THE HARDEST OF THE HARD CASES: ADOLESCENT HOMICIDE IN JUVENILE AND CRIMINAL COURTS*

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INTRODUCTION

The teenager accused of criminal homicide is the worst case that can confront a system that seeks to protect young offenders and to preserve their opportunity for normal development into adulthood. Causing a death inflicts the greatest harm that crime can cause in a developed nation, a type of loss that the economic resources and insurance mechanisms of a rich nation cannot protect against or meaningfully compensate. If death is caused by intentional infliction of a serious injury, the youth who inflicted the injury will often have intended enough harm so that his or her moral culpability would have been great even if death had been avoided. In such cases, the combination of high levels of personal culpability and worst-case outcome puts maximum pressure on the legal system to generate extensive punishment. Dealing with homicide cases is an important and particularly difficult part of a comprehensive policy toward youth violence.

These most serious cases are prominent in public concern about the legitimacy and effectiveness of the legal system. They are also difficult but important tests of the general principles that are supposed to be in play throughout the system. Homicide is one important domain to explore when trying to determine the motives and principles that should be at work in other youth crime and delinquency cases. If there is a real gap between what we do and what we say, a close look at decision making in homicide cases

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will likely show the gap.

This essay is about the substantive principles that should govern the punishment of adolescents who kill. Part I shows that the stereotypical juvenile and criminal courts are not well suited to reach just results in adolescent homicide cases. Part II uses cases reported in recent news coverage to explore the multiple varieties of youth homicide. Part III uses the diminished responsibility and room-to-reform conceptions developed in my recent book as a method of exploring punishment options for adolescent killers. Part IV sets out specific case studies in the meanings of diminished responsibilities: (1) the ages at which homicide offenders should be considered partially but not fully responsible, (2) appropriate methods for determining deserved punishments for adolescent killers, (3) constructive homicide liability as a problem for the criminal law of adolescence, and (4) the question of capital punishment for young killers.

I. A FALSE DICHOTOMY

If the only choice available for the trial and punishment of adolescent homicide cases was between a juvenile court solely concerned with treatment and a criminal court that ignored the age and circumstances of its defendants, the task of finding appropriate responses in homicide cases would be an impossible one. The intentional taking of life without justification requires a punitive response in most circumstances when the offender has even minimal appreciation of the nature of his acts and their consequences. Punishment must be one of the appropriate responses of any legal authority responsible for addressing adolescent homicide.

But, the proper punishment for fifteen-year-olds who kill must take into account the offender's immaturity and other particular circumstances. Otherwise, the legal authority that determines guilt and punishment will not be coherent in making retributive judgments. The popular assumption that trying very young defendants in criminal court removes any necessity to consider the immaturity and other limits of the defendant is mistaken but revealing. The transfer of juveniles to a criminal court is often described as a decision to "try this defendant as an adult." If the defendant is fifteen years old, five foot four inches tall and of slightly subnormal in-

telligence, to try and punish him as if he were adult in all respects is a dangerously counterfactual enterprise.

The language used to describe the process of transferring defendants to a criminal court is itself an invitation to what psychiatrists call processes of "magical thinking" in which it is imagined that changing the location of a case will suddenly remove characteristics of the case that cause conflict and ambivalence. The physical reality of jurisdictional transfer is rather mundane—to try an accused as an adult in a criminal court changes only the location of the hearing; it does not change the characteristics of the defendant. If we could in fact transform adolescents into adults by an act of juridical will, the procedure would be in great demand by parents and schools in circumstances far removed from delinquency and crime. This particular branch of "magical thinking" was immortalized by the revolutionary leader in the Woody Allen film *Bananas* who proclaims in his inaugural address that "All children under sixteen are hereby sixteen."[1]

The statistics available on waiver from juvenile to criminal court illustrate the unique problems that are generated by adolescents accused of homicide. The proportion of juvenile homicide charges waived in Texas is five times as large as for the crime with the next highest rate of transfer petitions, and the gap between waiver rates for homicide and for other offenses is much larger than the contrast between other classes of offenses.[2]

The sanctioning options usually available in juvenile court fall short of the perceived need for punishment in a substantial proportion of homicide cases. Pressure for greater punishment can be accommodated either by giving more punishment power to juvenile courts or by transferring defendants to criminal courts that already have much greater punishment powers. In either case an appropriate judicial performance in adolescent killing cases should require a particularized inquiry about the offense and the offender,

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1 Bananas (United Artists 1971).

2 Robert O. Dawson, An Empirical Study of *Kent* Style Juvenile Transfers to Criminal Court, 23 St. Mary's L.J. 975, 988 (1992); see also Joel Peter Eigen, The Determinants and Impact of Jurisdictional Transfer in Philadelphia, *in* Major Issues in Juvenile Justice Information and Training: Readings in Public Policy 333, 337-42 (John C. Hall et al. eds., 1981).

a mixture of factual detail and principles that have been specifically fashioned from an analysis of homicide offenders and their crimes.

It is therefore discouraging that the processing of thousands of adolescent killing cases through state criminal courts has produced very little discussion of the particular deserts of adolescents accountable for homicide. This silence is consistent with three different possibilities:

(1) The absence of particular analyses of adolescent homicide is an indication that transferred defendants are treated with equal severity to adults,

(2) The sentencing discretions available in the prosecution and adjudication procedures result in leniencies toward youthful defendants that are substantially without announced principle or discernable pattern, or

(3) There is a "silent common law" of unarticulated principles that could be used to both explain and predict the criminal justice system's punishment choices.

The most likely of these patterns is probably the second. The system for deciding the punishment consequences of immaturity is probably fundamentally lawless.

If so, the lack of appropriate legal standards explaining outcomes in homicide cases would have negative consequences that reach far beyond the particular results in homicide cases. If the outcomes in homicide cases are arbitrary, the pattern of arbitrariness is quite likely to be contagious. If the high stakes in homicide cases cannot produce dialogue and analysis regarding the justice of particular outcomes, there is little prospect of doing better in the treatment of lesser crimes. To default in providing a principled analysis of the punishment choices in homicide cases is to run the substantial risk that the whole process will be unprincipled.

II. IMMATURITY AND CULPABILITY: SOME LESSONS FROM MALCOLM SHABAZZ

A widely publicized New York case in the summer of 1997 provides an instructive illustration of the manifold impacts of

youth and immaturity on factors that influence the just punishment for an offense. Malcolm Shabazz was a troubled, much travelled twelve-year-old when he obtained gasoline and deliberately set a fire in the apartment of his custodian/grandmother, knowing that she was at home. Malcolm is the grandson of the black radical icon Malcolm X, and his grandmother, Betty Shabazz, was Malcolm's widow. Mrs. Shabazz died as a result of the burns she sustained in the fire.

