theory needs bright lines too. In particular, we need bright lines in any ideal theory that aims to describe the best set of laws and institutions we can have, the goal we should be working toward as we try to improve society, the "conception of a perfectly just basic structure."³ If ideal theory of this kind is going to be useful to beings like us, then it needs bright lines too, even when those bright lines prevent ideal outcomes. The proliferation of bright lines across our theory of justice places significant limitations on how ideal ideal theory can be. When we recognize the constraints this places on the ideal basic structure, we'll see that truly ideal justice is impossible.

In this article, I'll use juvenile justice as an extended example to illustrate the uses and limitations of bright lines. When we look at the reasoning in *Roper*, *Graham*, and *Miller*, we discover some grounds for establishing bright lines. When we look at the dissents, we can assess the case for case-by-case judgment. The initial discussion of these cases leads into the broader conclusion: that ideal theorists have not yet fully reckoned with the limitations bright-line rules place on how ideal a useful ideal theory of justice can be. Still, the benefits of adding bright-line rules to an ideal theory of justice must be balanced with the costs; examining the dissents more closely gives us some guidance about how to strike this balance.

Two caveats before we begin. First, it might seem like a mistake to use juvenile justice as an example to illustrate a feature of ideal theory. We should acknowledge right away that the US juvenile-justice system is far from ideal. It is racist, classist, and deeply underfunded. Moreover, criminal justice of any kind seems to belong to non-ideal theory, not ideal theory.

On the other hand, we can develop domain-specific ideal theories (an ideal theory of education, religious freedom, or punishment) independently of broader ideal theories; we can work out what the ideal system of punishment would be within other non-ideal constraints, just as we can figure out what an ideal moral agent would do in non-ideal circumstances. Extrapolating from a smaller, more manageable ideal can tell us what we should do in larger, more complicated ideal

³Rawls 1999a, p. 216. There are other, often overlapping, kinds of ideal theory as well—ideal theory might assume full compliance, or it might be theory that isn't bound by feasibility constraints. These and other kinds of ideal theory are described in Valentini's helpful "conceptual map" of ideal theory; Valentini 2012, p. 654. When other conceptions of ideal theory are relevant, I'll flag them.

theories. This can also help us better understand how to structure actual non-ideal systems, which I'll look at briefly in Section VI. Once we know we need bright lines in our ideal theory of justice, we can think about where additional bright lines are justified in non-ideal theory.

So that's the first caveat. Second, the Court assumes a retributivist justification for punishment, and I will follow its lead. The discussion, especially in the first part of the article, will be about what kind of punishment juvenile offenders *deserve*, rather than what kind of punishment would most effectively rehabilitate them or serve as a future deterrent. Even if, ultimately, criminal punishment cannot be justified on retributivist grounds, understanding the Court's claims can tell us the circumstances in which bright lines *would* be justified.

II. Juvenile justice: *Roper*, *Graham*, and *Miller*

In *Roper*, 17-year-old Christopher Simmons murdered an acquaintance; he was sentenced to death by a Missouri court.⁴ In *Graham*, 17-year-old Terrance Graham attempted to commit a home invasion while out on parole; a court in Florida sentenced him to life in prison without parole.⁵ And in *Miller*, 15-year-old Evan Miller, together with a friend, beat a neighbor to death; an Alabama court sentenced him to life in prison without parole.⁶ In each of these cases, the Court struck down these sentences, abolishing the death penalty for juveniles in *Roper*, banning juvenile sentences of life without parole for non-homicide crimes in *Graham*, and banning mandatory life without parole for juveniles in *Miller* (although juveniles can still receive life without parole for homicide after an individualized sentencing hearing).

Roper and *Graham* are the first cases we'll consider, since they're the clearest cases of new bright lines; *Miller* is a little more complicated. In these first two cases, the Court noted three central differences between juveniles and adults. First, juveniles are much more likely to be immature. The Court cites *Roper*'s amicus briefs (filed by the American Psychological Association, the American Psychiatric Association, the American Academy of Child and Adolescent Psychiatry, and others) containing evidence that juvenile brains have not yet fully developed.⁷ Because of this immaturity, juveniles act more recklessly, and it's harder for them to do what they believe they ought to do; we might say, as Brink puts it, that they lack *volitional competence*.⁸

Second, juveniles are more susceptible to peer pressure.⁹ The Court says relatively less in support of this claim, although it gestures toward psychological studies concluding that susceptibility to peer pressure peaks around the age of 14;

⁴*Roper v. Simmons* 2005, p. 556.

⁵*Graham v. Florida* 2010, p. 54.

⁶*Miller v. Alabama* 2012, p. 468.

⁷*Roper v. Simmons* 2005, p. 569.

⁸Brink 2019, pp. 9–10.

⁹*Roper v. Simmons* 2005, p. 569.

juveniles learn from their peers (who are also immature) about how they should behave in unfamiliar situations.¹⁰ This may make it harder for them to know what they ought to do, since they are taking guidance from their peers rather than thinking through the relevant moral reasons.

And, finally, juveniles have less well-formed characters.¹¹ The Court cites a 1968 book by Erik Erikson in support of this claim; possibly it felt that this claim was commonsensical enough not to need further support.¹² If juveniles have less well-formed characters, their actions are not necessarily evidence of an “irretrievably depraved character”; instead, they may reform over time.¹³

To be clear, the Court only held that juveniles *frequently* possess these attributes. This evidence does not show that juveniles are never fully culpable for wrongdoing, since each of these is just a claim about what juveniles are usually like. *Some* juveniles are mature and responsible, can make their own decisions without the influences of peer pressure, and can act from well-formed characters. But, on the whole, the Court maintained that age is a good proxy for culpability; juveniles are less likely than adults are to be fully culpable for their crimes.

A. The epistemic claim: we can’t judge culpability

Because of this evidence that juveniles are generally not fully culpable, two interlocking claims appear throughout the Court’s reasoning in these cases. The *epistemic* claim is that actors in the criminal-justice system cannot reliably determine which juveniles exhibit diminished culpability and which are in the fully culpable minority.¹⁴ Even experts, the Court noted, do not feel able to judge whether juveniles have the traits that ground culpability: experts cannot tell “unfortunate yet transient immaturity” from “irreparable corruption.”¹⁵ This is why the American Psychiatric Association forbids psychiatrists to diagnose juveniles with antisocial personality disorder—even experts cannot with certainty say whether a juvenile’s antisocial actions result from immaturity or a personality disorder.¹⁶ While experts do diagnose adults with personality disorders, they’ve agreed that it is appropriate to treat juveniles differently.

In fact, juveniles’ diminished culpability sometimes makes things worse for them. Prosecutors sometimes claim that the very fact of an offender’s youth counts

¹⁰Steinberg and Scott 2003, p. 1012.

¹¹*Roper v. Simmons* 2005, p. 570.

¹²The Court had more recent potential evidence at its disposal, including work on personality stability over time from the 1990s (Moffit 1993) and the early 2000s (McCrae and Costa 2003). Scott et al. (2016, p. 684) note, however, that evidence for this third claim is more limited than evidence for the first two.

¹³*Roper v. Simmons* 2005, p. 570.

