
FURTHER DEVELOPMENTS ON PREVIOUS SYMPOSIA

KIDS WHO KILL: A CRITIQUE OF HOW THE AMERICAN LEGAL SYSTEM DEALS WITH JUVENILES WHO COMMIT HOMICIDE

MIRAH A. HOROWITZ*

I

INTRODUCTION

Twenty years ago, sixteen-year-old Brenda Spencer shocked the nation when she opened fire at Grover Cleveland Elementary, killing the principal and custodian, and wounding eight children.¹ In today's world, such horrifying school shootings have become almost commonplace. In 1997, two separate shooting rampages took the lives of seven students. The first occurred on October 1 in Pearl, Mississippi, when sixteen-year-old Luke Woodham killed his mother before killing three students and wounding seven others at his high school.² The second school shooting that year occurred on December 1 in West Paducah, Kentucky, when fourteen-year-old Michael Carneal killed three students at a morning high school prayer meeting.³ In 1998, almost three times as many students lost their lives in school shootings. On March 24 in Jonesboro, Arkansas, thirteen-year-old Mitchell Johnson and eleven-year-old Andrew Golden killed four schoolmates and a teacher after setting the fire alarm to draw their victims out into their line of fire.⁴ On May 21 in Springfield, Oregon, fifteen-year-old Kip Kinkel killed his parents and later opened fire in the school cafeteria, shooting twenty-four classmates, two fatally.⁵ The largest, most frightening school massacre occurred on April 20, 1999, in Littleton, Colorado, when Eric Harris, eighteen, and Dylan Klebold, seventeen, opened fire at Columbine High School, killing thirteen people before taking their own lives.⁶

Copyright © 2000 by Mirah A. Horowitz

This note is also available at <http://www.law.duke.edu/journals/63LCPHorowitz>.

* J.D., May 2000, Duke University School of Law.

The author would like to thank Lenore Horowitz and Mat Kendall for their invaluable help and support.

1. See Tamara Jones, *Echoes of a Different Schoolyard*, WASH. POST, Apr. 23, 1999, at C1.

2. See JAMES GARBARINO, LOST BOYS 2-3 (1999).

3. See *id.*

4. See *id.* at 3, 132.

5. See *id.* at 3.

6. See Jonathan Rauch, *Hey, Kids! Don't Read This!*, 31 NAT'L J. 2003 (1999); Charlie Brennan, *Death, Murder Once Ran Through Cassie's Mind*, DENVER ROCKY MOUNTAIN NEWS, Sept. 10, 1999, at 4A.

As these high profile events escalate, so do the thousands of less visible homicides that occur daily in inner cities and in poor, minority neighborhoods. Approximately twenty-three thousand homicides occur each year in the United States, roughly ten percent of which involve a perpetrator who is under eighteen years of age.⁷ Between the mid 1980s and the mid 1990s, the number of youths committing homicides had increased by 168%.⁸ Juveniles currently account for one in six murder arrests (17%),⁹ and the age of those juveniles gets younger and younger every year. For example, in North Carolina in 1997, seventy juveniles under eighteen years of age were arrested on murder charges. Thirty-five were seventeen, twenty-four were sixteen, seven were fifteen, and four were thirteen or fourteen.¹⁰ In 1999, for the first time in North Carolina's history, two eleven-year-old twins were charged with the premeditated murder of their father as well as the attempted murder of their mother and sister.¹¹

As a result of both the increase in the juvenile homicide rates and the increase in highly publicized school shootings, Americans are demanding harsher punishments for the juveniles that commit them. For example, "[i]n the days after the Jonesboro, Arkansas, shootings in March 1998, an opinion poll revealed that about half the adults in America believed that the two boys who shot their classmates should receive the death penalty."¹² Those boys were thirteen and eleven years of age. Facing strong, punishment-oriented constituencies, legislators and prosecutors are seeking to impose the death penalty on younger and younger offenders, both through the legislation they propose and the punishments they seek in trial. When seeking the death penalty for juveniles under the age of sixteen, these legislators and prosecutors do not seem to be concerned with the United States Supreme Court constitutional requirement that offenders be at least sixteen before they can be sentenced to death.¹³

The issue of whether the imposition of the death penalty is constitutional under the cruel and unusual punishment prohibition of the United States Constitution has long been debated. On February 3, 1997, the American Bar Association ("ABA") called for a moratorium on the death penalty until serious flaws in its administration could be corrected.¹⁴ Among the most serious problems cited was the Supreme Court's refusal to prohibit the execution of juvenile

Bernall Family's Book Chronicles Years Before Her Death at Columbine, LONDON FREE PRESS, Sept. 27, 1999.

7. See GARBARINO, *supra* note 2, at 6.

8. See *id.* at 7.

9. See Victor Streib, *Executing Women, Children, and the Retarded: Second Class Citizens in Capital Punishment*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 206 (James R. Acker et al. eds., 1998) [hereinafter Streib, *Executing Women*].

10. See Anne Saker, *Twins' Shooting Puzzles Experts 11 Year-Olds' Acts Defy Explanation*, NEWS & OBSERVER, Apr. 11, 1999, at A1.

11. See *id.*

12. GARBARINO, *supra* note 2, at 20.

13. See *Stanford v. Kentucky*, 492 U.S. 361 (1989).

14. See American Bar Association, Resolution of the House of Delegates (Feb. 1997); American Bar Association, Report No. 107 (1997), reprinted in Appendix, 61 LAW & CONTEMP. PROBS. 219 (Autumn 1998).

offenders under the age of eighteen.¹⁵ In a recent symposium of *Law and Contemporary Problems* entitled “The ABA’s Proposed Moratorium on the Death Penalty,”¹⁶ Victor L. Streib, Carol Steiker, and Jordan Steiker supported the ABA’s position that the juvenile death penalty should be eliminated.

This note attempts to carry their arguments forward by looking more deeply at why juveniles commit homicides, and by suggesting more effective ways for society to address the problem presented by child killers. Part II describes the history of the death penalty in the United States, both as it has been applied in practice and how it has been viewed by the Supreme Court. Part III discusses the history of the juvenile death penalty, the circumstances under which it has been imposed in the United States, how it has been treated by the Supreme Court, and how it is viewed by the international community. Part IV looks at the many different factors that may induce a child to kill. This section demonstrates that “juveniles on death row have a disproportionate number of social and psychological problems, including unstable and abusive family backgrounds, drug and alcohol addiction at a very young age, mental illness and brain damage.”¹⁷ Part V discusses the problems with the current system, which allows sixteen and seventeen-year-old offenders to be sentenced to death, and demonstrates how this practice runs counter to the basic assumptions about juveniles that underlay other areas of both civil and criminal law. Particularly important is the system’s failure to recognize the fundamental differences that distinguish juveniles under the age of eighteen from adults, differences that reduce the criminal culpability of juvenile offenders. Finally, Part VI suggests other possible solutions for dealing with the increase in juvenile homicides in today’s society.

II

HISTORY OF THE DEATH PENALTY

The United States has considered the death penalty an acceptable form of punishment for over four centuries. Nearly eighteen thousand lawful executions have occurred in U.S. territories, the earliest occurring in 1608 in colonial Virginia.¹⁸ At that time, the death penalty was not limited to punishment for murder. In many jurisdictions, the death penalty could be imposed for crimes such as rape, kidnapping, armed robbery and even some assaults.¹⁹ “At the time of the American Revolution, all of the colonies except Rhode Island had 10 or

15. See James E. Coleman, Jr., *Foreword*, 61 LAW & CONTEMP. PROBS. 1, 1 (Autumn 1998).

16. Symposium, *The ABA’s Proposed Moratorium on the Death Penalty*, 61 LAW & CONTEMP. PROBS. 1 (Autumn 1998).

17. Barbara Frey, *International Standards and the Execution of Juvenile Defendants*, in MACHINERY OF DEATH 80 (Enid Harlow et al. eds., 1995).

18. See James R. Acker et al., *American’s Experiment with Capital Punishment in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT* 5 (James R. Acker et al. eds., 1998).

19. See Carol S. Steiker & Jordan M. Steiker, *Judicial Developments in Capital Punishment Law in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT* 51 (James R. Acker et al. eds., 1998).

more capital crimes on their books.”²⁰ Although capital punishment has always held a prominent place in the criminal law history of the United States, the United States Supreme Court did not address its constitutionality until the 1970s, denying certiorari to the increasing number of challenges that arose during the 1950s and 1960s and allowing the states to impose capital punishment however they saw fit.²¹

In the landmark case of *Furman v. Georgia*,²² the Supreme Court found that the extraordinary amount of discretion given to juries in the sentencing phase of capital trials violated the prohibition on cruel and unusual punishment established by the Eighth Amendment.²³ The decision effectively stalled capital punishment in the states, as legislators struggled to create statutes that met *Furman*'s constitutional requirements. Beginning what has been considered a new era of death penalty jurisprudence, the decision mandated that capital punishment must measurably further two goals in order to survive a constitutional challenge: the goals of retribution and deterrence.²⁴ Whether these goals are served has become a critical factor in determining whether the death penalty, as applied to a particular section of society, survives constitutional scrutiny.

Despite an increase in the constitutional litigation of capital punishment during the 1950s and 1960s, the Court did not agree to review the constitutionality of the death penalty until its 1972 *Furman* decision. *Furman* followed one year after a due process challenge to the unguided discretion in capital sentencing failed in *McGautha v. California*.²⁵ McGautha argued that the unbridled discretion of juries in sentencing capital cases violated his right not to be deprived of life without due process of law. In response, Justice Harlan, writing for the majority, indicated his belief that creating standards to effectively guide jury sentencing discretion would be not only impossible, but unnecessary.²⁶ He believed the jury could be trusted to make the decision between life and death.²⁷

Bringing their claim at a time when popular support for the death penalty was waning, the petitioners in *Furman* advanced a completely different theory. They argued that imposing the death penalty was no longer consistent with American values, and therefore constituted cruel and unusual punishment, which is prohibited by the Eighth Amendment.²⁸ The Court did not find that

20. James R. Acker & Charles S. Lanier, *Beyond Human Ability? The Rise and Fall of Death Penalty Legislation*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT* 82 (James R. Acker et al. eds., 1998).

21. See Steiker & Steiker, *supra* note 19, at 48-49.

22. 408 U.S. 238 (1972).

23. See *Furman v. Georgia*, 408 U.S. 238, 239 (1972).

24. See *id.* at 311 (1972) (White, J., concurring).

25. 402 U.S. 183 (1971); see also Acker & Lanier, *supra* note 20, at 80.