Testimony at later court hearings portrayed Malcolm as extremely troubled, with clinical indications of schizophrenia and a documented history as a chronic firesetter. The boy's defense attorney and a clinical psychologist retained by the prosecution both denied that the defendant intended to kill his grandmother. "'I do not believe he consciously meant to do harm to his grandmother,' said Dr. Elizabeth Osborn, a clinical psychologist hired by the prosecution. 'I believe it was an unconscious act to scare her, make her change, get her to do what he wanted'. . . ."[3]

On such facts, the youth and immaturity of the offender influence a large number of factors that bear on the just punishment in this case. Data about youth and immaturity may be required to make a judgment about whether the chronic firesetting behavior was compulsive (a condition not uncommon in this age group), whether the defendant subjectively appreciated the risk of death or of great bodily harm that was attendant to his setting fire to an occupied apartment, and the plausibility of the defendant's fantasy of an imaginary companion called Sinister Torch.[4]

What is crystal clear in the Shabazz case is that youth and immaturity are not just factors to be added on to modify an otherwise deserved penalty for a particular course of conduct and its result. The immaturity of an actor has a pervasive influence on a large number of subjective elements of the offense, including cognition, volition, and the appreciation that behavior such as setting a fire can produce results like the death of a person. The defendant's status and perceptions are relevant to a large number of issues, each of which can affect the extent of personal culpability, and

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[3] Jane Gross, Experts Testify Shabazz Boy is Psychotic, N.Y. Times, July 30, 1997, at B1.

[4] Id. at B4.

therefore, of deserved punishment.

Immaturity is not just a single variable in the equation that determines punishment, but a characteristic that may affect many different variables in the equation. It is best to think of youth and immaturity as factors that have a potential influence on every aspect of conduct other than the character of the resulting harm that plays a major role in determining the extent of blameworthiness. Malcolm Shabazz and a twenty-five-year-old arsonist with no known developmental difficulties are not two different sorts of people committing the same crime; they are two different sorts of people who are committing different crimes, offenses that are fundamentally different because of the characteristics and perceptions of the offenders.

The fatal fire that Malcolm Shabazz set was not the typical act of homicidal youth violence for a number of reasons. The perpetrator in the Shabazz case was much younger than the typical juvenile killer. He also acted alone, which is atypical of adolescent killers. The indications of mental illness in the case are much more substantial than in the usual run of cases. The intention to injure is usually easier to infer because of the use of a gun, knife, or personal force on the deceased. But, the potentially pervasive influence of youth and immaturity on the subjective factors that influence the degree of personal culpability is a standard feature of lethal violence involving adolescents.

There is one other reason why the Malcolm Shabazz case is not a typical instance of adolescent killing: There are no typical cases of adolescent homicide. The substantial variety encountered in adolescent homicide is apparent to any conscientious reader of the daily press. At the opposite end of the spectrum from Malcolm Shabazz is the Lam Choi case reported in the same month in my local newspaper. Choi allegedly shot crime boss Cuong Tran after speaking to him in a bar with a group of three adults and another youth. The group followed Tran to his car, and Choi allegedly shot him. Choi was seventeen.[5]

Yet another recent San Francisco Bay shooting, a case in

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[5] Stephen Schwartz, Accused Killer Will Be Tried as an Adult, S.F. Chron., June 28, 1997, at A17.

which the victim survived a nearly fatal wound, overlaps very little with either the Shabazz or the Choi circumstances. In that case, a thirteen-year-old boy "deliberately shot [a] girl after she dared him to use the handgun he was carrying."[6]

A further case from a recent season's crop of newspaper coverage concerned the sentencing of a sixteen-year-old boy who was fourteen when he fired shots that killed one British tourist and injured a second in Florida. This defendant was one of the four teens that stopped the car but the only one who fired a gun.[7]

A final case study in adolescent homicide received sustained media coverage in the months before this study was being prepared for publication. In West Paducah, Kentucky, a fourteen-year-old high school freshman broke up a high school prayer meeting by opening fire with a .22-caliber handgun. About a dozen shots were fired. Two of the students died from the gunshot wounds while six others were injured.[8]

The assertion that there are no typical adolescent killings is a jurisprudential argument rather than a criminological assertion. The statistical analysis of homicide cases involving adolescent offenders does reveal recurrent fact patterns in juvenile homicide, many of which have been discussed in my recent book on American youth violence.[9] Overwhelmingly, the weapon used in fatal assault is the firearm. When juveniles commit homicides there is a much higher likelihood of more than one offender being involved than when adults commit homicide. The rate of homicidal injuries is much higher among the two oldest age groups typically within the jurisdiction of the juvenile court: sixteen- and seventeen-year-olds.

Blameworthiness for adolescent killers comes in many different sizes. When it comes time to assess an individual defendant's conduct and circumstances to determine the degree of his culpability, both the number of significant variables and the distribution

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6 Thaai Walker & Elaine Herscher, Oakland Fifth-grader Shot by Schoolmate While Playing Hooky, S.F. Chron., Mar. 12, 1997, at A18.

7 Michael Peltier, Youth Gets 27 Years in Tourist Killing, Reuters, Nov. 14, 1995.

8 Paul Hoversten, In Kentucky, 'Blood Was Everywhere,' USA Today, Dec. 2, 1997, at 3A.

9 Franklin E. Zimring, American Youth Violence 17-47 (1998).

of factors influencing culpability is great. These factors include the age of the accused as well as the age-related judgment and experience possessed by a particular defendant. Then, there are the precipitating circumstances that led to the lethal assault and the extent to which these were the fault of the accused. If there was a fight, who started it? Who was responsible for the first use of lethal force? If there is group involvement, the extent to which this defendant's conduct was responsible for the lethal outcome must be considered. With all these factors playing an important role, the degree of culpability for homicide will be spread over a wide range, with a relatively small concentration of cases at any particular point on the continuum. If ever there were an attractive group of homicide cases for prix fixe penalty determination, juvenile killer cases certainly do not fit into that category.

The wide range and difficulty in determination of deserved punishment in juvenile killer cases is also an argument against guideline grids or other mechanically produced sentencing benchmarks that tend to rely on very few characteristics such as age and previous criminal record to produce modal sentencing values. More appropriate to the complexity of the task would be a common law of adolescent culpability constructed over time in the course of judicial analysis of large numbers of youth homicide cases.

Yet, the existing appellate court discussion of juvenile homicide cases combines much of the judicial effort that would be necessary to construct a common law of juvenile homicide culpability, with almost none of the benefits thereof. Appellate courts consider the circumstances of adolescent homicide cases in the course of reviewing the propriety of judicial waiver from juvenile court jurisdiction. The best that can be expected from such a process is the division of defendants into two rough categories characterized by different average levels of culpability. What cannot be addressed by this process are the principles that should govern an appropriate response to a particular killing, whether that killing has been adjudicated in a juvenile or criminal court.