¹⁴*Graham v. Florida* 2010, p. 77. Since judges make many of these judgments, I’ll often refer to them for simplicity, but juries and other actors in the criminal-justice system face similar obstacles.

¹⁵*Roper v. Simmons* 2005, p. 573.

¹⁶*Ibid.*

against her, because it suggests she will go on to commit worse acts in the future.¹⁷ Indeed, evidence *against* culpability may be interpreted as evidence *for* culpability.

Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense.¹⁸

A juvenile who swears at the judge could be doing so because he is impulsive and unable to calculate the long-term consequences of behaving rudely in a courtroom—factors that contribute to a *lack* of culpability. A judge, however, may incorrectly interpret this as evidence that the juvenile is incorrigibly bad and thus judge that the juvenile is culpable. As the Court held in *Roper*,

An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.¹⁹

Here, the Court’s epistemic claim is supported by recent evidence on juvenile competence to stand trial. A 2003 study found that juveniles were less competent than young adults to stand trial along several dimensions: they were less able to comprehend courtroom procedures and their own rights; to reason well about their legal strategy; and to recognize the relevance of information to their defense.²⁰ Juveniles are more likely to be compliant with authority—Grisso et al. found that they chose more frequently to take a plea agreement,²¹ and Kassin et al. note that the younger juveniles are, the more likely they are to make false

¹⁷Ibid. “Defense counsel argued that Simmons’ age should make ‘a huge difference to [the jurors] in deciding just exactly what sort of punishment to make.’ In rebuttal, the prosecutor gave the following response: “Age, he says. Think about age. Seventeen years old. Isn’t that scary? Doesn’t that scare you? Mitigating? Quite the contrary I submit. Quite the contrary”;
Roper v. Simmons 2005, p. 558.

¹⁸*Graham v. Florida* 2010, 78. See also *Miller v. Alabama* 2012, 477–8.

¹⁹*Roper v. Simmons* 2005, p. 573.

²⁰Grisso et al. 2003, p. 343.

²¹Ibid., p. 353.

confessions.²² Suggestibility, immaturity, and vulnerability—traits we have already seen as characteristic of juveniles—are likely contributing factors here.²³

All of this makes it harder to be certain juveniles are receiving the punishment they deserve, when these punishments are handed out on a case-by-case basis. Juveniles are more likely not to pursue the best legal strategy, because they are simply less capable of gathering and reasoning about information. Because they put themselves at a legal disadvantage, they are more likely to receive unduly harsh punishments. So even if we assume that the parties to the juvenile-justice system are acting in good faith—even if they are making every possible effort to correctly interpret the available evidence, free from bias—their decisions are more likely to be made without having all of the information. Even ideal actors are going to get it wrong with troubling frequency.

In the 2013 case *Diatchenko v. District Attorney*, the Massachusetts Supreme Judicial Court applied the *Miller* decision, concluding,

Because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved ... Therefore, it follows that the judge cannot ascertain, with any reasonable degree of certainty, whether imposition of [life without parole] is warranted.²⁴

No matter how bad we are at judging culpability generally, we are additionally bad at judging the culpability of juveniles.

B. The moral claim: overpunishment is worse than underpunishment

Because of the difficulty we face in accurately judging juvenile culpability, the Court made its second major claim, the *moral claim*: a system of juvenile justice that involves case-by-case judgment is morally worse than a system that underpunishes them. Overpunishment, the Court argued, violates the Eighth Amendment's proscription of cruel and unusual punishment.²⁵ Because juveniles are generally less culpable, punishments that would not be cruel for adults are potentially cruel for juveniles: "A 16-year-old and a 75-year-old each sentenced to life without

²²Kassin et al. 2009, p. 20. Grisso et al. (2003, p. 343) found differences between 11–13-year-olds and young adults (aged 18–24), but did not find significant differences between 16–17-year-olds and young adults. But this shouldn't be seen as a sign that 16–17-year-olds are fully competent; Kassin et al. (2009, p. 20) report that 15–16-year-olds are more likely to make false confessions than 18–26-year-olds are. As we'll see later, recent neuroscience has cast doubt on the idea that even young adults have fully formed decision-making capacities.

²³Fagan 2005.

²⁴*Diatchenko v. District Attorney* 2013, p. 670.

²⁵*Graham v. Florida* 2010, pp. 74–5.

parole receive the same punishment in name only.”²⁶ A life sentence for a 16-year-old means something radically different than it does for a 75-year-old—and since juveniles are held to be less culpable in general than adults are, these lengthy life sentences are even likelier to constitute cruel punishment.²⁷

By the Court’s logic, then, these punishments are *generally* cruel, and so immoral and unconstitutional. But the Court concedes that these punishments may not always be disproportionate, given the possibility that some juveniles are as culpable as some adults are.²⁸ This means that these bright lines will sometimes result in underpunishment. Those few juveniles who are as culpable as adults will be treated as if they are not, and as a result they will be punished more lightly than equally culpable adults would be. But, the Court held, this is morally better than the alternative. The moral risks of over- and underpunishment are asymmetric: it is morally worse to permit cruel punishment than it is to refrain from (purportedly) proportionate punishment.²⁹ Since we know that we can’t really know when punishing juveniles like adults is disproportionate, the Court determined that we need bright lines. We ought to protect juveniles against the risk of overpunishment, even if that lets some culpable juveniles off the hook.

²⁶Ibid., p. 70. The Court also argued in *Roper* and *Graham* that the punishments at issue were unusual, both within the US and internationally; however, this did not extend to *Miller*, since, as Chief Justice Roberts noted in his dissent in *Miller*, a majority of states in the United States still allowed mandatory life without parole in cases of homicide; *Roper v. Simmons* 2005, pp. 564–7, 576–8; *Graham v. Florida* 2010, pp. 62–4; *Miller v. Alabama* 2012, p. 494.

²⁷*Graham* represents a departure from the Court’s previous thinking on proportionality. In *Solem v. Helm* (1983), the Court concluded that Eighth Amendment protections apply to all criminal penalties, not just death-penalty cases. Later, though, in *Harmelin v. Michigan* (1991), *Ewing v. California* (2003), and *Lockyer v. Andrade* (2003), the Supreme Court essentially foreclosed the possibility of Eighth Amendment remedies for disproportionate sentences in non-capital cases. As Barkow notes, the reasoning in *Graham* was narrow enough that this probably doesn’t signal a revival of *Solem v. Helm*; Barkow 2010, p. 49.

²⁸*Roper v. Simmons* 2005, p. 572. Although for a recent argument that life without parole is a cruel punishment for anyone, see Bennett 2020.