26. See *McGautha v. California*, 403 U.S. 183, 208 (1971).

27. See *id.*

28. See *Furman*, 408 U.S. at 285 (“The question, then, is whether the deliberate infliction of death is *today* consistent with the command of the Clause that the state may not inflict punishments that do not comport with human dignity.”) (emphasis added); see *id.* at 291 (“In comparison to all other punishments *today*, then, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity.”) (emphasis added); see also *Gregg v. Georgia*, 428 U.S. 153, 179 (1976) (“*Furman* and

the death penalty was cruel and unusual punishment per se, but made clear that the current state practices implementing the death penalty were unconstitutional due to the unguided sentencing discretion given to juries.²⁹ The infrequency of death sentences and executions demonstrated a great disparity between the death penalty's availability and its use. No evidence suggested that a sentence of death was saved for the "worst" offenses in the death-eligible class.³⁰ This, coupled with the jury's unbridled discretion, made the decision between life and death unacceptably arbitrary. A punishment handed down so arbitrarily and infrequently did not serve either the retributive or the deterrent functions of the death penalty.³¹

Although the immediate effect of the *Furman* decision was to invalidate the death penalty statutes in thirty-nine states, the District of Columbia, and the federal government, the decision left unclear the standards that had to be met to make the death penalty constitutional. Because each of the five majority justices and each of the four dissenters appended a detailed conclusion to the per curiam opinion, legislatures had difficulty making an exact determination of the criteria capital statutes had to meet. Then, in 1976, the Court clarified its *Furman* holding when it upheld three newly amended death penalty statutes and struck down two others.³² In *Gregg v. Georgia*, the Court seemed to set out a three-prong test for judging when a punishment of death was appropriate. First, the punishment must not have been forbidden at the time the Bill of Rights was adopted.³³ Second, the punishment must not violate "the evolving standards of decency that marked the progress of a maturing society."³⁴ And, third, the punishment must not be "so excessive or disproportionate as to be inconsistent with the basic concepts of human dignity."³⁵ While this test may appear helpful at first glance, neither *Gregg* nor its companion decisions clarified how to determine society's evolving standards of decency, as each statute was upheld or struck down for its own mix of procedural protections or lack thereof.³⁶ The Court did make clear, however, that a mandatory death sentence was not constitutionally acceptable.³⁷ The death penalty could not be imposed without individual consideration of the particular circumstances surrounding

its companion cases predicated their argument primarily upon the asserted proposition that standards of decency had evolved to the point where capital punishment could no longer be tolerated.").

29. See *Furman*, 408 U.S. at 305-06 (Brennan, J., concurring); see *id.* at 369-71 (Marshall, J., concurring).

30. See *Furman*, 408 U.S. at 291-95 (Brennan, J., concurring).

31. See, e.g., *Furman*, 408 U.S. at 311 (White, J., concurring).

32. See Steiker & Steiker, *supra* note 19, at 50. In 1976, the Supreme Court upheld death penalty statutes challenged in *Gregg v. Georgia*, 428 U.S. 153 (1976), *Jurek v. Texas*, 428 U.S. 262 (1976), and *Proffitt v. Florida*, 428 U.S. 242 (1976). It struck down the death penalty statutes challenged in *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 428 U.S. 325 (1976).

33. See *Gregg*, 428 U.S. at 177 (1976).

34. Marcia Johnson, *Juvenile Justice*, 17 WHITTIER L. REV. 713, 758 (1996) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (Warren, C.J., plurality opinion)).

35. *Id.* (citation omitted).

36. See Steiker & Steiker, *supra* note 19, at 50.

37. See *Woodson v. North Carolina*, 428 U.S. 280 (1976); Steiker & Steiker, *supra* note 19, at 57.

the offense and the offender, including both the aggravating factors warranting death and the mitigating factors supporting a lesser sentence. By its very nature, a mandatory death sentence could not allow for any individualized consideration.

Several overlapping and sometimes inconsistent themes emerge from the Court's post-*Furman* decisions upholding various state death penalty statutes.³⁸ First, state death penalty statutes must narrow the class of offenders eligible for the death penalty so that punishment is imposed only upon the "worst" offenders.³⁹ Second, death penalty statutes must provide clear guidelines that establish when offenders are death-eligible so that the sentencer remains focused on the relevant information during the sentencing phase.⁴⁰ Third, capital defendants must be given the right to present, and to have the sentencer consider, all mitigating factors that might warrant a sentence less than death. This factor, the need for individualized determinations, is in constant tension with the need to make sure that death penalty statutes carry sufficient guidelines to ensure that sentences are not imposed arbitrarily.⁴¹ Finally, death sentences must meet a standard of "heightened reliability"—another precaution against arbitrariness.⁴² To meet this standard, state supreme courts immediately review death sentences to ensure that the punishment imposed does not exceed that which other offenders have received for similar offenses.

III

THE JUVENILE DEATH PENALTY

A. History of Executing Juveniles in the United States

The first recorded state execution of a condemned juvenile was in 1642, when Thomas Graunger was put to death in Plymouth Colony, Massachusetts.⁴³ Before that time, colonial America's favored punishment for juvenile offenders was to have parents "beat the devil" out of their child if he or she committed a crime.⁴⁴ Parents could be required to publicly execute, whip, or even banish their children if society found them to be criminally liable.⁴⁵

38. See Steiker & Steiker, *supra* note 19, at 51-52, 57.

39. See *id.* at 52-53.

40. See *id.* at 54-55.

41. See *id.* at 55-56.

42. See *id.*

43. See Victor L. Streib, Ohio Northern University, *The Juvenile Death Penalty Today: Death Sentences and Executions For Juvenile Crimes, January 1, 1973—June 30, 1999* (visited June 15, 2000) <<http://www.law.onu.edu/faculty/streib/juvdeath.htm>> [hereinafter Streib, *Juvenile Death Penalty Today*].

44. See Mary E. Spring, Comment, *Extended Jurisdiction Juvenile Prosecution: A New Approach to the Problem of Juvenile Delinquency in Illinois*, 31 J. MARSHALL L. REV. 1351, 1354-55 (1998).

45. See *id.*

In the three and a half centuries since the first execution of a juvenile offender, 361 Americans have been executed for crimes committed as juveniles.⁴⁶ Thirty-eight states and the federal government have carried out these executions, which comprise only 1.8% of the total confirmed American executions since 1608.⁴⁷ Seventeen of these executions have taken place since 1973, during the current era of post-*Furman* death penalty jurisprudence, and nine have occurred in Texas.⁴⁸ Although stays on death row used to last only a few years, current juvenile offenders can spend between six and twenty years on death row.⁴⁹

The seventeen executions that have occurred in the post-*Furman* era represent only a fraction of the 172 juvenile death sentences that have been imposed during that time.⁵⁰ Juvenile death sentences account for only 2.7% of the total number of death sentences imposed in the United States since 1973.⁵¹ Twenty-two states are responsible for imposing these juvenile death sentences, over two-thirds of which have been imposed on seventeen-year-old offenders.⁵² The rest have been imposed on fifteen- and sixteen-year-old offenders. No death sentences have been imposed on offenders who were fourteen or younger at the time of their crime.⁵³ Only sixty-seven of the 172 (39%) death sentences imposed during the current era are currently in force. Thirteen (7%) of those have resulted in executions, and ninety-two (53%) have been reversed.⁵⁴ Excluding the cases still pending appeal, the reversal rate for death sentences imposed on juvenile offenders is 89%.⁵⁵

While the imposition of death sentences on juvenile offenders has remained fairly constant in the post-*Furman* era, the number of actual executions has increased sharply during the 1990s.⁵⁶ Ten of the thirteen post-*Furman* executions of juvenile offenders have occurred during this decade. One juvenile offender was executed in 1990, another in 1992, four in the last six months of 1993, three in 1998, and one in 1999.⁵⁷ The last juvenile offender to be executed was Sean Sellers, who was age sixteen at the time of his offense.⁵⁸

46. See Streib, *Juvenile Death Penalty Today*, *supra* note 43, at 8.

47. See *id.*

48. See *id.*

49. See *id.*

50. See *id.*

51. See Victor Streib, *Moratorium on the Death Penalty For Juveniles*, 61 LAW & CONTEMP. PROBS. 55, 67 (Autumn 1998) [hereinafter Streib, *Moratorium on the Death Penalty*].

52. See *id.* at 69.

53. See *id.* at 67.

54. See Streib, *Juvenile Death Penalty Today*, *supra* note 43.

55. See Streib, *Moratorium on the Death Penalty*, *supra* note 51, at 69.

56. See Streib, *Executing Women*, *supra* note 9, at 206.

57. See Streib, *Juvenile Death Penalty Today*, *supra* note 43.

58. See *id.*

Sean Sellers was the first offender under the age of seventeen to be executed since 1959.⁵⁹ Sellers was sentenced to death for killing a convenience store clerk and then shooting and killing his mother and stepfather a few months later.⁶⁰ This “exceptionally bright student” got involved in a self-styled satanic cult, which developed out of his interests in Satanism and the fantasy game of Dungeons and Dragons.⁶¹ Soon Sellers had “dropped off the high school honor roll, lost interest in sports . . . and was conducting satanic worship services in an abandoned farmhouse with eight or so other youths who joined his self-styled cult.”⁶² In the course of one sacrificial ritual, the boys stole a .357 magnum and shot a convenience store clerk who had once refused to sell them beer.⁶³ A few months later, Sellers killed his parents as part of a satanic ritual when they refused to let him see his girlfriend and dragged him back home following an attempt to run away.⁶⁴ At trial, the jury rejected his insanity defense and sentenced him to die.⁶⁵

B. How the Law Views Juveniles

Criminal law has always held juveniles to a different standard of accountability from adults. In the 1600s, the law established the age of seven as the point after which a child could be held criminally responsible for his or her actions.⁶⁶ Because children under the age of seven did not understand the consequences of their actions and therefore could not be held responsible for them, they were deemed, as a matter of law, unable to form the intent required to be culpable for a criminal act.⁶⁷ Children over the age of seven who were found criminally culpable would face adult punishments because they had the requisite maturity to understand the consequences of their actions.⁶⁸ While capital punishment for juvenile offenders was not specifically addressed in the seventeenth century, the death penalty was not reserved for those we consider “adults” in the twentieth century. Although there are no recorded executions of juveniles during that period, Connecticut law, which embraced the Biblical Law as set forth in the Book of Exodus, imposed capital punishment on children sixteen or older, if they merely cursed or hit their parents.⁶⁹

The view that punishing children below a certain age was inherently different from punishing adults persisted through the eighteenth century. According to Blackstone’s Commentaries, published in 1768, “infants under the age of dis-

59. See Streib, *Executing Women*, *supra* note 9, at 207 (noting that Leonard M. Shockley, age 16 at the time of his crime, was executed on April 10, 1959 in Maryland).

60. See CHARLES PATRICK EWING, *WHEN CHILDREN KILL* 71-72 (1990).

61. *Id.* at 72.

62. *Id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. *See* Johnson, *supra* note 34, at 717.