A. The Theory Gap

Given the high volume of homicide cases and the substantial importance of each offense, the absence of a sustained analysis of culpability in adolescent homicide is both a peculiar and an important gap. There is a theory gap concerning the principles that should govern the punishment of adolescent homicide offenders. Part of the explanation may be the fact that the issues involved do not all comfortably fit into unified categories of legal theory or court jurisdiction. In the United States, the juvenile court and the criminal court are regarded as not merely two different legal institutions but as two different subjects for analysis and theory. In the Shabazz case, the twelve-year-old Malcolm appeared in the family court but would have been processed in the criminal courts of New York if he had been thirteen. The problems of comprehending Malcolm Shabazz's case do not change dramatically on his thirteenth birthday, but as long as we segregate the juvenile and criminal systems, there is no coordinated way to consider their joint problems.

Another part of the explanation of the theory gap is the preoccupation with the jurisdictional questions that characterize policy debates about violent adolescents. Americans conduct long dialogues about what kind of court should try juveniles accused of homicide under the mistaken impression that they are addressing substantive questions about the degree of penal responsibility of adolescent offenders for their criminal acts. Even criminal courts will have to determine the extent to which immaturity affects deserved punishment.

B. A Practice in Search of a Theory

The absence of analytic attention to the proper punishment for young homicide defendants does not mean that the present system ignores age and immaturity when making sanction decisions in juvenile and criminal courts. There is substantial evidence that age and immaturity are powerful influences on practice. Texas prosecutors do not even request transfer to criminal court in seven out

of every ten homicide charges.[10] The relatively thin evidence on the youngest offenders in criminal courts also suggests that factors associated with youth produce lesser punishment.[11] The current system in homicide cases seems like a classic case of what has been called "practice in search of a theory."[12] The combination of high stakes, nonexistent principles, and low visibility discretion is a prescription for arbitrariness and injustice. Coherent theory that is specific to adolescent homicide is an important practical need in the justice system, not merely a matter of academic nicety.

III. TWO PRINCIPLES APPLIED

This Part will use two broad doctrines[13] as the organizing categories for policy analysis of adolescents charged with homicide. Section A will survey the issues generated by diminished responsibility as a doctrine of substantive criminal law applicable to young killers. Section B will discuss the ways in which governmental policies toward children and youth, the sorts of concerns earlier discussed under the heading of "room to reform," might affect both the extent of punishment and the conditions under which it should be administered.

A. Diminished Responsibility and Desert

Those elements of an offender's constitution and perception that are relevant to questions of diminished responsibility should affect the amount of punishment deserved as a consequence of conviction for a particular criminal act. Some theorists would like to imagine the deserved punishment for a particular offense by a particular offender as a single level of punishment, the one appropriate penal price for an offense, but I agree with Norval Morris who considers desert to be a guiding principle in setting punishment, a principle that defines a range of punishments that are consistent with the degree of blameworthiness in a particular case. Set

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10 Id. at 114 tbl. 7.1.

11 See Peter W. Greenwood et al., Age, Crime, and Sanctions: The Transition from Juvenile to Adult Court 27 (1980).

12 Elizabeth W. Vorenberg & James Vorenberg, Early Diversion from the Criminal Justice System: Practice in Search of a Theory, *in* Prisoners in America 151, 151 (Lloyd E. Ohlin ed., 1973).

13 See Zimring, supra note 9, at 75-83.

the punishment below the minimum deserved punishment, and the community will suffer because the consequences to the defendant unduly depreciate the seriousness of the criminal act in the circumstances in which it was committed. Set the punishment above the maximum level of deserved punishment, and both the community and the offender will suffer because more suffering than is justified by the particular circumstances of the offender's culpability will have been imposed. Any punishment within the deserved range would be considered retributively appropriate.[14]

The offender's diminished responsibility should be part of the elements of the offense that define the appropriate range of deserved punishment in his particular case. The immaturity, psychological and perceptual handicaps, and inability to appreciate consequences risked by conduct that characterize the agreed facts in the case of Malcolm Shabazz are all important elements that establish a range of just punishments in his case. The factors identified in that case would seem to be of relevance whether the sentencing court was a juvenile or a criminal tribunal. Where elements of diminished responsibility are frequently encountered, they should be incorporated into the basic framework of the minimum and maximum punishments available for offenses. I would thus prefer a scheme in which the range of deserved punishments for homicide for very young offenders was separately determined rather than try to express a range of deserved punishments for all ages for homicide. If factors such as age can only be used to guide discretion within a range of minimum punishment decided on other grounds, the calculation will come too late in the process to ensure that the objective of retributive proportionality can be achieved.

Four general observations can be made about diminished responsibility on account of youth and the selection of punishment for adolescent killers. The first point is that doctrines of diminished responsibility should be applicable throughout the full spectrum of offense severity. The politically popular notion that immaturity should only be allowed to mitigate deserved punishment in relatively harmless crimes is nonsensical. If subjective culpa-

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[14] Norval Morris, Punishment, Desert and Rehabilitation, *in* Equal Justice Under Law 137, 140 (U.S. Dep't of Justice, Bicentennial Lecture Series 1976).

bility is relevant to deserved punishment at all, there is no principled basis on which one can impose a seriousness ceiling beyond which an offender's lack of maturity or judgment is irrelevant.

Mitigation of punishment on account of diminished responsibility may hamper the effectiveness of the criminal law as an instrument of control, but if moral consistency is the appropriate standard for judging the criminal law, doctrines of diminished responsibility should stand or fall as issues of general applicability. The operational importance of this for homicide cases can be stated in the negative conclusion that homicidal crimes should not be excluded from the reach of otherwise applicable doctrines of diminished responsibility on account of immaturity.

My second assertion is that the greater the significance of subjective rather than objective elements in determining the range of appropriate punishments for a crime, the greater the impact of diminished capacity because of immaturity on deserved punishment. The more the applicable branch of the criminal law concerns itself with not simply harms inflicted but with the circumstances of advertence and intention that produced the result, the larger the potential role for personal handicaps that diminish subjective culpability in mitigating the range of deserved punishment.

This emphasis on the subjective in diminished responsibility makes the criminal law of homicide an area in which the potential influence of mitigation is enormous. Criminal acts that cause death are classified in the United States as involuntary manslaughter, manslaughter, second degree murder, first degree murder, and (in three-quarters of the states) capital murder. From manslaughter to first degree murder, the range of minimum punishment is from probation to life imprisonment,[15] and the elements that differentiate these crimes are almost exclusively subjective features bearing on intent, advertence, and motivation that parallel the concerns that produced doctrines of diminished responsibility. When the difference between premeditation (first degree murder) and malice (second degree murder) can mean fifteen years or more of further imprisonment[16] and when equally lethal acts can be punished with

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15 See Franklin E. Zimring et al., Punishing Homicide in Philadelphia: Perspectives on the Death Penalty, 43 U. Chi. L. Rev. 227, 233-34 (1976).

16 Id. at 233-35.

probation (if negligent) and long imprisonment (if grossly reckless), a defendant's youth and immaturity should have a very large potential influence on the level of deserved punishment.