²⁹As further support for the idea that overpunishment is worse than underpunishment, we could appeal to Blackstone’s foundational principle that it is “better that ten guilty persons go free than that one innocent party suffer”; Blackstone 1791, p. 358. Indeed, recent work on under- and overpunishment often makes use of this principle. Brink reinterprets it as holding that “mistakes of overpunishment are worse than mistakes of underpunishment”; Brink 2020, p. 234; see also Brink 2018. Likewise, Foley writes of punishment that “Our current bent is ... to err on the side of harshness, a bent that contravenes ... in a sense, Blackstone’s maxim”; Foley 2009, p. 10. We haven’t established that there’s a ten-to-one ratio of overpunishment to underpunishment, although the exact numbers aren’t really the point (see Volokh 1997); and the original principle was about guilt or innocence, not under- or overpunishment. But retributivists should extend the principle to overpunishment—just as punishing the innocent is asking them to pay a debt they do not owe, overpunishing the guilty is asking them to continue paying a debt they’ve already repaid in full. Once again, we see a moral asymmetry between over- and underpunishment.

III. Lessons for ideal justice

In the juvenile-justice cases, the Court focused on specific epistemic and moral risks: the epistemic risk that we will be unable to determine culpability and the moral risk that we will wrongfully overpunish. But these are not the only circumstances in which laws are epistemically and morally risky; the justices' reasoning is not specific to juvenile justice. There are lots of situations where a) it is difficult for us to make reliable case-by-case judgments, and b) it is asymmetrically morally risky to get the judgments wrong. In these situations, we have a prima facie case for a bright-line rule. But this comes with costs; bright-line rules make even our ideal theories of justice less ideal than we might have expected they would be. These costs give us reasons to avoid bright-line rules where we can. In this section, I show how extensive our use of bright-line rules in ideal theory may be; later on, I'll discuss some ways to weigh the costs of bright lines against their benefits.

I said in the introduction that there are many different conceptions of ideal theory. Here, what I have in mind is what Valentini has called *end-state theory*, which sets out the best version of some subject, the goal we should be trying to achieve.³⁰ This subject is often the principles of distributive justice for our society, but ideal theories may tell us about subjects not clearly related to distributive justice: ideal moral agents or ideal families. Or they may outline more domain-specific ideals: what is the ideal end state of our healthcare system?

End-state theory is closely related to *full-compliance theory*, which assumes full compliance with the principles of justice.³¹ But we need to keep them separate: if criminal punishment is on the table, then we're probably in a society which lacks full compliance with the principles of justice. This is why it's important for us to restrict the domain of ideal theory in this case: when we're talking about ideal juvenile justice, we're talking about something specific, that is, what the best version of punishment would look like. And we can, and do, make claims about this all the time: we can agree that a system that is fair, proportional, and efficient is closer to the ideal than one that is unfair, excessively harsh, and inefficient. So we can theorize about ideal punishment without the assumption of full compliance.

Before the Supreme Court made its rulings in *Roper*, *Graham*, and *Miller*, decisions were made on a case-by-case basis. While the Court gave good reasons for thinking that this is a bad practice on the whole, it has its benefits. It seems as though the ideal end state would involve the correct distribution of desert—that those who are innocent go free, those who are guilty be punished, and those who have diminished culpability be punished proportionally less. We might think we can do a better job when we have the flexibility to consider all of the relevant circumstances, including features specific to a particular defendant.

³⁰Valentini 2012, p. 660.

³¹Ibid., pp. 655–6; Rawls 1999a, p. 215. And see Valentini (2012) for other definitions of ideal theory beyond these two.

Some of the crimes in these cases are heinous, and some of the defendants seem to have been fully aware that what they were doing was wrong and fully able to stop themselves. (Simmons, the defendant in *Roper*, planned his crime well in advance of committing it; Miller robbed and beat his neighbor, left, and returned to set the neighbor's trailer on fire.) The dissenters in the cases note that some fully culpable near-adults will not be punished to the extent they deserve. And they may deserve severe punishments indeed: "a 17½-year-old who sets off a bomb in a crowded mall or guns down a dozen students and teachers," may be treated like a child although she is as culpable as an adult, argued Justice Alito.³² Every time we add a new bright line to our system of justice, we are making that system less precise in its judgments. And a less precise system is a more unjust system.

But when we develop an ideal theory, we ought to follow Rawls and Rousseau and take "people as they are and laws as they might be."³³ The "people as they are" of ideal theory are reasonable—they treat each other fairly, cooperate under fair terms, and have a sense of justice. But they are still people. What makes them "people as they are" is that their basic epistemic capacities are restricted to something recognizably human. One function of laws is to make it easier for imperfect reasoners like us to make judgments about complicated cases. If ideal theory did not assume limits on our epistemic capacities, then it wouldn't tell us anything useful. Ideal theory without these limits would be a system of laws built for computers, not for people who need help making complicated judgments.

Even philosophers such as David Estlund, who take a fairly expansive view of the kinds of *moral* capacities ideal justice can expect out of us, don't generally extend this line of argument to conclude that ideal theory should assume expansive *epistemic* capacities.³⁴ Thus we should make "laws as they might be" for people who are, like us, incapable of remembering large amounts of abstract, complex information; who rely on imperfect heuristics when making judgments; who cannot perfectly sort out complex and conflicting evidence—that is, for people who are afflicted by the burdens of judgment.³⁵

In contrast, disagreement in non-ideal theory isn't just motivated by the epistemic limitations of reasonable people. Rawls also names some sources of "unreasonable disagreement"—"prejudice and bias, self- and group interest, blindness and willfulness ...".³⁶ These sources of disagreement are also characteristic of humans—we all have biases and blind spots. They are different from the epistemic limitations present in ideal theory in (at least) two ways. First, we can abstract away from our biases and prejudices and still be recognizably human. But if we abstract away from our finite capacity for knowledge and our

³²*Miller v. Alabama* 2012, p. 510.

³³Rawls 1999b, p.13.

³⁴See especially Estlund 2010, pp. 230–5, where he talks about which features of human nature may or may not be excusing.

³⁵Rawls 1996, p. 56.

³⁶*Ibid.*, p. 58.

reliance on heuristics, the resulting beings are really nothing like us when it comes to processing information. Second, we are culpable for our biases and prejudices, but not our inability to remember finite amounts of information. We are responsible for changing, or at least trying to change, whether we are unfairly biased against others.

In real life, of course, reasonable and unreasonable disagreement are often linked. Our epistemic limitations lead to some of our unreasonable biases—an imperfect ability to take in information leads us to rely on our biased beliefs about outgroups, for example.³⁷ This is potentially bad news for end-state (and full-compliance) ideal theory; if our biases are just as much a part of what it is to be human as our epistemic limitations are, then the ideal end state for “people as they are” is not very ideal at all. If this is true, then it strengthens the case for bright lines; if we can’t draw a line between our moral and epistemic failings even in the ideal, then, since (as we’ll see) non-ideal theory needs even more bright lines than ideal theory does, we’re going to need a whole lot of bright lines.³⁸

I don’t think we should rush to erase the distinction between ideal and non-ideal limitations. Ideal theorists have never claimed that the ideal end state is easy or feasible (maybe it’s not even possible). But it’s helpful to imagine the limit case, the kind of justice we could have if beings like us could somehow be free from bias and self-interest—and even there, we need bright lines. As long as it’s possible in theory to distinguish our purely epistemic limitations from our normatively inflected unreasonable burdens of judgment, then we can make an in-principle distinction between ideal and non-ideal theory, even if, in practice, we can’t always untangle reasonable from unreasonable limitations.