67. *See id.*

68. *See id.*

69. *See* Spring, *supra* note 44, at 1351 n.33.

cretion ought not to be punished by any criminal prosecution whatever . . . the age of discretion is.”⁷⁰ When children were too young to understand their criminal conduct, it was the parent’s responsibility, not the state’s, to determine the appropriate punishment. Because children knew that they were required to obey their parents before they knew or understood the laws of the state, the state would not interfere with the parent’s punishment.⁷¹

The Industrial Revolution created a major shift in the way the United States viewed and treated its juvenile offenders.⁷² As children left their homes and farms to enter the nation’s work force, the responsibility for punishment shifted from the parent to the state.⁷³ States created “houses of refuge” where delinquent children were detained, and although this policy was ultimately unsuccessful in curbing the growing tide of juvenile delinquency, it paved the way for the state-administered reform schools of the mid-nineteenth century.⁷⁴ Unfortunately, these reform schools also failed to live up to expectations because the poor post-Civil War economy forced them to operate more as warehouses, where children were exploited for their labor, than as rehabilitative facilities, where children were prepared to re-enter society. Looking for a more effective solution, reformers eventually created the juvenile court system.⁷⁵

Based on the idea that caring for juvenile offenders in a healthy home environment would best serve the child’s welfare, Illinois opened the first juvenile court for offenders under the age of sixteen in 1899.⁷⁶ The juvenile court system was intended “to protect the state’s right to use *parens patriae* for official intervention in the juvenile’s life, especially if the youth was neglected.”⁷⁷ By 1912, all the states except two had established juvenile court systems.⁷⁸ Although the primary goal of the juvenile court was rehabilitating the child, as juvenile crime continued to increase in the twentieth century, the emphasis slowly shifted toward controlling the juvenile offenders rather than meeting their special needs.⁷⁹

The sharpest shift in society’s attitude toward juvenile offenders occurred in the 1970s, when children began committing violent crimes with much greater frequency.⁸⁰ Once society decided that stronger punishment was the answer, rehabilitation never again became a primary concern. The 1987 federal sentencing guidelines reflected the continued perception that the juvenile justice system needed to be replaced by a more punitive system.⁸¹ Escalating juvenile

70. Johnson, *supra* note 34, at 749.

71. *See id.* at 717.

72. *See* Spring, *supra* note 44, at 1355.

73. *See id.*

74. *See id.*

75. *See id.* at 1356.

76. *See* Johnson, *supra* note 34, at 718; Spring, *supra* note 44, at 1356.

77. Kelly Keimig Elsea, *The Juvenile Crime Debate: Rehabilitation, Punishment, or Prevention*, 5 KAN. J.L. & PUB. POL’Y 135, 137 (1995).

78. *See id.*

79. *See* Spring, *supra* note 44, at 1356-57.

80. *See id.* at 1358.

81. *See* Johnson, *supra* note 34, at 721-22.

crime rates convinced legislatures that state juvenile courts were not able to sufficiently punish or deter juvenile offenders. As part of America's new "get tough" attitude toward juvenile crime, certain offenses required automatic transfer to adult criminal court.⁸² In other cases, either the prosecutors or the court itself would make the decision regarding whether an offender should be transferred.⁸³ These new provisions for transfer implicitly indicated that juvenile offenders would be subject to the same punishments that the courts could give adults guilty of the same offense.⁸⁴ Under the transfer system, non-mandatory judicial waiver requires a hearing to determine whether the juvenile is amenable to treatment or is a threat to public safety. This determination is based, among other things, on the seriousness of the offense, the manner in which it was committed, the maturity of the juvenile, his or her prior criminal record, and the prospect of rehabilitation.⁸⁵ Although each of those factors can theoretically be outweighed by another, serious felonies—such as homicide—almost always result in transfer to adult criminal court.⁸⁶

C. How Juveniles Are Treated Outside Criminal Law

Legislatures have distinguished juveniles from adults in many aspects of the law, revealing much about society's expectations for the responsibility of juveniles for their actions.⁸⁷ All states but two have established a uniform age of majority of eighteen or above.⁸⁸ No state allows minors under eighteen either to vote or to sit on a jury.⁸⁹ Only four states allow minors under eighteen to marry without parental consent; only fourteen states allow minors under eighteen to consent to medical treatment; and only seventeen states allow minors under eighteen to drive automobiles without parental consent.⁹⁰ Forty-two states prevent minors under eighteen from purchasing pornographic materials, and in those states where gambling is legal, minors under eighteen are generally not allowed to participate.⁹¹ The restrictions that society has placed on minors under the age of eighteen reflect "the simple truth derived from communal experience that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life."⁹²

82. See Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 5-6 (1997).

83. See *id.*

84. See Johnson, *supra* note 34, at 722; Spring, *supra* note 44, at 1358.

85. See Elsea, *supra* note 77, at 137.

86. See *id.* at 138.

87. See *Stanford v. Kentucky*, 492 U.S. 361, 394 (1989) (Brennan, J., dissenting).

88. See *id.*

89. See *id.*

90. See *id.*

91. See *id.*

92. *Id.* at 395.

D. Supreme Court Jurisprudence for the Juvenile Death Penalty

Until about twenty years ago, the legal system in the United States had not really addressed the issue of the imposition of the death penalty on offenders who were under the age of eighteen at the time they committed the offense at issue. Almost no state statutes specifically imposed the death penalty on juvenile offenders, and few trial courts were ever presented with the question of whether such action could be taken.⁹³ The first case in the post-*Furman* Supreme Court death penalty decisions even to note that an issue existed regarding the constitutionality of imposing the death penalty on juvenile offenders was the 1981 case of *Eddings v. Oklahoma*.⁹⁴ However, the Court sidestepped that direct question by reaching its decision on other grounds, namely that courts had a duty to consider all mitigating evidence during the sentencing phase of a capital trial.⁹⁵ The Court again passed up the opportunity to consider the constitutionality issue when it decided *Jack v. Kemp*⁹⁶ in 1987, although Justice Powell questioned the constitutionality of imposing such a punishment on a seventeen-year-old offender and was concerned by the majority's refusal to make a decision on that issue.⁹⁷ That same year, however, the Court took the opportunity to address the constitutionality of imposing the death penalty on a juvenile who was fifteen years old at the time of his offense in *Thompson v. Oklahoma*.⁹⁸ The Court addressed the same issue with respect to sixteen- and seventeen-year-old offenders the following year in *Stanford v. Kentucky*.⁹⁹

I. Eddings v. Oklahoma. In *Eddings v. Oklahoma*,¹⁰⁰ the Court was presented for the first time with the opportunity to determine whether a death sentence could be constitutionally imposed on a juvenile offender, but it declined to reach that issue. Eddings was sixteen at the time he murdered a highway patrol officer, and although Oklahoma law required the trial court to consider all mitigating evidence during the sentencing phase, the Court did not consider any evidence of Eddings' age or his "unhappy upbringing and emotional disturbance."¹⁰¹ Following the direction of the *Lockett* Court, which required "that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death,"¹⁰² the Court vacated the death sentence for failure to consider all mitigating circumstances. Although the majority never considered

93. See Streib, *Moratorium on the Death Penalty*, *supra* note 51, at 57.

94. 455 U.S. 104 (1982).

95. See Streib, *Moratorium on the Death Penalty*, *supra* note 51, at 58.

96. 483 U.S. 776 (1987).

97. See Streib, *Moratorium on the Death Penalty*, *supra* note 51, at 58.

98. 487 U.S. 815 (1988).

99. 492 U.S. 361 (1989).

100. 455 U.S. 104 (1982).

101. *Id.* at 106-09.

102. *Id.* at 104, *citing* *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

the constitutionality of the sentence as imposed on a sixteen-year-old offender, the four dissenting justices would have addressed the ultimate constitutional issue and rejected any constitutional bar on executing juveniles who committed such offenses at the age of sixteen.¹⁰³

2. *Thompson v. Oklahoma*. In *Thompson v. Oklahoma*, the Court addressed the question of “whether the execution of [a death] sentence would violate the constitutional prohibition against the infliction of ‘cruel and unusual punishments’ because petitioner was only fifteen years old at the time of his offense.”¹⁰⁴ The trial court had certified Thompson to be tried as an adult based on its conclusion “that there are virtually no reasonable prospects for rehabilitation of William Wayne Thompson within the juveniles system.”¹⁰⁵ Thompson, fifteen at the time of his offense, was found guilty of “actively participat[ing] in the brutal murder of his former brother-in-law” in concert with three older persons.¹⁰⁶

Although the plurality held that executing a fifteen-year-old offender was unconstitutional, the ruling was the result of a four-justice plurality with O’Connor adding the fifth vote and basing her opinion on different grounds. Because the plurality saw the Court as the ultimate arbiter of the limits of cruel and unusual punishment under the Eighth Amendment, it had to determine whether imposing the death penalty on a fifteen-year-old offender would run counter to the “evolving standards of decency that mark the progress of a maturing society,” the standard against which a punishment was judged cruel and unusual.¹⁰⁷ In determining whether this threshold was met, the plurality considered: (1) at what ages the different states would allow the imposition of the death penalty; (2) how willing juries had been to impose the death penalty on juveniles when the law permitted such a punishment; and (3) the opinions of other nations and informed organizations about imposing the death penalty on juvenile offenders. The plurality found that, because eighteen of the thirty-seven states permitting capital punishment required defendants to be at least sixteen years old at the time of the offense, it was reasonable to assume the existence of a national consensus against imposing the death penalty on fifteen-year-old offenders.¹⁰⁸ According to the plurality, the infrequency with which juries sentenced fifteen-year-old offenders to death demonstrated that this sentence constituted cruel and unusual punishment.¹⁰⁹ In addition, the plurality

103. See Streib, *Moratorium on the Death Penalty*, *supra* note 51, at 58.

104. *Thompson v. Oklahoma*, 487 U.S. 815, 818-19 (1988) (Stevens, J., plurality opinion) (footnote omitted).

105. *Id.* at 819-20.

106. *Id.* at 819.

107. *Id.* at 821 (Stevens, J., plurality opinion) (*quoting* *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (Warren, C.J., plurality opinion)).

108. See *id.* at 848-49 (Stevens, J., plurality opinion).

109. See *id.* at 832 (Stevens, J., plurality opinion) (“During the years 1982 through 1986 an average of over 16,000 persons were arrested for willful criminal homicide . . . each year. Of that group of

noted that a substantial number of foreign countries, including West Germany, France, Portugal, The Netherlands, and the Soviet Union, expressly prohibited the death penalty for juveniles.¹¹⁰

The plurality then reviewed the unique ways in which Oklahoma law treated children under the age of sixteen. Fifteen-year-olds were subject to many legal restrictions. They were not allowed to vote, to serve on a jury, to marry, or to gamble without parental consent, or to purchase alcohol or cigarettes.¹¹¹ Unless the offender was sixteen or seventeen years old and had been charged with murder or another similar felony, Oklahoma law did not hold juveniles under the age of eighteen criminally responsible for their offenses.¹¹² The only other civil or criminal statute that treated a juvenile under the age of sixteen as an adult was the state statute used to get the special certification to transfer Thompson to the adult criminal court.¹¹³ Oklahoma's legal restrictions supported the idea that "the normal fifteen-year-old is not prepared to assume the full responsibilities of an adult."¹¹⁴ If a fifteen-year-old is not prepared to assume the responsibilities of a normal adult, the plurality reasoned, then a fifteen-year-old should not be held to the same standard of conduct or subjected to the same severity of punishment as a normal adult. The plurality viewed youth as:

more than a chronological fact. It is a time and a condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.¹¹⁵

Because fifteen-year-olds lack the responsibility and maturity of adults, the plurality concluded that the traditional reasons justifying the imposition of the death penalty—retribution and deterrence—did not apply.¹¹⁶ The plurality found the goal of retribution to be inapplicable "given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children."¹¹⁷ Similarly, deterrence did not apply in this context because, even if the fifteen-year-old knew that other offenders of his or her age had been executed for similar crimes, most teens would never consider the possibility they would be the one caught, let alone executed.¹¹⁸ The plurality felt that "it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent, who may be deterred by the harshest of sanctions and toward whom society may le-

82,094 persons, 1,393 were sentenced to death. Only 5 of them, including the petitioner in this case, were less than 16 years old at the time of the offense.").