Related to the general importance of subjective factors in setting the punishment for homicide offenses, there are also branches of the substantive criminal law in which individual guilt and punishment are determined almost solely by an individual's intent, rather than physical participation in criminal acts, through doctrines like the liability of conspirators for the substantive criminal acts committed by their co-conspirators and the penal liability of an accessory for the crimes of the principal.[17] The greater the weight that the law places on the solely subjective dimensions of behavior for an individual's punishment, the greater the mitigational potential of diminished responsibility on account of immaturity. Where the only basis for punishment is the agreement and intention of the defendant, the defendant's immaturity should have a major impact on the range of deserved punishment.

The greater leverage of diminished responsibility in mitigating accessorial responsibility is of great practical significance for adolescent homicide because so many violent acts committed by teenagers are committed in groups. Data from New York City show that the majority of all family court charges for serious crimes in New York involved co-offenders.[18] Over half of all offenders under sixteen arrested for homicide were arrested with at least one other person.[19] When the circumstances that generate a homicide charge involve only the offender's presence or knowledge rather than physical participation in the infliction of injuries that cause death, the reduction in the range of deserved punishment for the passive or "tag along" accessories can and should be quite substantial. I will return to this point when discussing constructive liability for unintended outcomes in Part IV.

The high volume of accessorial charges is one important reason why a relatively small proportion of juvenile homicide charges results in prosecutorial requests for judicial waiver. The manifes-

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17 See Sanford H. Kadish, Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 Cal. L. Rev. 323, 346-49 (1985).

18 Zimring, supra note 9, at 79 fig.5.1.

19 Id.

tations of intention attendant on being a triggerman in a fatal gun assault are far more substantial than those of the fourteen-year-old associate standing next to the shooter or the sixteen-year-old waiting in the car. Further, the link between the defendant's act and the harm inflicted is much closer for the triggerman.

The final point to be made in this preliminary excursion into diminished responsibility concerns the substantial number of separate blameworthiness issues, relevant in setting punishment for homicide offenses, that may be generated by the defendant's overall immaturity, his inexperience in understanding the link between risk taking and causing harm, and his incapacity to control or deflect peer pressure. In addition to the standard questions regarding mens rea and mistake, the immaturity of an accused might also be relevant to whether some of the standard presumptions of Anglo-American law should apply to teenage homicide defendants. Recall the prosecution psychologist who believed that Malcolm Shabazz did not intend the death of his grandmother when he ignited gasoline to start a fire in her apartment. The standard slogan in Anglo-American criminal law is that a man intends the natural and probable consequences of his actions. Should we be quick to assume that a boy intends the natural and probable consequences of his actions when that boy is twelve, or fourteen, or sixteen years of age? A number of standard criminal law doctrines, including strict liability, may not fit the circumstances and psychology of immature defendants as well as they are believed to suit moral judgments about competent adults.

The large number of issues to which an offender's age and immaturity can be relevant to the range of deserved punishment suggests one procedural consequence that is contrary to the current trend in processing juvenile homicide cases. Case by case determinations of culpability by a judge would seem as important in homicide charges against adolescents as in any type of criminal case. Recognizing this need does not mean choosing between having judicial waiver hearings in a juvenile court in such cases and providing for extensive fact finding by sentencing judges at sentencing in either the juvenile or criminal court. Both waiver hearings and individualized sentencing determinations may be necessary to meet the complex challenge of doing justice in ado-

lescent homicide cases. The legislative trend is in exactly the opposite direction. The mode for murder charges is for transfers at the discretion of the prosecution, and the substantive law governing sentences in criminal courts is utterly silent on immaturity and its implications. Part IV of this essay will outline a few of the many questions of gradation of culpability that need to be addressed by criminal courts.

B. Homicide Sentencing and Youth Policy

One important standard by which a justice system must be evaluated is the extent to which it can adjudicate young offenders without compromising the objectives of government policy toward young people generally. I argued in my recent book that youths who violate the law are nonetheless the sort of young people who must be considered the subjects of a government youth policy.[20] The slogan for this conclusion is that the kid is a criminal, but the criminal is still a kid. The principal objective of youth policy in the adjudication and sentencing of minors is to avoid damaging a young person's development into an adulthood of full potential and free choice. Thus, the label for this type of policy is "room to reform."

In an ideal world, the punishment of all young people who violate the law would avoid disfiguring stigma, debilitating penal confinement, and other permanent developmental handicaps. In an ideal world, of course, fifteen-year-olds would not commit intentional homicide. Whenever a community's retributive demands are legitimate and substantial, there may be a conflict between maximizing the developmental opportunities of young offenders and meeting the retributive necessities occasioned by criminal homicide.

One important distinction between concerns of youth policy and the dimension of diminished responsibility previously discussed is that "room to reform" considerations are exterior to the range of deserved punishment that exists for a particular individual's participation in a specific criminal act. Every circumstance that is material to the determination of diminished responsibility

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20 Id. at 81-83.

helps to establish the minimum and maximum deserved punishment. Thus, there can be no real conflict between diminished responsibility and the range of deserved punishments because the former has helped to determine the latter.

Governmental policy toward youth should not be a part of any kind of equation that determines penal desert. The fact that we want all of our teenagers to develop into healthy and realized adults has no direct bearing on the minimum level of punishment felt necessary for an offense or on the maximum beyond which punishment would exceed desert and is therefore unjustified. Because the interests of a youth policy are not a part of the determination of desert, the two may be in direct conflict. The smallest punishment appropriate to desert in the case of a terrible crime may inflict exactly the kind of damage that governmental youth policy seeks to avoid.

When there is unavoidable conflict between the objectives of youth policy and the minimum demands for deserved punishment, the demands for deserved punishment should carry the day. This will not be an unjust result if youth and immaturity have been fully accommodated in the calculus of diminished responsibility. But, the outcome in such cases will disserve socially important interests in allowing young people to fully recover from their adolescent mistakes in the transition to adulthood. Where desert and youth support conflict, electing the punishment minimum becomes the sad necessity of the sentencing court.

Still, youth policy can be much better accommodated even in the treatment of adolescent killers than is evident in current practice. The value of promoting normal adolescent development can properly influence the amount of punishment selected within the confines of an already established desert range, and the nature and conditions of adolescent punishment can be designed in ways that serve the interests of governmental youth policy vastly better than the current system.

To say that a government policy favoring youth development will not affect the range of punishments deserved by particular young offenders is far from saying that a youth development policy should have no influence on the penalty to be selected in particular cases. In the first place, the range of deserved penalties for

serious crimes is frequently substantial, and the influence of youth policy within that desert range can make a big difference to the punishment selected. To oversimplify, assume that the range of deserved punishment for a particular type of involvement in homicide is two and one-half years at the minimum and nine years at the maximum. Even youth policies that do not have an impact on those minimum and maximum values can be powerful determinants of the actual sentence.