In the case of juvenile justice, then, we can see how even ideal reasoners would be prevented from perfectly determining juveniles’ culpability. Even well-intentioned judges—even experts—might have difficulty assessing complex and conflicting evidence. A juvenile who appears to show little remorse for his crime may be unsure about how to act while on trial; a juvenile who appears to have little regard for others may grow out of exhibiting impulsive behavior. Even people who are aware of the distinctive features of the juvenile brain may not be able to tell which of these features mark culpability and which mark immaturity. Similarly, even well-intentioned experts have to deal with the vagueness present in hard cases; the resulting indeterminacy means that even equally well-intentioned and reasonable adults will disagree about whether a juvenile meets the criteria for culpability or not. And finally, even a system of social institutions entirely composed of well-intentioned, reasonable legal actors is what Rawls calls a “limited social space”—reasonable people will have to balance the value of making perfect judgments against the reality of limited time, resources, and epistemic ability.³⁹

³⁷See Gendler 2011.

³⁸See Galston 2016, pp. 246–7.

³⁹Rawls 1996, p. 57.

But even assuming this very basic set of epistemic limitations, the ramifications for ideal theory of justice are significant. The Supreme Court made its central epistemic claim because of the limitations we have: even when we're making an honest effort to figure out which juveniles are culpable, we—including experts on juvenile psychology!—often cannot. People “as they are” cannot perfectly sort out culpability within the limited social space of the juvenile-justice system. A world of computers, or of omniscient beings, might be able to—but that's just too unlike our world to give us any information about how *we* should judge culpability.

This means that even an ideal system of justice—even “laws as they might be”—must contain some bright-line, categorical rules. Because people “as they are” cannot tailor culpability judgments perfectly to particular individuals, the law must place individuals into categories.⁴⁰ We've seen that this is true in the case of juvenile justice, but imperfect categories show up across the legal and political landscape—any time we're in a bad epistemic position, and there are asymmetrical moral risks involved if we get it wrong, we have a *prima facie* case for a bright line. I outline just a few cases where this is true.

Voting rights. Democracies are built on the voices of their citizens, and so they ought to hear as many of those citizens' voices as possible. Democracies go badly wrong when they deny the franchise to members of a particular sex or race, so there are moral risks present in restricting the vote. Democracies also have an interest in making competent decisions, and children are generally too immature to be competent citizens. But while age is a good proxy for maturity *in general*, we are in a bad epistemic position with respect to the maturity of any *particular* individual. So we face epistemic limitations in judging who's mature enough, and there are moral risks if we prevent people from voting. We have at least a *prima facie* case to draw an age-based bright line with respect to voting, and to draw that line on the young side, so that we can include rather than exclude competent voters.

This is only a *prima facie* case. To justify a particular bright line, we would need to show that the moral risks are truly asymmetrical, but Brennan, among others, has noted the downside of allowing incompetent voters, and has argued that age may not be the right proxy for competence.⁴¹ Still, while the exact age (or other proxy) we use for voting rights may be up for debate, the epistemic challenges remain in any case—we still need a way to decide who's a competent voter, and our difficulty judging on a case-by-case basis means we need a bright line of some kind.⁴²

The case of voting rules reminds us, too, that the impact of different bright lines may vary. The age-based bright-line rules around punishment are just a couple more features in an already complicated legal landscape, but there are fewer rules and standards governing who may or may not vote—so instituting or

⁴⁰See also Endicott 1999.

⁴¹Brennan 2016, pp. 23–73, 147–9.

⁴²See *ibid.*, pp. 204–30, for some discussion of possible competence bright lines.

changing an age-based bright line for voting has a comparatively more significant effect on the relevant area of law. When we are considering the epistemic and moral risks present in bright lines or case-by-case judgment, the larger context matters too.

Affirmative action. If you think that affirmative action is morally justified, you might believe this to be the case because some people are discriminated against based on their membership in some identity category, commonly race. We have strong moral reasons to rectify discrimination. But members of any demographic group have widely varying experiences. When it comes to knowing who has actually faced discrimination, and how much, university officials, corporate boards, and policy-makers are in a bad epistemic position. The criteria the justices developed apply here too; we have a prima facie case for a bright line based on race. Again, there are also moral risks in giving unfair advantages to people who have suffered less from oppression and discrimination; again, where exactly to set the bright line is a matter of reasonable debate even assuming affirmative action is justified. But the main point is the same: if affirmative action programs are justified, the epistemic obstacles of judging on a case-by-case basis mean we will need a bright line somewhere.

Driving under the influence. People respond to alcohol very differently, depending on their age, weight, and history with alcohol. Even drivers with a similar blood-alcohol level vary as to how alcohol affects them—one study found that drivers with lower baseline competence are more significantly affected by alcohol than their equally drunk but more competent peers.⁴³ This puts us in a bad epistemic position to know who can drive safely. But we have moral reasons to try to limit the number of driving deaths caused by alcohol. This gives us a prima facie case for a bright line based on blood-alcohol content.⁴⁴

Unlike the other two cases, the asymmetry of the moral risks is more readily apparent in this case. While there are real and legitimate debates about how to balance disenfranchisement and competent voting, and about how to run affirmative-action programs fairly, there's less of a contest about how to balance the risks and benefits of drunk driving. The risks of killing innocent people through drunk driving just don't seem comparable to the risk of inconvenience for slightly tipsy but still safe drivers. This bright line should err on the side of keeping people off the roads. Still, while the weights are different from the more controversial cases, the structure is the same. Even in mundane, relatively less controversial cases, we need bright lines when there are some moral risks and we have difficulty making judgments on a case-by-case-basis.

⁴³Harrison and Fillmore 2005, p. 882.

⁴⁴Many states, such as California, pair a bright-line rule with a second test: was the person actually impaired? See *People v. McNeal*. Someone who is below the legal limit may still face punishment if their driving is impaired; someone who is above the legal limit may face punishment even if their driving is not impaired.

These three examples—voting age, affirmative action, and blood-alcohol content—have very little in common. And yet, in all of these cases, we find that the bad epistemic position we are in puts us at risk of doing the wrong thing. The moral reasons vary from case to case, but in all of these examples, we have good reason to rely on bright-line rules when making policy. In the case of juvenile justice, I have argued, the Court has given us good reasons for establishing categorical rules that will lead to underpunishment of culpable juveniles, because the moral risks of overpunishment are significant. As we move from domain-specific ideal theory to ideal theory for the broader basic structure, the result will be the same: ideal justice is a system of the best rules, which often fail to deliver the best case-by-case outcomes.

This makes ideal theory of justice unjust. There are some cases in which we know the just outcome: we know that some juvenile is as culpable as an adult is, or we know that someone is too immature to vote well, or we know that someone has not suffered from discrimination, or we know that someone is safe to drive. We know what justice would look like in this situation, and yet the just set of rules prevents us from acting justly. A theory that delivers justice to some but not others, or that is imprecise in its application of justice, seems that it could not possibly be an ideal theory. Any time categorical rules are warranted—as they are throughout the law—ideal theory becomes less ideal, because it is less able to deliver what we know to be the just outcome. That this is true across many otherwise diverse domains shows us that ideal theory is significantly more limited than we might have thought.