110. *See id.* at 832 (Stevens, J., plurality opinion).

111. *See id.* at 832 (Stevens, J., plurality opinion).

112. *See id.* at 824 (Stevens, J., plurality opinion).

113. *See id.* (Stevens, J., plurality opinion).

114. *Id.* at 824-25 (Stevens, J., plurality opinion).

115. *Id.* at 834 (Stevens, J., plurality opinion) (*quoting* *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

116. *See id.* at 836-37 (Stevens, J., plurality opinion).

117. *Id.* at 836-37 (Stevens, J., plurality opinion).

118. *See id.* at 838 (Stevens, J., plurality opinion).

gitimately take a retributive stance.”¹¹⁹ Without the justification of retribution or deterrence, the plurality found that imposing the death penalty on fifteen-year-old offenders would be “‘nothing more than the purposeless and needless imposition of pain and suffering’ and thus an unconstitutional punishment” under the Eighth and Fourteenth Amendments.¹²⁰

Justice O’Connor’s independent concurrence provided the last vote needed to reverse Thompson’s death sentence, but she did not agree with the reasoning of the plurality opinion. O’Connor believed that when a state legislature, like Oklahoma’s, did not set a minimum age for imposing the death penalty, the Court could not conclude that it approved of executing young offenders.¹²¹ She considered it possible that the legislature had simply neglected to consider the fact that fifteen-year-olds would be subject to the death penalty when it created the state’s statutory transfers to adult court.¹²² Because she felt that one of the most important themes in the jurisprudence of the death penalty was the “need for special care and deliberation in decisions that may lead to the imposition of that sanction,”¹²³ O’Connor concluded that “petitioners and others who were below the age of sixteen at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender’s execution.”¹²⁴

Scalia, writing for three dissenters, disagreed with virtually every point asserted by the plurality.¹²⁵ He did not believe the Eighth Amendment was created to prevent the imposition of the death penalty, nor did he believe that the different state capital punishment statutes established a national consensus regarding the minimum age for imposing the death penalty.¹²⁶ To Scalia, the fact that juries rarely imposed sentences on people under the age of sixteen did not reflect a new constitutional standard, but rather, the fact that people considered the death penalty an extreme punishment that should be reserved for the most serious of crimes.¹²⁷ Finally, Scalia did not believe that “a majority of the small and unrepresentative segment of our society that sits on this Court” should be responsible for determining society’s evolving standards of decency when society itself, through its elected representatives, was capable of making that determination.¹²⁸ If executing fifteen-year-old offenders violates society’s evolving

119. *Id.* at 825 n.23 (Stevens, J., plurality opinion).

120. *Id.* at 838 (Stevens, J., plurality opinion) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

121. *See id.* at 856 (O’Connor, J., concurring).

122. *See id.*

123. *Id.*

124. *Id.* at 857-58.

125. At the time of this decision, Justice Powell had retired, but his spot had not yet been filled. As a result, there were only eight justices on the Court. *See* Streib, *Moratorium on the Death Penalty*, *supra* note 51, at 60.

126. *See Thompson*, 487 U.S. at 864 (Scalia, J., dissenting).

127. *See id.* at 870-71 (finding “no justification . . . for converting a statistical rarity of occurrence into an absolute constitutional ban”).

128. *Id.* at 873 (1988) (Scalia, J., dissenting).

standards of decency, Scalia reasoned, the legislature, as the representative of the people, would make that determination.

3. *Stanford v. Kentucky*. One year after *Thompson*, in *Stanford v. Kentucky*,¹²⁹ the Court dealt with a similar issue, but this time the petitioners were sixteen and seventeen years old at the times of their offenses.¹³⁰ This time, however, in a plurality opinion written by Justice Scalia, the Court failed to find either death sentence to be contrary to “the evolving standards of decency that mark the progress of a maturing society.”¹³¹ As a result, the plurality did not find either sentence to be cruel and unusual punishment in violation of the Eighth Amendment. After the juvenile court determined that it would be in “the best interest of petitioner and the community” for Stanford (seventeen at the time of his offense) to be tried as an adult given his repetitive delinquent behavior and the seriousness of his crime, he was convicted of “murder, first degree sodomy, first degree robbery, and receiving stolen property.”¹³² Wilkins (sixteen at the time of his offense) pled guilty to charges of “first degree murder, armed criminal action, and carrying a concealed weapon.”¹³³ He was certified to be sentenced as an adult due to the “viciousness, force and violence of the alleged crime, [his own] maturity, and the failure of the juvenile justice system to rehabilitate him after previous delinquent acts.”¹³⁴

As it had in *Thompson*, the plurality first looked to legislatures and juries to see whether a national consensus existed either in support of, or in opposition to, the imposition of the death penalty on offenders of these ages. Because several states had expressly required that juvenile offenders be either sixteen or seventeen years old before they could be sentenced to death, the plurality placed the “heavy burden” of establishing a national consensus against imposing such a sentence on the petitioners.¹³⁵ The plurality did not find that the petitioners met that burden. Executions of sixteen- or seventeen-year-old offenders had not been as rare as executions of fifteen-year-olds, which had been an important factor in *Thompson*.¹³⁶ Neither the existence of state capital punishment statutes requiring offenders to be eighteen years of age, the federal death penalty’s eighteen-years-old floor for certain drug-related offenses, nor “society’s apparent skepticism” in actually sentencing sixteen- and seventeen-year-olds to death, was sufficient to establish the requisite national consensus.¹³⁷

The plurality declined to use the proportionality analysis adopted in *Thompson*, claiming that the Court had “never invalidated a punishment on

129. 492 U.S. 361 (1989).

130. *Stanford v. Kentucky* was consolidated with *Wilkins v. Missouri*, 492 U.S. 937 (1989).

131. *Stanford*, 492 U.S. at 369 (Scalia, J., plurality opinion).

132. *Id.* at 365-66 (Scalia, J., plurality opinion).

133. *Id.* at 367 (Scalia, J., plurality opinion).

134. *Id.* at 367 (Scalia, J., plurality opinion) (citation omitted).

135. *See id.* at 373 (Scalia, J., plurality opinion).

136. *See* Streib, *Moratorium on the Death Penalty*, *supra* note 51, at 60.

137. *Stanford*, 492 U.S. at 378 (Scalia, J., plurality opinion).

[that] basis alone.”¹³⁸ As a result, the plurality did not attempt to assess whether the punishment imposed was disproportionate either to the crime committed, or to the criminal culpability of the defendant.. Nor would the plurality investigate whether the punishment contributed to the acceptable goals of retribution and deterrence.¹³⁹ According to the plurality, “it is not this Court but the citizenry of the United States” who must determine whether a punishment is cruel and unusual.¹⁴⁰ Because the plurality could “discern[] neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age . . . such punishment did not offend the Eighth Amendment’s prohibition against cruel and unusual punishment.”¹⁴¹

Justice O’Connor once again provided the final vote needed to support the plurality’s decision but wrote a separate concurrence. Using the same criteria as she had in *Thompson*, O’Connor reviewed the state statutes dealing with capital punishment and found that every legislature which considered the issue specifically required a defendant to be at least sixteen years of age or older before imposing a capital punishment.¹⁴² As a result, she concluded that “it is sufficiently clear that no national consensus forbids the imposition of capital punishment on sixteen- or seventeen-year-old capital murderers.”¹⁴³

Justice Brennan’s dissent closely followed the analytical framework set forth in Justice Steven’s plurality opinion in *Thompson*.¹⁴⁴ Brennan found that most legislatures, juries, informed organizations,¹⁴⁵ and foreign nations opposed capital punishment for sixteen- and seventeen-year-old offenders.¹⁴⁶ Brennan also found that executing sixteen or seventeen-year-old offenders “fail[ed] to satisfy two well-established and independent Eighth Amendment requirements—that the punishment not be disproportionate, and that it make a contribution to the acceptable goals of punishment.”¹⁴⁷ Brennan believed that juveniles “very generally lack that degree of blameworthiness” that he found to be “a constitutional prerequisite for the imposition of capital punishments under our precedents concerning the Eighth Amendment proportionality principle.”¹⁴⁸ Despite the fact that individual consideration was given to the offenders’ youth and culpability at the time they were transferred to adult court, Brennan did not believe that this policy singled out “exceptional individuals whose level of respon-

138. *Id.* at 379 (Scalia, J., plurality opinion).

139. *See id.* (Scalia, J., plurality opinion).

140. *Id.* at 378 (Scalia, J., plurality opinion).

141. *Id.* at 380 (Scalia, J., plurality opinion).

142. *See id.* at 381 (O’Connor, J., concurring in part).

143. *Id.*

144. *See* Streib, *Moratorium on the Death Penalty*, *supra* note 51, at 62.

145. Brennan cites the American Bar Association, the National Council of Juvenile and Family Court Judges, and the American Law Institute as organizations opposing the death penalty for 16- and 17-year-olds. *See Stanford*, 492 U.S. at 388-89 (Brennan, J., dissenting).

146. *See id.* at 390-91 (Brennan, J., dissenting).

147. *Id.*

148. *Id.* at 402-03 (Brennan, J., dissenting).

sibility is more developed than that of their peers” for the death penalty.¹⁴⁹ Because Brennan believed that sixteen- and seventeen-year-olds lack the culpability that makes a crime extreme enough to warrant the death penalty, the retributive goal of capital punishment would not be served.¹⁵⁰ Similarly, because Brennan did not believe that sixteen- and seventeen-year-olds acted as rational beings, thinking through the gains and losses of their actions before proceeding, he did not believe that the goal of deterrence would be met.¹⁵¹ Therefore, Brennan concluded that taking a life of a defendant who under the age of eighteen at the time of the offense was forbidden under the Eighth Amendment’s prohibition on cruel and unusual punishment. He would have set the minimum constitutional age at eighteen.¹⁵²

E. The Current Status of the Juvenile Death Penalty in Legislatures

Currently, thirty-eight states and the federal government authorize the death penalty as an acceptable form of punishment for certain acts of murder.¹⁵³ Fifteen of those states have expressly established eighteen as the minimum age for imposing the death penalty, and four have established seventeen as the minimum age.¹⁵⁴ Florida’s Supreme Court recently held that the state constitution requires offenders to be at least seventeen before they can be sentenced to death.¹⁵⁵ Nine states have expressly required offenders to be at least sixteen years old, and while the remaining ten states do not set a minimum age, *Thompson’s* constitutional minimum of sixteen years of age is controlling.¹⁵⁶ Although the death penalty-free jurisdictions of Iowa, Massachusetts, and the District of Columbia have proposed imposition of the death penalty, no action has been taken yet, and it remains unclear whether a juvenile death penalty would be included.¹⁵⁷

With the growing emphasis on harsh punishments for juvenile offenders, state legislatures seem to be moving toward lowering the minimum age required for imposing a death sentence. Crime prevention and control have been hot political platforms in the 1990s, and legislatures have been working to create tougher punishments for those they deem to pose a danger to society. Inun-

149. *Id.* at 403 (Brennan, J., dissenting).

150. *See id.* at 403-04 (Brennan, J., dissenting).

151. *See id.* at 404 (Brennan, J., dissenting).