Moreover, youth policy can influence the form of a criminal punishment within a desert range that is established by other considerations. A recurrent example of this is the greater use of indeterminacy in the sentencing of young offenders convicted of very serious offenses. The presumed malleability of younger offenders and the likelihood that fundamental changes in character and maturity will occur in the course of penal confinement have resulted in an emphasis on indeterminacy in the sentencing of older youths in criminal courts. Both the Federal Youth Corrections Act, which was a sentencing option in the United States until 1984, and parallel provisions in Great Britain and on the continent of Europe reflected this emphasis. All of these provisions were established for the criminal court sentencing of younger offenders. In such circumstances, the effective minimum for the young offender will be the bottom of the range of deserved punishment, but the substantive concerns of a youth policy might produce the offender's release "at the pleasure of Her Majesty" shortly after that minimum has been met.

The other way in which policy toward children and youth should influence the treatment of young homicide offenders in the criminal justice system is atrociously ignored in much American practice. No matter how serious the crime committed by a fourteen-year-old, there is no reason short of magical thinking for concluding that the young offender has become an adult on matters such as his need for education and vulnerability to adult predation. It seems obvious that whenever a young offender's need for protection, education, and skill development can be accommodated without frustrating community security there is a governmental obligation to do so.

One of two sentiments seems to underlie the frequent assertion

that young persons who commit serious crimes should cease to be regarded as requiring the services and schooling usually appropriate to their age. The first notion is that truly serious crime is a mark of maturity, a benchmark that indicates that legal emancipation is appropriate. Inferring maturity from participation in violent crime has never been attempted with any empirical data on the persons convicted of serious crimes. It seems instead to follow as the obverse of an assumption that the truly immature are incapable of committing homicide.

The second sentiment is that withdrawal of all special protections is an appropriate punishment for crime. The political slogan is "If you are old enough to do the crime, you are old enough to do the time." Apparently, some proponents of this theory would extend it to denial of special conditions of confinement such as age segregation and protection from older prisoners, educational programs, counseling, and special mental health services. The implicit argument is that young offenders do not deserve anything that might benefit them, such as youth-oriented protections.

As long as the security of confinement is not compromised, it is difficult to see a genuine conflict between providing youth services and punishing even the most serious of young offenders. On utilitarian grounds, the education and training of the young is a positive value even if long term confinement is its context. From a retributive perspective, the provision of age-appropriate conditions of confinement would seem analogous to providing needed medical care for all prisoners, a continuing obligation that does not compromise the punitive bite of confinement in a destructive fashion. Education and security from predatory assault are not privileges conferred on young persons and revocable as a consequence of misbehavior.

The interaction of youth policy with the retributive necessity of punishment is a contingent one. When the community's minimum level of required punishment is too high to accommodate full protection of the development of the young offender, there will be a direct conflict between what is desirable for all adolescents and what can be provided for the most serious adolescent offenders. In cases of such true conflicts, the need for minimum deserved punishment will control.

Often, however, there will be opportunities to find punishments within the desert range that preserve opportunities for the offender's growth and development into near normal adulthood, and it will always be possible to provide education and age appropriate security and conditions of confinement to even the most culpable of adolescent killers. In these respects, there is no good reason to terminate special policies toward youth that do not conflict with the demands of penal justice.

IV. CASE STUDIES IN DIMINISHED CULPABILITY

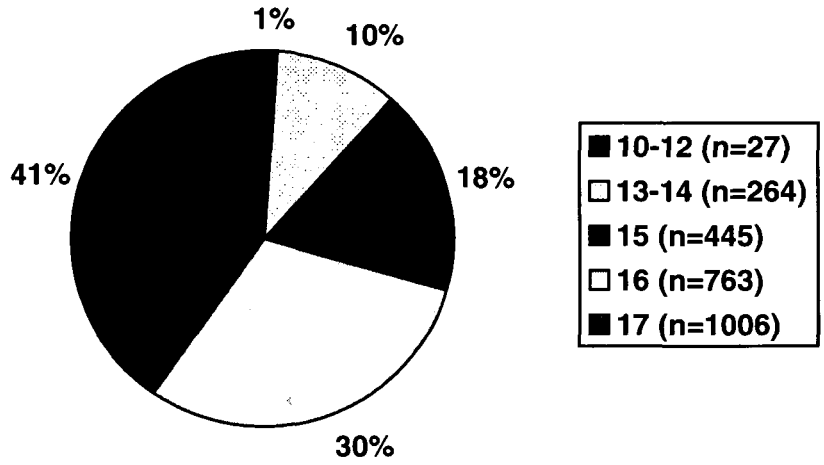
This Part is a modest down payment on the substantial work that will be necessary if the implications and limits of responsibility in youth violence are to be determined. This Part focuses on four substantive issues that range from age boundaries for diminished capacity all the way to potential eligibility for capital punishment.

A. The Age Span of Diminished Responsibility

A substantial number of practical questions stand between the principles discussed earlier in this Essay and an operating system of adjudication and disposition of adolescent homicide. One question concerns the age boundaries of diminished responsibility. At the lower extreme, when should we declare the transition from incapacity to minimum states of capacity not inconsistent with some punishment for serious crime? The common law had a conclusive presumption of incapacity below age seven and of capacity after age fourteen.

Figure 1 shows the distribution of all homicide arrests for offenders under eighteen for 1995.

Figure 1. Percentage of Juvenile Arrests for Murder and Nonnegligent Manslaughter, Ages 10-17, 1995[21]



As Figure 1 shows, homicide arrests are rare events under age thirteen and infrequent under age fifteen. More fifteen-year-olds are arrested for homicide than the total of all ages under fifteen, and more sixteen-year-olds are arrested for homicide than the total for all ages under sixteen.

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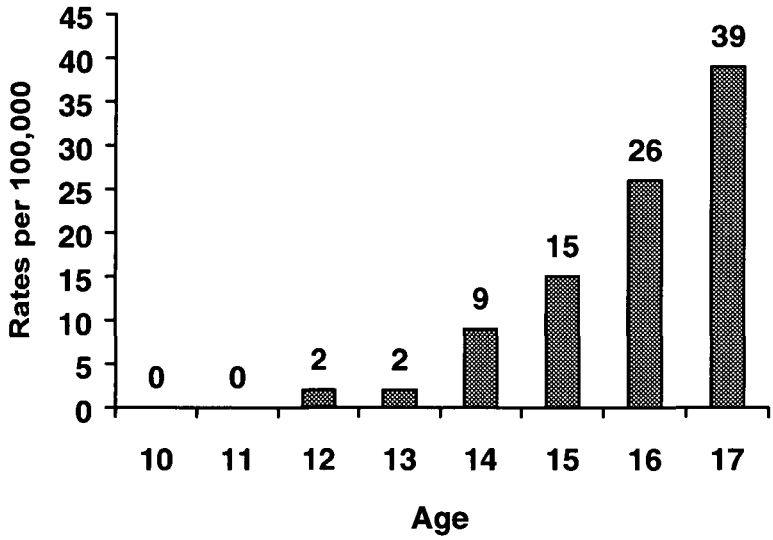
21 Federal Bureau of Investigation, U.S. Dep't of Justice, Crime in the United States: Uniform Crime Reports 1995, at 218 (1996).

Figure 2 shows estimated rates of homicide charges in juvenile court by age at referral and provides rate detail for each age.