While Rawlsian ideal theory can ultimately cope with this result, I don't think the full extent of the limitations it places on ideal justice has been appreciated. Bright lines are an instance of what Rawls calls *imperfect procedural justice*—we know what the just outcome would be, but even the most just procedure is not guaranteed to reach that outcome.⁴⁵ Rawls thinks that imperfect procedural justice is a later part of what he calls the four-stage sequence of ideal theory; once we have the principles of justice, and we have codified them into more concrete rules, applying those rules to particular cases is a matter of imperfect procedural justice.⁴⁶ It's not clear whether imperfect procedural justice is truly meant to be part of ideal theory; as Ronzoni notes, creating and applying concrete rules for a particular case seems to mean taking account of "the baggage of injustice that a society carries," and that's the subject of non-ideal theory.⁴⁷

But we know that at least some of the bright lines we've examined are not merited because of injustice; instead, they're a result of the burdens of judgment present even in ideal theory. The epistemic and moral risks of punishing juveniles don't exist as a result of the peculiarities of the American judicial system but rather because of our inability to make precise case-by-case judgments. (There are

⁴⁵Rawls 1999a, pp. 74–5.

⁴⁶Ibid., pp. 171–6.

⁴⁷Ronzoni 2015, p. 292.

features of juvenile justice that *are* specific to the US, and those *do* belong in non-ideal theory—more on those later.) So there are at least some cases of imperfect procedural justice that belong in ideal theory. But taking this seriously has significant ramifications for ideal theory, more than Rawls appears to acknowledge in his discussions of imperfect procedural justice.

When Rawls gives his account of imperfect procedural justice, he uses the example of a standard criminal trial, in which even perfect trial procedures cannot guarantee that the correct verdict is reached.⁴⁸ But bright lines make the situation even worse for justice. In the criminal trial, it's theoretically possible to achieve the just result 100 percent of the time, since a standard criminal trial requires case-by-case judgment. When we institute the bright lines we've been talking about, we guarantee that the ideal outcome will sometimes not be reached. And this imperfection will repeat itself across our ideal theory—any time, and there are many, when we employ bright lines, our imperfect justice gets a little more imperfect.

Still, the ideal of perfectly precise justice has its place. Hamlin and Stemplowska make a useful distinction between “ideal theory” and “theory of ideals”—the latter is supposed to “identify, elucidate, and clarify the nature of an ideal,” such as justice, while the former “is concerned with the identification of social arrangements that will promote, instantiate, honor or otherwise deliver on the relevant ideals.”⁴⁹ The vision of ideal justice as perfectly delivering just deserts belongs to “theory of ideals”—elucidating and clarifying what perfect just deserts are can help us to understand the best rules of an ideal theory of justice. It may be helpful for us to think about what perfect justice would look like in the abstract—this can remind us why justice is a value we're pursuing, it can help us to clarify conceptual matters, and it may sometimes be directly applicable to our circumstances.

But even coming down to the still-lofty level of ideal theory requires us to view justice as less of an isolated abstraction. If ideal theory requires us to make any claims at all about human epistemic capacities—as I have argued that it does—then the vision of justice we get in “theory of ideals” is not perfectly translatable into ideal theory. The ideal of justice is in no way constrained by our epistemic capacities, nor is it bounded by the other features an ideal system of laws would have to have. So while the ideal of perfect just deserts may have a role to play, it cannot survive untouched in an ideal theory of justice.

IV. Against bright lines: the dissents

So far, we have seen that bright lines are justified in ideal theory, even though this makes ideal theory less ideal. But bright lines come with costs. When we take a look

⁴⁸Rawls 1999a, pp. 74–5.

⁴⁹Hamlin and Stemplowska 2012, p. 36. Here they seem to be concerned with the end-state branch of ideal theory, although a similar distinction between ideal theory and theory of ideals could exist for other varieties of ideal theory too.

at the dissents in this series of cases, we see some considerations that could defeat the prima facie case for bright lines.

First, the dissenting justices argue that these particular categorical rules are arbitrary. *Roper* and *Graham* set the bright line between juveniles and adults at 18 in part because that's the line society already uses for determining who can vote or be drafted—but this seems like a thin rationale for deciding whether and how to punish. Age is only an imperfect proxy for culpability, and it's not clear why voting age and culpability age would hang together.⁵⁰

The first worry gives weight to the second, that bright lines tend to breed other bright lines.⁵¹ It's because we already had the bright-line rule about voting that the Court could easily establish bright-line restrictions on punishment at 18. The more bright-line rules we have, especially if those bright lines are arbitrary, the less precise our judgments about justice are. In the case of juvenile justice, this means that some fully culpable 17-year-olds, guilty of heinous crimes, will not be punished to the extent they deserve.

In the case of juvenile justice, these criticisms should not prevent us from imposing bright lines. If the line between 17 and 18 is arbitrary, that's a concern—but as long as the epistemic claim is correct, there is *some* place at which we tend to become unreliable (or, at least, *extra* unreliable) judges of culpability. The solution, in this case, is not to remove bright lines, but rather to find a less arbitrary place at which to set them. We know that no bright line can be completely perfect—some people will be under- or overpunished, and so some arbitrariness may remain—but there are better justifications than voting age for the bright line of culpability, and so there are less arbitrary places this line can be drawn.⁵²

The second concern is a pragmatic concern about the effects of bright lines, not a concern about those lines themselves. If there is evidence that a particular

⁵⁰As Justice O'Connor noted, age is distinct in this way from other culpability-lessening conditions, such as intellectual disability; *Roper v. Simmons* 2005, p. 602. Unlike age, intellectual disability is *directly* connected to diminished culpability.

⁵¹*Miller v. Alabama* 2012, p. 510.

⁵²A third view, recently put forward by Gideon Yaffe, is that lighter sentences for juveniles are indeed justified, but not because of those juveniles' immaturity; rather, juveniles deserve less punishment because they have less say over the laws governing them; Yaffe 2018, p. 159. If this view is true, then we don't need a bright line around juveniles, since age is not a proxy for diminished culpability—rather, disenfranchisement should directly result in lowered punishment. Yaffe's arguments have come in for their share of criticism: Agule (2020, p. 275) points out that while juveniles are held to be less culpable interpersonally, this can't be a result of their disenfranchisement; Husak (2018) notes that legal reasons are only a small part of why we ought to refrain from *malum in se* crimes such as murder; and Brink (2020; pp. 232–3) claims that we would recoil from punishing juveniles as harshly as we punish adults even if they did have the vote. Even supposing that Yaffe can overcome these objections, this does not invalidate the broader point about bright lines. Even if this is a case in which we don't need a proxy for diminished culpability, we need proxies in other areas where there are epistemic and moral risks.

bright line is appropriate, then concerns that that bright line will breed other bright lines are concerns about the knock-on effects in the wider judicial system—they're not concerns about that particular bright line itself. So if the bright lines in *Roper* and *Graham* are justified on epistemic and moral grounds, then the dissents need to marshal evidence to show that those bright lines will a) lead to other, unjustified, bright lines, b) the negative effects of which exceed the positive effects of the original, justified, bright lines.