152. *See id.* at 405 (Brennan, J., dissenting).

153. *See* Streib, *Juvenile Death Penalty Today*, *supra* note 43.

154. *See id.*

155. *See* Brennan v. State, 754 So. 2d 1 (Fla. 1999); *see also* Jo Becker, *Court Raises Execution Age to Seventeen*, ST. PETERSBURG TIMES, July 9, 1999, at 1A (reporting that in a divided 4-3 opinion, the court found it cruel and unusual punishment to impose a penalty so infrequently handed out. The state had not executed a 16-year-old in over half a century).

156. *See* Streib, *Juvenile Death Penalty Today*, *supra* note 43. Those expressly requiring an offender to be sixteen include: Alabama, Indiana, Kentucky, Louisiana, Missouri, Nevada, Oklahoma, Washington, and Wyoming. Those whose minimum age is set by the constitutional default include: Arizona, Arkansas, Delaware, Idaho, Mississippi, Pennsylvania, South Carolina, South Dakota, Utah, and Virginia. *See id.*

157. *See id.*

dated by media accounts of children who kill, voters seem tired of talking about rehabilitation and want immediate action.¹⁵⁸ One response has been to impose “more punitive sentences by developing laws that make it easier to transfer juveniles (in some states, to ‘waive,’ ‘certify,’ or ‘bind over’) for trial in criminal court rather than juvenile court.”¹⁵⁹ Some state legislatures are replacing judicial waiver, the traditional method of transferring juveniles in which an individual determination is made regarding the maturity of each offender, with mandatory statutory exclusions, which result in automatic adult criminal court jurisdiction for the most serious offenses.¹⁶⁰ Other states are giving prosecutors more discretion in choosing the court in which to file, without requiring the consent of the court or even an individual hearing before prosecuting juvenile offenders in adult court for serious felonies.¹⁶¹ The age at which juveniles can be transferred out of the juvenile court system, with its emphasis on rehabilitation, and into the more punitive adult criminal court has been steadily declining. In some states, juveniles as young as thirteen, ten, or even seven may be transferred to adult criminal court, and some state legislatures have not even proscribed a minimum age for transfer.¹⁶²

In an attempt to establish reputations as being “tough on crime,” many politicians have used the death penalty as a political tool.¹⁶³ Feeding on the mixture of public outrage and fear that has resulted from recent high-profile juvenile crimes, such as the school massacres that began in October 1997, politicians have proposed drastic measures that will teach juvenile offenders a lesson.¹⁶⁴ One drastic measure has been pursuing the death penalty for increasingly younger offenders.¹⁶⁵ Criticizing a recent decision by the Florida Supreme Court¹⁶⁶ that executing sixteen-year-olds constituted cruel and unusual punishment under the state Constitution, Republican Florida State Senator. Locke Burt pointed out that “this Legislature has said that you can try someone as an adult if they are as young as fourteen, and if you can do that, they ought to be subject to the same penalties as adults,” implying that he would support the

158. See Elsea, *supra* note 77, at 136.

159. Grisso, *supra* note 82, at 3, 5.

160. See *id.* at 5.

161. See *id.* at 6.

162. See *id.* at 6.

163. See Amnesty International Report, AMR 51/24/98 § 4 (visited Sept. 19, 2000) <www.amnesty-usa.org/amnesty/rightsforall/juvenile/dp/section4.html> [hereinafter Amnesty Report]. For example, according to Amnesty International, Governor Pete Wilson stated that he was in favor of imposing the death penalty on children as young as 14. The governor of New Mexico called for 13-year-olds to be subjected to the death penalty, and in Los Angeles, a district attorney supported the death penalty for children of all ages.

164. See *id.*

165. See Andrew F. Garofalo, “Brennan v. State: The Constitutionality of Executing Sixteen-Year-Old offenders in Florida,” 24 NOVA L. REV. 855 n. 89 (2000); see also LeCray v. State, 533 So. 2d 750, 757 (Fla. 1988) (discussing the legislative history of the statutory provisions in Florida which permit children as young as fourteen to be tried as adults).

166. See Brennan v. State, 754 So. 2d 1 (Fla. 1999).

death penalty for juveniles as young as fourteen.¹⁶⁷ Senator Burt is not alone. After the shootings in Jonesboro, Arkansas, a Texas legislator complained that that his state could not execute an eleven-year-old, and announced his intention to remedy the problem by lowering the age for imposing the death penalty to eleven.¹⁶⁸ In 1996, more than 100 years after the state's last execution of a juvenile offender, the governor of New Mexico announced his support for imposing the death penalty on juveniles as young as thirteen.¹⁶⁹ The Governor of California has also announced his personal support for a juvenile death penalty, specifically calling for the minimum age to be set at fourteen.¹⁷⁰ Perhaps even more startling is the opinion of a Los Angeles District Attorney who has been quoted as supporting the death penalty for children "no matter what their age."¹⁷¹

Judges, tired of the violent offenses they face every day, have also begun to come down harder on juvenile offenders. The sentences being handed down are increasingly punitive and show less concern for the prospects of juvenile rehabilitation. For example, in 1999, when sentencing a seventeen-year-old to serve fourteen years in prison for the murder of his father, Judge Thomas V. Warren said, "I'm not concerned about recidivism or rehabilitation. The matter of concern is punishment."¹⁷² Florida Supreme Court Justice Charles Wells, dissenting from the court's opinion that executing sixteen-year-olds violated the state constitution, pointed out that "the defendant in this case did not commit a child-like crime."¹⁷³ He would have allowed the death sentence to stand.¹⁷⁴ Although some trial court judges seem willing to impose death sentences on juveniles under the age of sixteen, despite the violation of *Thompson*, none of those cases has survived state supreme court review. For example, the Supreme Court of Louisiana held that *Thompson* prevented the execution of fifteen-year-old offenders in *State v. Stone* (1988) and *Dugar v. State* (1993), as did the Indiana Supreme Court in *Cooper v. State* (1989), and the Alabama Supreme Court in *Flowers v. State* (1991).¹⁷⁵

F. How the International Community Views Juvenile Executions

Since the end of the World War II, the international community has acted in steady opposition to the juvenile death penalty. More than fifty foreign countries, including nearly all of Western Europe, have formally abolished the death penalty or limited its use to exceptional crimes, such as treason.¹⁷⁶ The interna-

167. Becker, *supra* note 155, at 1A.

168. See GARBARINO, *supra* note 2, at 21.

169. See Amnesty Report, *supra* note 163, at § 4.

170. See *id.*

171. *Id.*

172. Wynne W. Wasson, *Teen-ager To Serve 14 Years—He Was Convicted of Killing His Father*, RICHMOND TIMES-DISPATCH, Apr. 2, 1999, at B1.

173. *Brennan v. State*, 754 So. 2d 1 (Fla. 1999).

174. See *id.* at 25.

175. See *State v. Stone*, 535 So. 2d 362 (La. 1998); *Dugar v. State*, 615 So. 2d 1333 (La. 1993); *Flowers v. State*, 586 So. 2d 978 (Ala. 1991); *Cooper v. State*, 540 N.E.2d 1216 (Ind. 1989).

176. See *Stanford v. Kentucky*, 492 U.S. 361, 389 (1989) (Brandeis, J., dissenting).

tional community's rejection of the juvenile death penalty is based on the belief that juveniles are less responsible for their actions than adults and more likely to be responsive to rehabilitation.¹⁷⁷

International treaties on this subject demonstrate an almost universal agreement that "[t]he imposition of the death penalty on persons who have not attained full physical or emotional maturity is recognized as inappropriate and inhumane, because it permanently denies the child any chance of rehabilitation or reform."¹⁷⁸ The first treaty to forbid such executions was the Fourth Geneva Convention, adopted in 1949.¹⁷⁹ The United States signed and ratified this treaty regulating wartime behavior without claiming any special exemptions, as it did with later treaties.¹⁸⁰ The next international treaty dealing with juvenile executions to be signed by the United States was the American Convention on Human Rights, which prohibited the execution of juvenile offenders under the age of eighteen.¹⁸¹ Although this treaty was signed by United States in 1979, it was never ratified, largely due to the prohibition on juvenile executions.¹⁸² For similar reasons, the United States has not even signed the Convention on the Rights of the Child, which was adopted by the United Nations in November 1989 and has been joined by 164 countries.¹⁸³ In 1992, the United States ratified an international treaty opposing the juvenile death penalty, the International Covenant on Civil and Political Rights,¹⁸⁴ with one important caveat, the U.S. reserved "the right, subject to its Constitutional constraints, to impose capital punishment on any person other than a pregnant woman duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below 18 years of age."¹⁸⁵

A number of regional human rights agreements also prohibit the imposition of the death penalty on juvenile offenders. The American Convention on Human Rights¹⁸⁶ provides that capital punishment "shall not be imposed on persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age."¹⁸⁷ Although the United States signed but did not ratify this treaty, the Inter-American Commission on Human Rights (the "Commission")

177. See Frey, *supra* note 17, at 80-81.

178. *Id.* at 81.

179. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 68, Aug. 12, 1949, 6 U.S.T. 3516, 3560.

180. See Frey, *supra* note 17, at 80-81.

181. See American Convention on Human Rights, art. 4, Nov. 22, 1969, 1144 U.N.T.S. 123.

182. See Frey, *supra* note 17, at 80-81.

183. See Convention on the Rights of the Child, art. 37a, Nov. 20, 1989, 1577 U.N.T.S. 3. See Frey, *supra* note 17, at 80 ("Article 37 of the convention provides that children under 18 convicted of crimes shall not be subject to capital punishment, life imprisonment, torture or cruel and inhumane punishment," and calls for every child deprived of liberty be treated in a manner which takes into account the needs of persons of his or her age.).

184. See International Covenant on Civil and Political Rights, art. 6.5, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

185. See Frey, *supra* note 17, at 81-82.

186. American Convention on Human Rights, art. 4.5, Nov. 22, 1969, 1144 U.N.T.S. 123.

187. Frey, *supra* note 17, at 82.

found the United States to be bound by the section entitled the American Declaration on the Rights and Duties of Man (the “American Declaration”).¹⁸⁸ In 1987, the Commission found that by leaving the issue of the juvenile death penalty to the discretion of state officials, the United States had created a “patchwork scheme of legislation which makes the severity of the punishment dependent, not primarily on the nature of the crime committed, but on the location where it was committed.”¹⁸⁹ Because the executions of minors James Terry Roach and Jay Pinkerton in South Carolina and Texas, respectively, were allowed to take place under this scheme, the United States had violated articles 1 and 2 of the American Declaration.¹⁹⁰

Although the majority of the international community opposes the juvenile death penalty, the United States is not alone when it permits the execution of offenders who were sixteen or seventeen years old at the time of their crime. According to Amnesty International, eight countries have documented executions of juveniles under eighteen in the period from 1985 to 1995, and it is possible that other similar executions have taken place without being documented.¹⁹¹ The number of juvenile offenders who have been executed may also be greater than actually reported, because Amnesty International’s research focused on the age of juveniles at the time of their execution and did not take into account those persons over eighteen who were executed for crimes they committed when they were under eighteen.¹⁹² Although it has been established that juvenile executions have occurred in these countries, comparisons to the United States are difficult to make because little is known about the offenders’ crimes or the criminal process by which they were convicted.¹⁹³

IV

WHY CHILDREN KILL

In order to create a system that deals effectively with children who kill—as well as one that successfully prevents children from killing in the future—it is important to understand what causes children to kill and why they should be treated differently from adults who commit similar offenses. Dealing with children who kill “create[s] a serious dilemma for the criminal and juvenile justice systems” because it is difficult both to determine the causes of juvenile homicide and to reconcile the lesser culpability of juvenile offenders with society’s desire for immediate and substantial punishment.¹⁹⁴ Research in this area is limited, and sample sizes are generally small. Most of the available empirical

188. *See id.*

189. *Id.*

190. *See id.*

191. *See* Streib, *Moratorium on the Death Penalty*, *supra* note 51, at 64. In addition to the United States, the countries that permit the execution of juvenile offenders include Bangladesh, Iran, Iraq, Nigeria, Pakistan, Saudi Arabia, and Yemen.