Figure 2.Estimated Rates per 100,000 of Prosecution for Youth, 1992[22]



The greater detail in the prosecution rates shows that age thirteen has a very low rate of prosecution referral. Significant homicide-charging activity begins at age fourteen and increases steadily with age thereafter. By age seventeen, the charging rate is nineteen times as large as at age thirteen. In practice, the significant threshold for the minimum ages for homicide prosecution are twelve through fourteen. It is not clear whether discretionary nonarrest and noncharging play a major role in the near zero rates below age fourteen. The border between incapacity and capacity is usually regarded as a matter of case by case determination, in the first instance by prosecutors and in the second instance by juvenile court judges.

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22 Howard N. Snyder & Melissa Sickmund, U.S. Dep't of Justice, Juvenile Offfenders and Victims: A National Report 57 (1995).

After the age of minimum culpability is attained, how long should considerations of diminished capacity play a role in determining deserved punishment, and how great a role should they play? The correct policy answer to this question depends on the range of capacities believed relevant to culpability and the ages at which they are typically attained. If all the characteristics of diminished responsibility outlined in *American Youth Violence* are relevant to punishment, then inquiry about such matters could extend up to and not infrequently beyond age eighteen in homicide cases.[23] If the lack of experience in learning to deflect peer pressure and in dealing with provocation are regarded as mitigating elements, most adolescent homicide cases will involve offenders operating at far from trivial deficits. By contrast, most of the basic moral judgment capacities are achieved earlier, normally by age fourteen or fifteen. The greater the emphasis on experience and social skills, the larger the degree of social and experiential development that must take place before criminal acts can be said to deserve the full measure of punishment.

These general observations fall far short of a specific schedule of degrees of responsibility linked to age or other offender attributes. One reason for this is the absence of good data on the social skills and social experience of adolescent offenders. The important elements of penal maturity have yet to be agreed upon, let alone assessed in large numbers of cases. There is reason to believe that concentrated efforts will tell us much more than we now know about the social psychology of adolescent violence, and this knowledge about general patterns of development will be helpful in developing policy to some extent.

I doubt whether even advanced knowledge of adolescent development and the particular characteristics of young violent offenders will produce a satisfactory schedule of punishments normed to age or prior offenses. The range of individual variation among children of the same age is notoriously large. The relationship of a particular young offender to the criminal harm is another important dimension affecting culpability, and this will interact with different ages in different ways. The significant variables in determining the proper punishment for a teen killer will not fit

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23 Zimring, supra note 9, at 75-81.

comfortably into a two dimensional sentencing grid. For such cases, I know of no acceptable alternative to the combination of wide potential sentencing frames, individual judicial judgments with reasons, and appellate review as a method of determining punishment in individual cases.

This lack of fit with price list sentencing is a special characteristic of adolescent homicide cases for two related reasons. The degree to which subjective elements influence deserved punishment is great in homicide cases of all kinds, so that a wide range of punishments should be available even before immaturity complicates matters. Punishment for homicide is a lousy environment for narrow band sentencing guidelines for any group. Adding multiple issues of diminished responsibility into the equations makes things ever more difficult to domesticate onto a guideline grid.

The second problem with anything approaching a youth homicide price list is a logical corollary of the importance of subjective factors such as intention or advertence in determining deserved punishment ranges. Price list sentencing works best when the major influence in the appropriate sentence is the type of harm inflicted rather than variations in the offender's subjective state or his capacity to control his behavior. If most burglaries should be punished within a relatively narrow range for offenders with equivalent criminal records, sentencing guidelines can be relatively specific and not unjust. The less dominant the particular offense is in defining the specific sentence, the less useful the sentencing guideline system that usually selects offense as the basic organizing category.

B. The Calculus of Juvenile Desert

Once the substantive decision is made to recognize immaturity as a mitigation of culpability and thus an influence on the range of deserved punishment, there are two different approaches that can be taken to the determination of appropriate sanctions for a particular young offender. I will label these approaches discounting and independent determination. In a discounting strategy, the starting point for a calculation of the deserved punishment for a youth would be the deserved punishment of an adult for the same

type of offense. If adult burglars with particular criminal histories typically get four years of penal confinement at sentencing, the way to calculate the appropriate penalty for a fifteen-year-old burglar is to determine a discount from the secure confinement sentence of an adult that is appropriate for fifteen-year-olds and then apply it. If, on the average, conditions of diminished responsibility for fifteen-year-olds should produce a fifty percent punishment reduction, one calculates the punishment for the fifteen-year-old by multiplying the adult sentence times 1.0 minus the discount, or in this case: 4 years x (1.0 - .5) = 2 years. This discounting strategy is directly dependent on the adult penalty for the type of punishment and its duration. Variations on this discountive methodology have been suggested for juveniles in criminal courts[24] and in juvenile court.[25]

Little has been written about how the wide variety of different characteristics of adolescent offenders might be translated into a schedule of discounts. Barry Feld, who advocates discounting for young offenders in criminal court as an alternative to the current juvenile court system, describes the process he imagines this way:

> This categorical approach might take the form of an explicit "youth discount" at sentencing. A fourteen-year-old offender would receive, for example, 25 percent of the adult penalty; a sixteen-year-old defendant, 50 percent; and an eighteen-year-old, the adult penalty, as is presently the case. The "deeper discounts" for younger offenders correspond to the developmental continuum of responsibility.[26]

This approach uses the same age-based discounts across all categories of offense type and liability.

A contrasting approach might take its hierarchy of offense seriousness from the adult system, so that burglary is regarded as

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[24] Barry C. Feld, Juvenile and Criminal Justice Systems' Responses to Youth Violence, *in* 24 Youth Violence 189, 246-47 (Michael Tonry & Mark H. Moore eds., 1998).

[25] Barbara Danziger Flicker, Institute of Jud. Admin. & American Bar Ass'n, Standards for Juvenile Justice: A Summary and Analysis 2 (1977).

[26] Feld, supra note 24, at 246-47. I constructed a table based on these standards in Franklin E. Zimring, Two Views of the Project, 91 Harv. L. Rev. 1934, 1938 (1978) (reviewing Juvenile Justice Standards Project (1977)).

less serious than robbery and more serious than theft, but would not use the average penal sanctions imposed on adults as the basis for computing the eventual penalty for the adolescent. For a number of reasons, I believe that such independent determinations of sanctions for young offenders are more appropriate in both juvenile and criminal courts.

The independent calculation of sanctions for young homicide offenders more accurately reflects both the nonquantifiable nature of criminal punishments and the large variation in levels of culpability that characterize adolescent homicide offenders. The average term of penal confinement for adult homicide offenders generally is an aggregate of many different grades of offenses and degrees of criminal culpability. Voluntary manslaughter time served is typically not much longer than sentences served for some nonfatal violent crimes. Second degree murder sentences are much longer in many jurisdictions. Aggregating the two groups of sentences and taking a group mean would provide a rather arbitrary measure of desert for adult killers. Providing separate averages for the two offense categories assumes that the types of homicides reflected in the adult distribution are also found among juveniles and that the relationship of blameworthiness in the two classes of cases is the same for juveniles in different homicide categories as it is for adults. This does not seem to be a plausible set of assumptions.