In this case, that evidence isn't there. The dissenting justices worry that the decisions will lead to barring, as Chief Justice Roberts put it,

all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive. Unless confined, the only stopping point for the Court's analysis would be never permitting juvenile offenders to be tried as adults.⁵³

This prediction hasn't been borne out yet. The Court had the opportunity to take up these issues in its 2017 term, in the cases *Johnson v. Idaho* and *Valencia v. Arizona*. But the Court declined to take those cases, and so it has not gone on to create further bright lines in this domain.⁵⁴

But while *Roper*, *Graham*, and *Miller* have not led to an epidemic of arbitrary bright lines, other bright lines could have similar negative effects. Mandatory-minimum laws draw bright lines too—anyone who's found guilty of certain crimes must receive a minimum level of punishment, regardless of mitigating factors. But these bright lines are not established out of a concern that we're overpunishing offenders. Instead, they're at least partly based on a concern that our justice system isn't retributive *enough*.⁵⁵ They also seem to be ineffective at some of their aims (such as deterring crime) and bad at tracking our judgments about the relative seriousness of offenses (a 738-month sentence for a drug dealer who carried a gun that was never used or displayed during his drug deals; a 235-month sentence for a terrorist who detonated a bomb in a public place).⁵⁶ In the wake of a decades-long expansion of mandatory minimums, even the conservative Heritage Foundation now supports changing the mandatory minimums for certain drug crimes.⁵⁷ So while the objections to bright lines aren't sufficient in the case of juvenile justice,

⁵³*Miller v. Alabama* 2012, p. 501.

⁵⁴In the wake of *Miller*, 20 states plus the District of Columbia have banned life without parole for juveniles; *New York Times* 2017. Four other states keep the sentence on the books, but never actually impose it. In Michigan and Louisiana (which account for over a quarter of juveniles previously sentenced to life without parole), the story is different. In these states' *Montgomery*-mandated resentencing hearings, prosecutors are seeking life without parole in more than half of these hearings and in a little less than one in three, respectively.

⁵⁵United States Sentencing Commission 2011, pp. 88–9.

⁵⁶Martin 2004, pp. 312–16.

⁵⁷Larkin and Bernick 2014; United States Sentencing Commission 2017, p. 17.

they are legitimate considerations, and they could cause us to rethink other bright lines.

V. Balancing the strengths and weaknesses of bright lines: the *Miller* decision

So if bright lines are sometimes necessary, and sometimes arbitrary or harmful, this creates a challenge for bright-line rules in any domain of ideal theory. We can find one attempt to create a balance in *Miller*, the third major case in this series. Here, although the Court used the same reasoning as in *Roper* and *Graham*, it reached a different conclusion. Alabama had mandated life in prison without parole for anyone convicted of homicide. In *Miller*, the Court struck down that law. But rather than creating a new bright-line rule, the Court mandated case-by-case treatment: Alabama can still sentence individual juveniles to life without parole, as long as it finds sufficient culpability on the part of those individuals. *Roper* and *Graham* banned the consideration of individual culpability; where juveniles are concerned, *Miller* required it. The dissenting justices were skeptical of this move: Justice Alito cautioned that while *Miller* permitted individualized sentencing, we should “not expect this possibility to last very long.”⁵⁸ As the dissents in all three cases argued, bright-line rules breed bright-line rules—*Miller* may be a temporary stopping place en route to a more sweeping conclusion. (So far, as we have seen, this hasn’t happened.)

But this stopping point is just one way to balance the pros and cons of bright lines, and there are probably better alternatives. Based on the logic on display in *Roper* and *Graham*, the Court should have established a bright line in *Miller*.⁵⁹ We have already seen that bright lines were justified in *Roper* and in *Graham*; the same reasons applied, with the same force, to the issues at stake in *Miller*. The Court held back from establishing a bright line because “*Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption.”⁶⁰ But the judgment in *Roper* and *Graham* was precisely that such line-drawing is impossible—that judges are too frequently unable to distinguish the transiently immature from the irreparably corrupt.

Miller prescribed “a hearing where ‘youth and its attendant characteristics’ are considered as sentencing factors” in order to make clear what individual offenders deserve—why wouldn’t that suffice in *Graham* and *Roper*, rather than setting up separate categorical rules? Presumably because these hearings would not be enough to establish a juvenile offender’s level of culpability, since the decisions argued that even experts are bad at assessing culpability. If we have

⁵⁸*Miller v. Alabama* 2012, p. 514.

⁵⁹Breyer argued in his concurrence that a categorical rule barring life without parole may be appropriate; *ibid.*, p. 493.

⁶⁰*Montgomery v. Louisiana* 2016, p. 734.

grounds to doubt the reliability of our culpability judgments in *Graham* and *Roper*, then we also have grounds to doubt the reliability of those judgments in *Miller*. *Miller's* solution doesn't go far enough.

Other solutions are better. Drawing on research that shows that brains continue to develop throughout young adulthood, Shust proposes an un rebuttable presumption of diminished culpability due to youth until the age of 18 and a rebuttable presumption through the age of 25.⁶¹ This combines the stricter bright lines of *Roper* and *Graham* with the case-by-case judgment of *Miller*, but it confines that case-by-case judgment to young adults (not juveniles). Drawing on research about the “nonlinear” ways juvenile and young-adult brains develop, Casey et al. recommend “moving this single line to multiple lines that consider developmental changes across both context (emotionally charged or not) and time (in the moment or in the future).”⁶²

Steinberg et al. similarly recommend multiple bright lines. They think we can treat juveniles as adults in cases where they typically are asked to deliberate and reason, relatively free of emotion and peer pressure and with access to objective information about the costs and benefits of potential actions, because, in these cases, they perform roughly as well as adults.⁶³ But we need a different bright line for situations in which juveniles are prone to impulsivity, emotion, and social coercion, and in which they lack access to objective expert advice; in these cases, juveniles make worse decisions than adults do.⁶⁴ So, they conclude, the question of whether to notify parents about an abortion merits a different bright line than the question of whether to try a juvenile as an adult.

This suggests two different ways to mitigate the issues posed by the dissenting justices. First, we can minimize the downsides of bright lines by reducing, where we can, the ways in which they are arbitrary. In this case, paying attention to the neuroscientific evidence about juvenile and young-adult brain development can help us to more precisely target our bright lines to actual culpability.⁶⁵ Where we can avoid it, we should not arbitrarily set bright lines just because others already exist (as we would if we simply set cut-offs for juvenile justice at the voting cut-off); the evidence we have now can help us to avoid arbitrariness. Likewise for the other domains that necessitate bright lines. The relevant evidence might be psychological, sociological, economic—paying attention to whatever evidence is relevant will help us set reasonable bright lines for affirmative action, driving rules, voting rights, and so on.

Second, although the dissenting justices have a legitimate worry about the proliferation of bright lines, in some cases the solution is *also* the proliferation of

⁶¹Shust 2014, pp. 696–7.

⁶²Casey et al. 2008, p. 12.

⁶³Steinberg et al. 2009, pp. 586, 592.

⁶⁴*Ibid.*, p. 592.