192. *See id.*

193. *See id.*

194. *See* EWING, *supra* note 60, at 13.

data comes from anecdotal evidence, and results are often tainted by selection bias: The only juveniles studied are those referred for psychological or psychiatric evaluation and/or treatment.¹⁹⁵ Despite these problems, it is apparent that certain factors present in a child's life increase the probability that that child will eventually kill. For example, a juvenile's chances of committing murder are twice as high if: (1) his or her family has a history of criminal violence; (2) he or she has a history of being abused; (3) he or she belongs to a gang; or (4) he or she abuses alcohol or drugs.¹⁹⁶ The probability that a child will commit murder triples if: (1) he or she uses a weapon; (2) he or she has been arrested; (3) he or she has a neurological problem that impairs thinking and feeling; or (4) he or she has difficulties at school and has a poor attendance record.¹⁹⁷ Rarely does any single factor alone create a homicidal juvenile, but the presence of a combination of these factors makes it much more likely that a particular juvenile will be pushed into violence.¹⁹⁸

Two of the most important factors affecting juvenile violence are the child's home environment and the child's relationship with his or her parents. According to modern developmental science and theory, "human development proceeds from attachment in the first year of life."¹⁹⁹ Children who kill have often failed to receive the love, support, or faith they needed in the first years of their lives.²⁰⁰ As a result, these children have what Dr. James Garbarino²⁰¹ calls "damaged souls" and are "unable to connect with love to the world around them."²⁰² These children "often lack the emotional fundamentals for becoming a well-functioning member of society and are prone to become infected with whatever social poisons are around them. In short, they have trouble learning the basics of empathy, sympathy, and caring."²⁰³ They feel no connection to their homes, their parents, or their surroundings, and so society's social conditions do not get "incorporated into the ways [the] kids think and feel about the world, about *their* world, and about themselves."²⁰⁴ Because they do not feel connected to society, these children do not incorporate society's definitions of "right" and "wrong" into their daily lives.

Many children who kill come from broken homes. Studies conducted as early as 1942 have shown that a majority of homicidal juveniles (five out of six)

195. *See id.* at 13-14.

196. *See* GARBARINO, *supra* note 2, at 10 (*citing* R. Zager et al., *Think about the Characteristics: Homicidal Adolescents: A Replication*, 67 PSYCHOL. REP. 1235-42 (1991)).

197. *See id.* (*citing* Zager et al., *Think about the Characteristics: Homicidal Adolescents: A Replication*, 67 PSYCHOL. REP. 1235-42 (1991)).

198. *See id.*

199. *Id.* at 38.

200. *See id.* at 36-38.

201. James Garbarino, Ph.D., is the Co-Director of the Family Life Development Center, Professor of Human Development at Cornell University, and the author of *LOST BOYS*.

202. GARBARINO, *supra* note 2, at 38.

203. *Id.* at 52.

204. *Id.* at 19 (*emphasis in original*).

come from broken homes or homes plagued by serious marital problems.²⁰⁵ More recent studies have produced similar results. According to a 1978 study, thirty-three out of forty-five juvenile killers came from broken homes,²⁰⁶ and according to another study done three years later, the proportion rose to seven out of nine homicidal juveniles.²⁰⁷ Not all studies define a “broken home” in the same way, however. In one study, nine of the ten homicidal juveniles lived in a broken home, defined as a home in which at least one parent had deserted the family.²⁰⁸ In another study, a broken home was defined as one lacking both natural parents, a situation present for twenty-three of the thirty-one juveniles observed.²⁰⁹ The percentage of homes headed by single women is one of the most powerful indicators of a community’s crime rates.²¹⁰ Children raised by single mothers in poor communities are “more likely to become school drop-outs, be abused, use drugs, and become delinquent than those raised either in two parent homes or by single parents with better economic resources.”²¹¹ However, a broken home is not always characterized with an absent parent; it can also be a home with parents who are alcoholic and/or mentally ill.²¹² In one study of juveniles on death row, nine out of fourteen had either an alcoholic parent, a mentally ill parent, or a parent who had been hospitalized for psychiatric treatment,²¹³ results that have been confirmed in other similar studies.²¹⁴

A turbulent home life does more than simply deprive the child of the tools needed to function in society; it shapes the way in which the child views the world. Often children who kill are exposed to violence at home, and as a result, they learn that violence is an acceptable response to problematic situations. In fact, “[p]robably the single most consistent finding in the research on juvenile homicide to date is that children and adolescents who kill, especially those who kill family members, have generally witnessed and/or been directly victimized by domestic violence.”²¹⁵ According to a study of homicidally aggressive children, nearly two-thirds (62%) of homicidal children lived in households where

205. See *id.* (citing Patterson, *Psychiatric Study of Juveniles Involved in Homicide*, 13 AM. J. ORTHOPSYCHIATRY 125 (1943)).

206. See *id.* (citing Rosner et al., *Adolescents Accused of Murder and Manslaughter: A Five-Year Descriptive Study*, 4 BULL. AM. ACAD. PSYCHIATRY & LAW 342, 345-46 (1978)).

207. See *id.* (citing Petti & Davidman, *Homicidal School-Age Children: Cognitive Style and Demographic Features*, 12 CHILD PSYCHIATRY & HUM. DEV. 82, 85 (1981)).

208. See *id.* (citing McCarthy, *Narcissism and the Self in Homicidal Adolescents*, 38 AM. J. PSYCHOANALYSIS 19 (1978)).

209. See *id.* (citing Sorrels, *Kids Who Kill*, 23 CRIME & DELINQUENCY 312, 317 (1977)).

210. See Johnson, *supra* note 34, at 771.

211. *Id.*

212. See EWING, *supra* note 60, at 21.

213. See *id.* (citing Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584, 587 (1998)).

214. See EWING, *supra* note 60, at 21.

215. *Id.* at 22.

their fathers had been physically abusive to their mothers, as compared to only thirteen percent of the non-homicidal children studied.²¹⁶

Violence does not have to occur in the home to have an impact on a child's life; often the violence pervades the local community, especially when children are living in low-income areas. In 1993, Chicago-based psychiatrist Carl Bell found that among students ranging from ages ten to nineteen years old, residing in areas characterized by low incomes and moderate to extremely high crime rates, three out of four had witnessed a robbery, stabbing, shooting, and/or killing, more than a third (35%) had witnessed a stabbing or a shooting (39%), and one in four had seen someone killed.²¹⁷ Forty-five percent had seen more than one violent incident, and many of the children knew the victims of the crimes they observed.²¹⁸ Children who witness domestic violence or violence in their community exhibit symptoms similar to the post-traumatic stress disorder experienced by children living in war-torn countries like Mozambique and Cambodia. U.S. inner-city youth exposed to this level of violence "lose interest in the world and try to avoid anything that reminds them of the event; they manifest feelings of estrangement, constriction in affect and cognition, memory impairment, phobias, and impairment in performing daily activities."²¹⁹ As they detach themselves from the violence around them, children come to accept violence as natural and inconsequential. Eventually children who witness violence see violent and risky behavior as "unthreatening, even appealing, because it aligns the child with the aggressor instead of the victim."²²⁰

Exposure to violence not only teaches children that violence constitutes acceptable behavior; it can also cause physical changes in the child's brain. "[C]onstant exposure to pain and violence can make their brain's system of stress hormones unresponsive, like a keypad that has been pushed so often it just stops working."²²¹ As a result, children who have been repeatedly exposed to violence typically display a lack of empathy and a "practically nonexistent" sensitivity to the world.²²² These adolescents do not respond to punishment because nothing hurts; "[t]heir ability to feel, to react, has died and so has their conscience."²²³ These children do not understand that emotional pain can result

216. See *id.* (quoting Lewis et al., *Homicidally Aggressive Young Children: Neuropsychiatric and Experiential Correlates*, 140 AM. J. PSYCHIATRY 148 (1983)).

217. See Hattie Rutenberg, *The Limited Promise of Public Health Methodologies to Prevent Youth Violence*, 103 YALE L.J. 1885, 1896 (1994) (citing Carl C. Bell & Esther J. Jenkins, *Community Violence and Children on Chicago's South Side*, PSYCHIATRY, Feb. 1993, at 46, 49).

218. See *id.* (citing Carl C. Bell & Esther J. Jenkins, *Community Violence and Children on Chicago's South Side*, PSYCHIATRY, Feb. 1993, at 46, 49).

219. *Id.* at 1897 (quoting JAMES GARBARINO ET AL., *CHILDREN IN DANGER: COPING WITH THE CONSEQUENCES OF COMMUNITY VIOLENCE* (1992)).

220. *Id.*

221. Sharon Begley, *Why the Young Kill*, NEWSWEEK, May 3, 1999, at 32; see also STEVEN LEVITT, *JUVENILE CRIME AND PUNISHMENT* (Nat'l Bureau of Econ. Research Working Paper No. W6169, 1981).

222. See *id.*

223. *Id.*

from their actions.²²⁴ Often these children abuse animals, seeing their suffering as funny, amusing, or not seeing the animals' suffering at all.²²⁵ For example, both Kip Kinkel, the fifteen-year-old who killed his parents and schoolmates in Springfield, Oregon, and Luke Woodham, responsible for the Pearl, Mississippi, shootings, had histories of animal abuse.²²⁶ Woodham, for example, had previously beaten his dog with a club, wrapped it in a bag and set it on fire.²²⁷

Children not only observe violence in the home and in the community; too often they experience it. "There is a clear and undisputed nexus between child abuse and aggression. Although not all abused children grow up to be abusers, there is a strong correlation that those who are seriously abused become the most violent members of society."²²⁸ This strong correlation between child abuse and juvenile homicide has been demonstrated in a number of published case studies.²²⁹ For example in a study of fourteen juveniles on death row, twelve "had been 'brutally' abused physically," and five had been sodomized by older family members.²³⁰ Looking outside the small sample of juvenile death row inmates, fifty-five percent of the homicidally aggressive children studied had been physically abused.²³¹ The results of this study are not unique. Looking at juveniles hospitalized for psychiatric treatment, six of the ten homicidal juveniles had been subjected to "parental brutality," while only one of ten non-homicidal juveniles had such experiences.²³² In addition, four of the homicidal juveniles had been "seduced" by a parent, while none of the non-homicidal juveniles had.²³³ Experiencing violence leads a child to resort to violence because he or she "comes to understand how the world works through the lens of his own abuse."²³⁴ For example, while on trial for the murder of his father, Jacob Wilson, then seventeen years old, testified that he lived in fear of being beaten during his father's rages, which were brought on by heavy bouts of drinking and intensified by his father's use of cocaine.²³⁵ When the violence at home became too much for him to bear, Wilson responded to the situation in the only manner he knew how: with violence.