There is also no reason to suppose that terms of penal confinement express different levels of deserved condemnation in a ratio and proportion relationship. Is the community condemnation expressed in a ten-year sentence twice as much as in a five-year sentence, and is five years five times one year? If not, discounting should not be based on a fixed proportion of a term of confinement. If adult punishments are inexact, even crude measures of blameworthiness and variations in terms of confinement are only roughly correlated with levels of culpability, then providing a specified fraction of an adult penalty as a youth penalty or creating a schedule of different fractions is treating a crude and multiply determined average of prison time served as if it were a much more sensitive and accurate measure of the community's sense of deserved punishment. No matter how carefully the fractions are measured and reported, the enormous margin of error to be found

in any measure of sentence served for adult homicide crime as an indication of desert cannot be reduced. Indeed, it turns out that any system of discounting fractions for young offenders may exacerbate the problems that result from the problematic nature of adult penalties as a currency of culpability.

In the first place, age is an incomplete proxy for levels of maturity during the years from twelve to eighteen. The variation among individuals of the same age is great, and individualized determinations of immaturity are thus superior to averages based on aggregate patterns.[27] Secondly, the vulnerabilities associated with early and middle adolescence play a more important part in explaining some patterns of homicide than others. The passive accomplice who acquiesces in a robbery that turns lethal rather than be called chicken by his peers is a more attractive candidate for extensive mitigation of punishment than his same-age peer who instigated the robbery plan, even though that more active role was also motivated by the need to make a positive social impression. Some types of provocation in group conflict situations may also lead us to extensive mitigation as when the thirteen-year-old in Oakland was accused of being "too chicken" to shoot his victim in the case mentioned in Part II. Situations that put extreme pressure on particular vulnerabilities characteristic of adolescents are strong candidates for sharply reduced punishment when a fatality results. And, the large variation in level of achieved maturity interacts with the differential vulnerabilities found in different circumstances to present a complicated landscape, one much too complex for the sentencer to be comfortable with an age-determined series of presumed discounts from a standing price list of penalties.

My own view is that measuring mitigated penalties as a percentage of usual time served would be an inappropriate strategy in both juvenile and criminal courts. In juvenile court, the expected sentence for an adult guilty of a similar offense may be only remotely related to the proper disposition of the youthful offender. The type of confinement to be served is different, the adolescent and the adult have different senses of time, and the mix of purposes behind sanctioning decisions is also not the same as in the criminal court.

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27 Franklin E. Zimring, The Changing Legal World of Adolescence 126 (1982).

The case for fixed discounts might seem stronger for young offenders being sentenced in criminal courts but is still far from compelling. The criminal law has extensive experience in creating offense categories to allow mitigated punishment for homicide offenders. Second-degree murder was invented as one such mitigation strategy; voluntary manslaughter is another. It is worth noting that nowhere was the penalty for manslaughter derived as a fraction of the penalty for first-degree murder. Each step down the ladder of culpability for homicide has its own penalty range that has never in my experience been derived as a fraction of the going rate for particular grades of murder.

The traditional method of special sentences for youth in criminal courts also avoided deriving punishments for kids by using a particular fraction of adult penalties in the United States or in Europe. Instead, indeterminate terms with relatively short minimum sentences is the typical pattern of young offender sentences in the U.S. federal system prior to 1984 and in Germany. That fixed discounts have never been adopted as the mechanism to implement diminished responsibility should inspire caution.

C. Constructive Doctrine and Adolescent Homicide Liability

A cluster of related doctrines impose criminal liability on adults for the lethal acts of others and for deaths that they might cause, even if a particular defendant did not have a specific intent to injure. These doctrines include the felony murder rules, the doctrine of accessorial liability, and rules that accessories are guilty of the criminal acts committed by those they have aided or agreed to aid in the commission of a crime. A standard criminal law example of the web of constructive liability begins with A, B, and C agreeing to rob a convenience store. A provides the plans for this caper but stays home. B drives C to the store but waits in the car. C pulls a gun on the resistant salesclerk. The gun goes off during the struggle, and the salesclerk is mortally wounded. A, B, and C are all guilty of first-degree murder under the standard analysis in the great majority of American states. The rules of accessorial liability make A and B liable for C's acts in furtherance of their common design. The felony murder rules make intending to further the robbery a sufficient mental state to generate liability

for first-degree murder if the robbery causes a death. The intention to commit the robbery is the legal equivalent of malice, and murder statutes typically impose first-degree murder liability on all parties accountable for the forcible felony that caused the death.[28]

Rules relating to accessorial liability are of great importance to adolescent offenders because group involvement is greater in teen violence than at any other age. Our analysis of Federal Bureau of Investigation homicide data shows that just over half of all persons arrested for homicide under eighteen were involved in an offense in which at least one other homicide arrest was made. That is more than twice the proportion of multiple arrest defendants in the over-eighteen homicide arrests (fifty-one percent versus twenty-three percent).[29] Felony murder doctrine is also important—about one-fifth of all homicide arrests of persons under eighteen are for police-nominated felony killings.

Accessorial liability can interact with the vulnerability of adolescents to group pressure to create very marginal conditions for extensive criminal sanctions. This is not to deny that some juvenile accomplices may have played dominant roles in particular deaths. Instead, I would argue that the range of culpability to be found in the distribution of adolescent accomplices to killings is very great and that the culpability at the low end of the seriousness distribution should be rather small. A case can be made for allowing the waiver of a youth to criminal court on solely accessorial responsibility for a killing only if there is evidence that the particular defendant knew of and encouraged the use of lethal force to inflict a wound. In a justice system in which only homicide leads to transfer in large proportions, requiring more than constructive liability for homicide would seem to make sense.

I know of no extensive analysis of felony murder and accessorial liability for adolescent offenders. Perhaps large numbers of accused accessories being transferred into the criminal courts will lead to the first sustained dialogue about deserved punishment and modes of adolescent co-offending in the history of Anglo-

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28 Franklin E. Zimring & James Zuehl, Victim Injury and Death in Urban Robbery: A Chicago Study, 15 J. Legal Stud. 1, 31 (1986).

29 Audio tape of Uniform Crime Reports: Supplementary Homicide Reports, held by the Federal Bureau of Investigation, U.S. Dep't of Justice (1994-95).

American criminal law.

The case for substantial mitigation from solely accessorial responsibility for a killing is based on the greater emphasis on subjective culpability for the accomplice. The felony murder rule might be a distinguishable case from other accessory situations. The felony murder rule imposes strict liability, so there is no requirement of a subjective mental state beyond the intention to commit a forcible felony to serve as the foundation for substantial mitigation on account of immaturity. It might be argued, however, that the law assumes maturity and capacity beyond ordinary adolescent attainments as the foundation on which strict liability for the outcome of forcible felonies is based. The question is not one that has received any sustained attention during a period when most adolescent homicides were disposed of in low-stakes and informal juvenile court hearings, but it would be possible for a court to find that the imposition of strict liability felony-murder-style depends on more than minimal capacity for criminal liability generally.