⁶⁵Although, for skepticism about whether neuroscientific evidence will help here, see Maroney 2009.

bright lines. We can see now that part of the problem with the proliferation of bright lines is the proliferation of *arbitrary* bright lines. Bright lines may make our judgments about justice clunky and less reliable, but when they are more precisely targeted, that worry lessens. In the case of juvenile (and young-adult) justice, that probably means different bright lines for different crimes and/or different age groups. Different bright lines for different kinds of offenses and different kinds of decision-making will reduce (although not entirely dispel) the clunkiness the dissenting justices were worried about. The solution to the problem of breeding bright lines is *better* bright lines.

Still, we can only precisify our political and legal systems up to a point. If we keep refining our bright lines over time, we'll start to lose the advantages that led us to adopt those bright lines in the first place. This is an objection commonly lodged against any kind of rule-based system in which the rules are a proxy for something else (for example, rule consequentialism). If the rules are too clunky, then we should create more rules so we can more precisely target the relevant criteria. But if we do that too much, then we wind up back at case-by-case judgment, with all of the epistemic and moral problems that entails. One rule-consequentialist answer is to look for rules that are actually workable: the set of rules people will actually accept.⁶⁶ People are unlikely to accept rules with a million exceptions—because they can't remember them, they can't be assured others will comply, or they recognize the temptation to squeeze their case into one of the many exceptions.

This response is particularly apt in the political and legal context. Once we've accepted the need for bright lines in our ideal theory of justice, those bright lines are sticky—they require a complicated legal or policy procedure in order to be instantiated, and they become part of legal precedent. The legal system balances a distinctive set of concerns: efficiency, correctness, the ability of courts and legislatures to make changes to the justice system, the coherence of our justice system with the other aspects of our ideal or non-ideal theory, the costs and benefits of both bulky and more narrowly targeted bright lines, relevant empirical evidence, the risks of under- and overpunishment, and more. Bright lines can be added, altered, or abandoned, but the stickiness of our legal system makes this significantly harder to do without good reason.

Finally, return to one of the issues that motivated these bright lines in the first place, the epistemic limitations even ideal people face. If these same epistemic limitations affect what bright lines we accept and where we choose to place them, then bright lines inherit the disadvantages of case-by-case judgment, in addition to being less precise.

In the case of juvenile justice, the limitations of case-by-case judgment are less pressing, sometimes even nonexistent, when we use bright-line rules. For one thing, many of the problems the Court cites with case-by-case judgment are problems that obtain in the assessment of particular juveniles—the incorrect

⁶⁶See Hooker 2003.

assessment that *this* juvenile is fully culpable because he swore at the judge. Second, case-by-case judgment is also problematic because of the epistemic limitations of the actors in the juvenile-justice system. Even well-intentioned judges may not be up on trends in the research on juvenile brains. This does not, of course, mean that the psychological or neuroscientific evidence is perfect—researchers in this area disagree with one another. But it does mean that a different set of epistemic limitations applies to those judging juveniles than to those conducting research in the first place. In this case, at least, we have good reason to believe that our decision-making about juvenile justice is better when we use bright lines.

There's still a lot more to say here. Psychological and neuroscientific evidence is a work in progress, as the recent replication crisis has underlined. And there are reasonable debates to be had about whether psychological evidence is the right benchmark to use in the first place.⁶⁷ We will not be able to eliminate arbitrariness completely, since age is not a perfect proxy for culpability. But the choice is not between a clunkier or more precise system of judgment based on the same evidence and suffering from the same epistemic limitations; rather, it's between appealing to our pretheoretical notions about juvenile culpability, which we have good reason to believe will lead us to overpunish, or applying a rule based on reasonable evidence, which doesn't trigger those same biases.

VI. Non-ideal juvenile justice

For most of this article, I've argued that the case of juvenile justice shows how any *ideal* theory of justice must be hemmed in by bright-line rules. But we should be clear: juvenile justice as it exists in the US is far from ideal, especially with respect to race. Rovner writes, "As of 2013, black juveniles were more than four times as likely to be committed as white juveniles, American Indian juveniles were more than three times as likely, and Hispanic juveniles were 61 percent more likely."⁶⁸ Although rates of juvenile commitment have fallen, people of color now make up a higher percentage of those in juvenile facilities: black juveniles outnumber non-Hispanic white juveniles 40 to 32, even though whites are a significantly larger percentage of the general population.⁶⁹ Black juveniles are significantly more likely to be arrested than white juveniles, even though the two groups exhibit common delinquent behaviors at roughly the same rates.⁷⁰ If a case goes to trial, a black juvenile is much more likely to be sentenced to prison (rather than put on probation) than a white juvenile is.⁷¹

⁶⁷We know from above that Yaffe (2018) thinks that juvenile immaturity is not the right reason to punish juveniles less; see also Maroney 2009.

⁶⁸Rovner 2016, p. 1.

⁶⁹Ibid.

⁷⁰Ibid., p. 6.

⁷¹Ibid., p. 8.

We saw earlier that judges can interpret immature behavior by any juvenile as evidence that that juvenile is fully culpable, and race is implicated here too; Goff et al. found that that study subjects are more likely to overestimate the age and culpability of black juveniles than white juveniles.⁷² Our juvenile-justice system is systematically stacked against people of color at all stages. And while race is perhaps the most salient way in which our justice system is far from ideal, there are others too—culture, national origin, economic and social class.

Given that we're in extremely non-ideal circumstances, should we even bother with ideal theory? I think so. Because it abstracts away from non-ideal features of the actual world, ideal theory is more primary and foundational.⁷³ It's *fact-insensitive*: we don't need to know the facts on the ground in order to reason about ideal justice. It's *general*: since we've shown that ideal justice needs bright lines, we can know that this is true in all circumstances. Once we know what the ideal looks like, we can adapt it to our particular non-ideal circumstances, but this doesn't work in reverse. Non-ideal theory is fact-sensitive; its claims depend on particular circumstances, and its results are not always applicable in different circumstances.

In this case, the facts being abstracted away from are our non-ideal epistemic faults—our racial and classist biases. I have shown that *even when* we abstract away from those biases, bright lines are necessary. Even when we assume only basic epistemic limitations, of the kinds that can distinguish us from gods or computers, we need bright lines. Beginning with ideal theory, and showing that we need bright lines, even in the absence of non-ideal epistemic problems, is a stronger result than showing that bright lines are only justified in non-ideal circumstances.

As we add in the epistemic limitations that are present in non-ideal theory, more bright lines become appropriate. Departures from the ideal set of bright lines are justified by the particular non-ideal circumstances we find ourselves in.⁷⁴ Even in ideal theory, the Court's epistemic and moral claims justify distinct treatment for juveniles in the juvenile-justice system; in the non-ideal circumstances we're in, additional bright lines are justified to protect against racist or classist biases. So while we need categorical rules even in ideal theory, the non-ideal theory appropriate for our circumstances will make more extensive use of categories, probably erring even further on the side of underpunishment.

References

Agule, Craig. 2020. Yaffe, Gideon: *The Age of Culpability: Children and the Nature of Criminal Responsibility*. *Ethics*, 130, 271–6.