224. See GARBARINO, *supra* note 2, at 54.

225. See *id.*

226. See *id.*

227. See Begley, *supra* note 221, at 32.

228. Johnson, *supra* note 34, at 767.

229. See EWING, *supra* note 60, at 22 (citing Sherl & Mack, *A Study of Adolescent Matricide*, 5 J. AM. ACAD. OF CHILD PSYCHIATRY 559 (1966)); Duncan & Duncan, *Murder in the Family: A Study of Some Homicidal Adolescents*, 127 AM. J. PSYCHIATRY 1498 (1971); Malmquist, *Premonitory Signs of Homicidal Juvenile Aggression*, 128 AM. J. PSYCHIATRY 461 (1971)).

230. *Id.* at 23 (quoting Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY, 584 (1998)).

231. See *id.* (quoting Lewis et al., *Homicidally Aggressive Young Children: Neuropsychiatric and Experiential Correlates*, 140 AM. J. PSYCHIATRY 148 (1983)).

232. See *id.* (quoting Sendi & Blomgren, *A Comparative Study of Predictive Criteria in the Predisposition of Homicidal Adolescents*, 132 AM. J. PSYCHIATRY 423, 425 (1975)).

233. See *id.* (quoting Sendi & Blomgren, *A Comparative Study of Predictive Criteria in the Predisposition of Homicidal Adolescents*, 132 AM. J. PSYCHIATRY 423, 425 (1975)).

234. GARBARINO, *supra* note 2, at 80.

235. See Wasson, *supra* note 172, at B1.

Like children who are victims of physical abuse, children who suffer from emotional abuse erect barriers around themselves to prevent themselves from feeling pain. Abused children “frequently have a pervasive sense of helplessness that results from feeling trapped in a situation from which they cannot escape.”²³⁶ Abuse causes emotional dissociation, otherwise known as the famous “fight or flight” response.²³⁷ If they are unable to flee physically, these children flee psychologically by “shut[ting] down emotionally and disconnect[ing] themselves from their feelings so that they don’t have to feel them anymore. It’s a survival strategy By cutting off or disowning the feelings that threaten to overwhelm them, children can survive traumatic threats.”²³⁸ Once a child learns to bury his emotions in the face of violence, that skill remains with the child for the rest of his life, preventing him from fully confronting the consequences of his actions.²³⁹ It is not that the child does not feel anything; he feels too much—so much that he can only survive if the feelings are deeply buried.²⁴⁰ Dr. Garbarino uses the story of John to illustrate how children develop the skill of disassociation.²⁴¹ John learned to disassociate himself from pain when he was six years old, and that skill stayed with him for his entire life, preventing him from feeling anything while committing horrific violent acts. Once, when he was six, John woke up at three in the morning to find his stepfather sneaking into the house following a big fight he had had with John’s mother. John handed his stepfather a big knife as he was ordered. All he remembers after that is screaming, feeling “pee running down his leg onto his foot,” and “the red walls.”²⁴² Years after his stepfather stabbed his mother to death in her bedroom, as he himself awaits execution for stabbing a fifty-year-old woman to death in her bedroom, John cannot remember how he felt when he committed the murder.²⁴³

Besides disassociation, another survival skill learned by abused children is hypervigilance. A hypervigilant child is always “acutely aware of his or her environment and remains on the alert for any signs of danger.”²⁴⁴ As a result of this constant environmental monitoring, a hypervigilant child will react—sometimes violently—to changes in people or situations that other children would ignore.²⁴⁵ Hypervigilance is not simply a learned behavior; it also results from

236. Jamie Heather Sacks, Comment, *A New Age of Understanding: Allowing Self-Defense Claims For Battered Children Who Kill Their Abusers*, 10 J. CONTEMP. HEALTH L. & POL’Y 349, 355-56 (1993).

237. See GARBARINO, *supra* note 2, at 85.

238. *Id.*

239. *See id.*

240. *See id.* at 86.

241. *See id.*

242. *Id.*

243. *See id.* at 85–86.

244. Sacks, *supra* note 236, at 356 (quoting Steven R. Hicks, *Admissibility of Expert Testimony on the Psychology of the Battered Child*, 11 LAW & PSYCHOL. REV. 103, 103-04 (1987)).

245. *See id.* (quoting Steven R. Hicks, *Admissibility of Expert Testimony on the Psychology of the Battered Child*, 11 LAW & PSYCHOL. REV. 103, 103-04 (1987)).

physical changes in the brain that alter a child's ability to react rationally to certain life situations. According to Dr. Bruce Perry of Baylor College of Medicine:

A child who suffers repeated 'hits' of stress—abuse, neglect, terror—experiences physical changes in his brain . . . The incessant flood of stress chemicals tends to reset the brain's system of fight-of-flight hormones, putting them on hair-trigger alert. The result is the kid who shows impulsive aggression, the kid who pops the classmate who disses him.²⁴⁶

For example, the Chicago Daily Herald reported that “[a] one-time honor roll student at Palatine High School may have stabbed a 78-year-old neighbor, police said, because he believed the man disrespected him by giving him a dirty look.”²⁴⁷ These children become hypersensitive to perceived injustices,²⁴⁸ and use the only means they know—violence—to remedy the situation.

Physical and/or emotional abuse is not the only way a parent can permanently damage his or her child's development. Often children who kill suffer deeply from a parent's emotional neglect. Research has shown that a child's emotional tie to his or her parents is one of the most influential factors contributing to antisocial behavior, including homicidal tendencies.²⁴⁹ Neglected children often feel that their parents have abandoned them. A belief that their parents do not want them causes the children deep feelings of shame.²⁵⁰ The shame they experience “begets covert depression, which begets rage, which begets violence.”²⁵¹

Parental neglect has also been shown to create physical problems, such as the impairment of the development of the brain's cortex, which controls feelings of belonging and attachment.²⁵² Children who suffer from neglect fail to develop—or even lose—the neural circuits that control the capacity to feel and form healthy relationships.²⁵³ Neglected children often feel that they do not matter, and violence becomes a way—better than none at all—to gain attention.²⁵⁴

Physical and neurological brain damage, not uncommon among homicidal juveniles, causes many problems.²⁵⁵ Lesions in the frontal lobe of the brain have been shown to induce apathy and distort judgment and emotion.²⁵⁶ In a study of fifty murderers, psychiatrist Daniel Amen found that the structure in the brain

246. Begley, *supra* note 221, at 32.

247. Steve Warmbir & Sandra Del Re, *From Honor Role to Murder Rap*, CHICAGO DAILY HERALD, Sept. 14, 1999, at 1.

248. *See* Begley, *supra* note 221, at 32.

249. *See* Johnson, *supra* note 34, at 770.

250. *See* GARBARINO, *supra* note 2, at 44.

251. *Id.*

252. *See* Begley, *supra* note 221, at 32.

253. *See id.*

254. *See id.*

255. *See* EWING, *supra* note 60, at 19.

256. *See* Begley, *supra* note 221, at 32.

called the cingulate gyrus (CG) was consistently hyperactive.²⁵⁷ When the CG is thus impaired, a person cannot fluidly transmit his or her thoughts through the brain, and as a result, that person gets stuck on one thought.²⁵⁸ Amen also found that in many of the murderers, the prefrontal cortex, the brain's supervisor, was sluggish. Either of these conditions can result in "violent thoughts [getting] stuck in the murderers' brains without any supervisor to prevent the thoughts from becoming actions."²⁵⁹

Other studies have found similar correlations between violent behavior and physical brain damage. According to Charles Ewing, thirty years ago two-thirds of the juvenile killers tested had abnormal electroencephalogram (EEG) tracings.²⁶⁰ A more recent study found that every one of the fourteen juveniles on death row "had histories and/or symptoms consistent with brain damage."²⁶¹ Eight had injuries severe enough to result in hospitalization for indention of the cranium, and nine had documented neurological abnormalities.²⁶²

In addition to suffering from physical brain damage, children who kill often suffer from a range of mild to severe personality disorders.²⁶³ Most personality disorders affecting children who kill are "characterized by inflexible, maladaptive 'patterns of perceiving, relating to, and thinking about the environment and oneself.'"²⁶⁴ Some of the most common include antisocial, paranoid, avoidant, and dependent behavior.²⁶⁵ A child suffering from any of these disorders is often unable to control the aggressive impulses that result in episodic explosive outbursts.²⁶⁶ According to one study, "many if not most juveniles who kill have prehomocidal histories of antisocial behavior, reflected in records of arrests and criminal convictions."²⁶⁷ Among the thirty-seven juvenile killers in this study, twenty-nine (78%) had prior criminal convictions. Of these, twelve (32%) had two or three convictions, and the rest had between four and eight convictions.²⁶⁸ Other studies show a similar connection between homicidal juveniles and personality disorder. One found that thirty-one out of forty-five (69%) homicidal

257. See Begley, *supra* note 221, at 32 (citing Daniel Amen et al., *Visualizing the Firestorms in the Brain: An Inside Look at the Clinical and Psychological Connections Between Drugs and Violence Using Brain SPECT Imaging*, 29 *PSYCHOACTIVE DRUGS* 307-19 (1997)).

258. *See id.*

259. *Id.*

260. See EWING, *supra* note 60, at 19.

261. *Id.* at 19 (citing Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 *AM. J. PSYCHIATRY* 584 (1998)).

262. *See id.*

263. *See id.* at 17. Personality disorders need to be distinguished from major mental disorders, which are less common among homicidal juveniles.

264. *Id.* at 16 (quoting AMERICAN PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3rd ed. 1987)); *see also id.* at 19.

265. *See id.* at 17.

266. *See id.*

267. *Id.* at 24 (quoting Fiddes, *A Survey of Adolescent Murder in Scotland*, 4 *J. ADOLESCENCE* 47, 58 (1981)).

268. *See id.*

juveniles observed had previously been arrested,²⁶⁹ while another found that nine out of ten homicidal juveniles had extensive histories of fighting and other antisocial behavior prior to killing.²⁷⁰

Homicidal children often exhibit serious trouble in school, as a result of low intelligence and/or a lack of focus and motivation. Failure at school not only diminishes opportunities for later employment and higher education, it also fosters another environment where the child does not fit in.²⁷¹ Sometimes academic failure results from a below average intelligence, meaning that the child has an IQ score around eighty, just above the level that is considered mentally retarded.²⁷² Sometimes academic failure results from learning disorders.²⁷³ Confirming earlier studies that many juveniles on death row suffer from learning disorders, a 1988 study found that “ten out of fourteen [juveniles on death row] had major learning problems, that only three were reading at grade level, and that three had never even learned to read until they were incarcerated on death row.”²⁷⁴ Sometimes children fail academically because they have neither the time nor the motivation to succeed.²⁷⁵ When children must constantly defend themselves from outside dangers that threaten their survival, they do not have the time or energy for less urgent tasks, such as learning to read, write, and do arithmetic, and learning about geography, history, and science.²⁷⁶

Poverty is another factor that often contributes to the violent behavior of children who kill. Living in poverty reduces the amount of parental supervision that a child receives. Parents cannot provide the supervision and guidance that families with better resources have if their attention is monopolized by finding money for rent, food, doctor’s bills, and other necessities.²⁷⁷ Adults living in poverty are also more likely to suffer from depression or substance abuse.²⁷⁸ In addition to consuming a large percentage of the family income, these habits create ineffective, harsh, or unresponsive parents,²⁷⁹ and set an example that such behavior is acceptable.