As a practical matter, if transfer to criminal court is to be restricted to cases that are the moral equivalent of intentional homicide, such a transfer should not be based solely on liability for the homicidal acts of another under the felony murder rules. This type of restriction would not eliminate criminal court processing of felony killings. But, it would restrict the defendants to those whose active support and participation in the acts that cause death can be established. The system's most serious sanctions should be reserved for those young offenders whose participation in homicide was not solely as a nonaggressive accomplice. Strict liability to murder prosecution should be reserved for more experienced forcible felons.

D. Capital Punishment and the Adolescent Killer

The only legal issue concerning the diminished capacity of adolescent killers that has received sustained attention in the United States is the constitutional question of whether the Eighth Amendment's prohibition of cruel and unusual punishment implies that very young killers cannot be executed. Defense attorneys had sought a per se exclusion of persons under eighteen at the time

an offense was committed from eligibility for the death penalty, arguing from minimum ages that are observed in other death penalty nations and in several American death penalty states. The U.S. Supreme Court declined that invitation but has excluded the eventual execution of offenders under sixteen at the time the crime was committed on Eighth Amendment grounds even if the offender is otherwise competent and culpable.

The reasoning of the justices in *Eddings v. Oklahoma*[30] and *Thompson v. Oklahoma*[31] does not provide clear exposition on questions of diminished responsibility for adolescent killers for three reasons. First, the issue comes up in a death penalty context, and strong categorical sentiments about capital punishment dominate the responses of many observers to detailed questions about death penalty policy. In order to put great weight on the importance of a defendant's youth as a diminishment of responsibility after *Thompson*, it is first necessary to remove the principles to be found in the cases from a solely death penalty context. This has not yet been done.

A second major restriction in the Eighth Amendment cases is the limited basis for constitutional review. It is not the self-appointed duty of the federal Supreme Court to draw a minimum age for execution eligibility that would be appropriate on policy grounds. Instead, the Court will only limit state power when clear violations of contemporary standards of decency would otherwise occur. The standards the Court has established may well be far short of the appropriate policy on minimum age that many of the justices would choose as appropriate in a legislative or state common law standard setting role.

The third reason these Eighth Amendment cases are not good guidance on diminished responsibility is that the method of analysis in the Supreme Court put its emphasis on the practices in various punishment systems rather than the reasons behind those practices. *Thompson*, for example, exposes the reader to a debate about how many states have implicit or explicit minimum ages for death penalty eligibility, instead of a debate about why such

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30 455 U.S. 104 (1982).
31 487 U.S. 815 (1988).

minimum ages might be regarded as necessary to a morally coherent death penalty.[32] So, the illumination this provides on basic issues about adolescent capacity and culpability is indirect at best. Concerns about diminished capacity may be the reason for minimum age standards in states and nations that observe all limits for the death penalty, but it is the age limits rather than the rationale for them that has center stage in the constitutional debate.

With these considerable limits, the death penalty case law still has value as precedent in any discussion of a defendant's youth as a mitigating factor in determining the appropriate punishment for criminal homicide. The four judge plurality in *Thompson* endorsed a prohibition on death for all offenders under sixteen, while the O'Conner concurrence supported that result in the circumstances of the Oklahoma statute.[33] If the Constitution forbids executing anyone for any crime committed prior to age sixteen, this must be because a presumption of diminished capacity requires such minimum age standards under the Eighth Amendment. There would be no Eighth Amendment minimum if the justices thought these presumptuous without substantive content. When age at the time of the offense is the standard, the substantive content being enforced must be a notion of diminished culpability for the crime rather than incapacity to comprehend the punishment.

If one reads *Thompson* as suggesting a ban on executions for crimes committed under age sixteen, the use of a sixteenth birthday limit for the per se Eighth Amendment rule should not be regarded as an endorsement for the execution of sixteen and seventeen year olds who commit murder. The Court has clearly indicated that juries must be instructed that youth beyond the sixteenth birthday can be taken into account in the penalty trial.[34] And, if *Thompson* is a per se rule for under sixteen, it is the only instance in death penalty jurisprudence where a defendant responsible for a capital murder cannot be executed by reason of diminished capacity at the time of the crime.

Even though the standards for the Eighth Amendment are quite

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32 Compare Thompson, 487 U.S. at 826-29 (Stevens, J.), with id. at 867-70 (Scalia, J., dissenting).

33 Id. at 848-59 (O'Connor, J., concurring).

34 Eddings, 455 U.S. at 113-14.

loose, the peculiar facts of capital punishment in the United States could well support an extension of proportionality limits to the seventeenth or eighteenth birthday. With less than one execution for every two hundred killings, only the most blameworthy of killers should be selected for a capital sanction. On what facts would a sixteen or seventeen year old killer be found in the top one percent of heinousness? While it might be awkward for a federal court to restrain state death sentences on the young because of the distribution of death sentences in other cases, state court proportionality review can and should measure the sentences issued to adolescents against the real politics of sentences and execution.

The struggle in the Supreme Court over death as a sanction for young killers has its broadest impact because it establishes general principles to govern the sentencing of young offenders in criminal court. Cases like *Eddings* and *Thompson* involve defendants already waived from juvenile court and convicted of aggravated murder in criminal courts. By restricting the availability of the death sentence, the Court has already recognized that the defendant's youthful status follows him or her into criminal court and precludes the treatment of any young person within criminal court jurisdiction as fully adult for all purposes. The magical thinking of regarding young persons as no longer young when transferred to criminal court is not only irrational, but also against the weight of U.S. Supreme Court authority. The principle was invoked in Eighth Amendment jurisprudence because of the special status of the death penalty. But, the Court's emphasis on the fact of youth rather than the form of court is a principle of general applicability.

CONCLUSION

The search for appropriate legal standards for adolescent homicide offenses is important in its own right and also an example of the type of analysis that is necessary to determine just punishments for other types of adolescent offenders in criminal courts. There is very little legal analysis or argument currently addressing the punishment of serious adolescent offenders in criminal court. This Essay is intended as a demonstration of the variety and complexity of questions that are confronted when the substantive criminal law of homicide is measured against the circumstances and developmental limits usually found in adolescent homicide

cases.

The conventional belief about punishment decisions for youth homicide offenders is that the important decisions have been made once the issue of transfer to criminal court has been decided. Not so. Rather than being the end of difficult decisions, the transfer determination should be regarded as the beginning of a series of factual and legal inquiries as subtle, as problematic, and as controversial as can be found in the modern criminal law of personal violence.

Building principle into the punishment of adolescent homicide offenders in criminal courts has been, for some time, an unmet challenge for American criminal law. The increase in automatic transfer cases and the high priority of youth violence in penal policy remind us that a void in principles at the heart of the legal response to homicide becomes a greater embarrassment with each passing day.