⁷²Goff et al. 2014.

⁷³Rawls 1999a, p. 216.

⁷⁴Ibid.

- Barkow, Rachel. 2010. Categorizing *Graham*. *Federal Sentencing Reporter*, 23, 49–53.
- Bennett, Nolan. 2020. “The state was patiently waiting for me to die”: life without the possibility of parole as punishment. *Political Theory*, forthcoming.
- Blackstone, William. 1791. *Commentaries on the Laws of England*. London: Strahan & Woodfall.
- Brennan, Jason. 2016. *Against Democracy*. Princeton: Princeton University Press.
- Brink, David. 2018. Partial responsibility and excuse. Pp. 39–59 in Heidi Hurd (ed.), *Moral Puzzles and Legal Perplexities: Essays on the Influence of Larry Alexander*. Cambridge: Cambridge University Press.
- Brink, David. 2019. The nature and significance of culpability. *Criminal Law and Philosophy*, 13, 347–73.
- Brink, David. 2020. The moral asymmetry of juvenile and adult offenders. *Criminal Law and Philosophy*, 14, 223–39.
- Casey, B. J., Rebecca Jones, and Todd Hare. The adolescent brain. *Annals of the New York Academy of Sciences*, 1124, 111–26.
- Diatchenko v. District Attorney*. 2013. 466 Mass. 655.
- Endicott, Timothy. 1999. The impossibility of the rule of Law. *Oxford Journal of Legal Studies*, 19, 1–18.
- Estlund, David. 2011. Human nature and the limits (if any) of political philosophy. *Philosophy and Public Affairs*, 39, 207–37.
- Ewing v. California*. 2003. 538 U.S. 11.
- Fagan, Jeffrey. 2005. Adolescents, maturity, and the law. *The American Prospect*, Sept. A5-A7.
- Foley, Brian. 2009. The mass incarceration crisis as an opportunity to rethink blame. *Connecticut Public Interest Law Journal*, 9, 1–15.
- Galston, William. 2016. What realistic utopias are—and aren’t. *Social Philosophy and Policy*, 33(1–2), 235–51.
- Gendler, Tamar Szabó. 2011. On the epistemic costs of implicit bias. *Philosophical Studies*, 156, 33–63.
- Goff, Philip, Jackson, Matthew, Di Leone, Brooke, et al. 2014. The essence of innocence: consequences of dehumanizing black children. *Journal of Personality and Social Psychology*, 106, 526–45.

- Graham v. Florida*. 2010. 560 U.S. 48.
- Grisso, Thomas, Laurence Steinberg, Jennifer Woolard, et al. 2003. Juveniles' competence to stand trial: a comparison of adolescents' and adults' capacities as trial defendants. *Law and Human Behavior*, 27, 333–63.
- Hamlin, Alan and Zofia Stemplowska. 2012. Theory, ideal theory, and the theory of ideals. *Political Studies Review*, 10, 48–62.
- Harmelin v. Michigan*. 1991. 501 U.S. 957.
- Harrison, E. L. and M. T. Fillmore. 2005. Are bad drivers more impaired by alcohol? Sober driving precision predicts impairment from alcohol in a simulated driving task. *Accident Analysis and Prevention*, 37, 882–9.
- Hooker, Brad. 2003. *Ideal Code, Real World*. Oxford: Oxford University Press.
- Husak, Douglas. 2018. The age of culpability: children and the nature of criminal responsibility. *Notre Dame Philosophical Reviews*.
- Kassin, Saul, Steven Drizin, Thomas Grisso, et al. 2009. Police-induced confessions: risk factors and recommendations. *Law and Human Behavior*, 34, 49–52.
- Larkin, Paul and Evan Bernick. 2014. *Reconsidering Mandatory Minimum Sentences: The Arguments for and against Potential Reforms*. Heritage Foundation. <<https://www.heritage.org/crime-and-justice/report/reconsidering-mandatory-minimum-sentences-the-arguments-and-against>>.
- Lockyer v. Andrade*. 2003. 538 U.S. 63.
- Maroney, Terry. 2009. The false promise of adolescent brain science in juvenile justice. *Notre Dame Law Review*, 85, 89–176.
- Martin, John. 2004. Why mandatory minimums make no sense. *Notre Dame Journal of Law, Ethics and Public Policy*, 18, 311–17.
- McCrae, Robert and Paul Costa. 2003. The stability of personality: observations and evaluations. *Current Directions in Psychological Science*, 3, 173–5.
- Miller v. Alabama*. 2012. 567 U.S. 460.
- Moffit, Terrie. 1993. "Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy." *Psychological Review* 100, 674-701.
- Montgomery v. Louisiana*. 2016. 136 S. Ct. 718.
- New York Times*. 2017. Editorial: justice for the youngest inmates. 21 Nov., A26.
- People v. McNeal*. 2009. 46 Cal. 4th 1183.

- Rawls, John. 1996. *Political Liberalism*. New York: Columbia University Press.
- Rawls, John. 1999a. *A Theory of Justice*. Rev. edn. Cambridge, MA: Belknap Press.
- Rawls, John. 1999b. *The Law of Peoples*. Cambridge, MA: Harvard University Press.
- Ronzoni, Miriam. 2015. The four-stage sequence. Pp. 290–2 in Jon Mandle and David Reidy (eds), *The Cambridge Rawls Lexicon*. Cambridge: Cambridge University Press.
- Roper v. Simmons*. 2005. 543 U.S. 551.
- Rovner, Joshua. 2016. Racial disparities in youth commitments and arrests. *The Sentencing Project*. Apr. 1-16.
- Scott, Elizabeth, Thomas Grisso, Marsha Levick, and Laurence Steinberg. 2016. Juvenile sentencing reform in a constitutional framework. *Temple Law Review*, 88, 675–716.
- Shust, Kelsey. 2014. Extending sentencing mitigation for deserving young adults. *Journal of Criminal Law and Criminology*, 104, 667–704.
- Solem v. Helm*. 1983. 463 U.S. 277.
- Steinberg, Laurence and Elizabeth Scott. 2003. Less guilty by reason of adolescence: developmental immaturity, diminished responsibility, and the juvenile death penalty. *American Psychologist*, 58, 1009–18.
- Steinberg, Laurence, Elizabeth Cauffman, Jennifer Woolard, et al. 2009. Are adolescents less mature than adults? Minors' access to abortion, the juvenile death penalty, and the alleged APA “flip-flop”. *American Psychologist*, 64, 583–94.
- United States Sentencing Commission. 2011. *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*. <<https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>>.
- United States Sentencing Commission. 2017. *An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System*. <<https://www.ussc.gov/research/research-reports/2017-overview-mandatory-minimum-penalties-federal-criminal-justice-system>>.
- Valentini, Laura. 2012. Ideal vs. non-ideal theory: a conceptual map. *Philosophy Compass*, 7, 654–64.
- Volokh, Alexander. 1997. *n* guilty men. *University of Pennsylvania Law Review*, 146, 173–216.
- Yaffe, Gideon. 2018. *The Age of Culpability: Children and the Nature of Criminal Responsibility*. Oxford: Oxford University Press.