Living in poverty affects the behavior of children as well, determining the kinds of opportunities they will have and dictating the pressures they will face.²⁸⁰

269. See *id.* (quoting Rosner et al., *Adolescents Accused of Murder and Manslaughter: A Five-Year descriptive Study*, 4 BULL. AM. ACADEMY OF PSYCHIATRY & LAW 342, 345-46 (1978)).

270. See *id.* (quoting McCarthy, *Narcissism and the Self in Homicidal Adolescents*, 38 AM. J. PSYCHOANALYSIS 19 (1978)).

271. See *id.* at 18.

272. See *id.*

273. See *id.* at 18-19.

274. *Id.* at 18-19 (citing Bender, *Children and Adolescents Who have Killed*, 116 AM. J. PSYCHIATRY 305-308 (1957); Patterson, *Psychiatric Study of Juveniles Involved in Homicide*, 13 AM. J. ORTHOPSYCHIATRY 125 (1943)).

275. See Rutenberg, *supra* note 217, at 1897.

276. See *id.*

277. See Johnson, *supra* note 34, at 768.

278. See Rutenberg, *supra* note 217, at 1895 (citing Jane D. McLeod & Michael J. Shanahan, *Poverty, Parenting and Children’s Mental Health*, 58 AM. SOC. REV. 351, 357 (1993)).

279. See *id.*

280. See *id.*

Children living in poverty may be forced to drop out of school to help support the family, or they may chose to do so in the absence of effective parental supervision. Children turn to gangs to fill the emotional gaps left by a non-existent family, and gang involvement often leads to criminality and violence.²⁸¹ Gangs provide physical protection in the increasingly lawless world in which poor children struggle to survive.²⁸² The longer a child lives in poverty, the more his or her opportunities for education and employment may slip away and the greater the likelihood that he or she may become involved in violent crime.²⁸³

Many children who kill turn to drugs and alcohol. A study of seventy-two homicidal juveniles found that twenty-four (36%) regularly or heavily used alcohol, while twenty-nine (40%) regularly or heavily used drugs.²⁸⁴ A similar study reported that two-thirds of the twelve homicidal juveniles observed had histories of substance abuse.²⁸⁵ Substance abuse pushes children to violence in two ways. First, the actual consumption of drugs and/or alcohol encourages aggressive behavior because using reduces the likelihood that the conventional rules for social interaction will be followed.²⁸⁶ Second, the financial burden of supporting a drug—or even an alcohol—habit often puts the child in situations where violence becomes necessary.²⁸⁷ Researchers have found that “although the extent of the connection between youth violence and these two categories of heightened risk is unclear, the connection itself is undeniable.”²⁸⁸

Understanding why children kill is a complex problem because each child's experience is different. In an attempt to find an easy solution to an increasing rate of juvenile violence, politicians blame identifiable external social problems and suggest that by remedying these outside factors, juvenile violence will disappear. One popular scapegoat is the media. Because “a typical American child can witness more images of death and destruction from the comfort of his or her own living room than any cop or soldier witnesses in actuality in the line of duty in a lifetime,”²⁸⁹ the American Psychological Association (“APA”) believes that the media has created a violent American culture that teaches children that violence is an effective and accepted method of solving problems.²⁹⁰ Following the 1999 shootings at Columbine High School in Littleton, Colorado, President Clinton encouraged the entertainment industry to stop marketing

281. See EWING, *supra* note 60, at 80-90 (discussing gang-related killings).

282. See GARBARINO, *supra* note 2, at 11.

283. See *id.*

284. See EWING, *supra* note 60, at 26 (quoting Cornell et al., *Characteristics of Adolescents Charged with Homicide: Review of 72 Cases*, 5 BEHAV. SCI. & LAW 11, 18-19 (1987)).

285. See EWING, *supra* note 60, at 26 (quoting Brandstadter-Palmer, *Children Who Kill*, paper presented at Annual Convention of the American Psychological Association (Toronto, Aug. 1984)).

286. See Ruttenberg, *supra* note 217, at 1898.

287. See *id.*

288. *Id.* (citing OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, UNITED STATES DEPARTMENT OF JUSTICE, URBAN DELINQUENCY AND SUBSTANCE ABUSE, INITIAL FINDINGS REPORT 5, 11(1993).

289. GARBARINO, *supra* note 2, at 108.

290. See *id.* (citing REASON TO HOPE: A PSYCHOSOCIAL PERSPECTIVE ON VIOLENCE AND YOUTH (L.D. Eron et al. eds., 1994).

products that glorify violence to children, “warning, however subt[ly], that government action could result if Hollywood does not voluntarily rein in some of the ultra-violent films and games that the industry rates as not appropriate for children under seventeen, and then markets precisely to that audience.”²⁹¹ Although no one has been able to establish a direct correlation between violent juveniles and violent television, the APA assumes that there is a direct connection between the two.²⁹² Without role models in the media, the APA believes that juvenile violence will decline sharply.

However, no matter how much violence children observe in the media, killing requires a weapon in an American society: Guns are too easily accessible. Juveniles today “find themselves surrounded by tools which make acts of violence quick and easy.”²⁹³ Not only are guns available, but children are willing to carry them. The arrest rate for weapon possession among juveniles rose almost 63% between 1980 and 1990.²⁹⁴ In 1987, 64% of juvenile homicides involved the use of guns, while in 1991 that figure rose to 78%.²⁹⁵ According to those who believe gun accessibility is the problem, keeping guns out of children’s reach is the solution.

As discussed above, many factors can contribute to children turning to violence and killing. No list can completely account for every influence that may move a child to violence, and no formula can be created to prevent it. In dealing with the problem of juvenile homicides, lawmakers must not only focus on the external scapegoats currently condemned by popular opinion; they must also look to the deeper problems that affect the lives of juveniles and their families.²⁹⁶ In order to determine the best punishments and the most effective preventative measures, it is not only necessary to understand what the different variables are, but to realize that there is no set equation for producing a child that kills.

V

PROBLEMS WITH THE CURRENT SYSTEM

A. Fundamental Differences Between Children and Adults

Perhaps the biggest problem with a system that allows sixteen- and seventeen-year-old children to be sentenced to death is its failure to recognize the fundamental differences between children and adults. Although many of the mitigating circumstances presented on behalf of adults and juveniles facing the

291. Faye Foire & Melissa Healy, *Clinton Urges Hollywood to Cut Violence*, L.A. TIMES, May 11, 1999, at A1.

292. See GARBARINO, *supra* note 2, at 108.

293. Kathleen M. Heide, *Why Kids Keep Killing: The Correlates, Causes and Challenge of Juvenile Homicide*, 7 STAN. L & POL’Y REV. 43, 44 (1996).

294. See Ruttenger, *supra* note 217, at 1899.

295. See *id.*

296. See *infra* Section VI.

death penalty are the same—such as evidence of childhood abuse and exposure to violence—an adult standing trial for murder has had time either to come to terms with his childhood or to remove himself from the intolerable situation that his childhood may have created.²⁹⁷ Sixteen- and seventeen-year-olds have not had the time, the freedom, or the ability to put the same distance between themselves and the factors that drove them to violence. While a thirty-year-old who has been out of the house for ten years has had time to form a new life, teenage offenders do not.²⁹⁸ As a result “[t]he damage done to them emotionally and mentally is not so far removed.”²⁹⁹ Because most sixteen- and seventeen-year-olds depend entirely on their parents for financial and emotional support, they cannot escape a violent or abusive home environment.³⁰⁰ In many situations, the children cannot look for outside help, either because they do not have the courage, or because they will be severely punished for doing so.³⁰¹ A child may not even realize that his or her home environment is abnormal. Unlike an adult, a child “has no outside context with which to compare the abusive reality.”³⁰² Not only may they not know to leave, but they may not know how to deal with staying. Children “do not yet have the life experiences on which to draw, and are unable psychologically to manage the abuse by putting [it] into perspective.”³⁰³

Sixteen- and seventeen-year-olds see their place in the world in a manner very different from adults. According to Dr. Garbarino, “adolescents are theatrical, viewing the world as a stage, with themselves playing the leading roles.”³⁰⁴ Teenagers, more often than adults, “tend to believe that they are always the star of the show. This is why teenagers find it nearly impossible to leave home for school in the morning without carefully considering their appearance. After all, *everyone* will be looking at them.”³⁰⁵ As the star of the show, teenagers often believe that nothing bad can happen to them, and as a result, they “have a greater tendency than adults to take risks that endanger them.”³⁰⁶ They may believe in their own invulnerability as part of the “egocentrism” associated with the adolescent developmental process. While they may see the possibility of

297. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“[A sentencer must consider] any aspect of a defendant’s character as a basis for a sentence less than death.”).

298. See Amnesty Report, § 5 (visited Sept. 19, 2000) <www.amnesty-usa.org/amnesty/rightsforall/juvenile/dp/section5.html>.

299. *Id.*

300. See *State v. Janes*, 850 P.2d 495, 506 (Wash. 1993) (en banc) (recognizing battered child syndrome).

301. See Wasson, *supra* note 172, at B1.

302. *Janes*, 850 P.2d at 503.

303. Sacks, *supra* note 236, at 357.

304. GARBARINO, *supra* note 2, at 133.

305. *Id.* at 141 (emphasis in original).

306. Grisso, *supra* note 82, at 14 (citing J. Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, DEV. REV. 12, 339-373 (1992)).

failure or injury or consequence as applying to others, they do not believe that it applies to them.³⁰⁷

A teenager's ability to use reason in making decisions is less developed as well. Although their cognitive capacities may be similar to adults, "theory suggests that they will deploy those abilities with less dependability in new, ambiguous, or stressful situations because the abilities have been acquired more recently and are less well established."³⁰⁸ They "are more vulnerable, more impulsive, and less self-disciplined than adults," and are without the same 'capacity to control their conduct and to think in long-range terms.'³⁰⁹ Furthermore, adolescents are particularly impressionable, subject to peer pressure, and they lack "experience, perspective, and judgment."³¹⁰ Adolescent decision-making skills vary depending on "differences in motivation, in functioning under stress, and in individual differences in rates of cognitive development."³¹¹ Furthermore, "empirical studies have demonstrated that we should not expect adolescents newly developed abilities to be manifested uniformly across different domains of social problem solving."³¹² Because behavior is a developmental process that begins "with a nervous system bias toward survival and social responsiveness" and that is equipped to respond aggressively or fearfully when the threat to survival is extreme," a teenager, who has not had the experiences that an adult has had, cannot be expected to react in the same way.³¹³

Although some individual teenagers may be more mature than others, and therefore better able to understand the consequences of their actions, the current system does not effectively take into consideration the general lack of maturity and experience that applies to this age group. Although "some juveniles may be responsible enough to be executed, [that] is not enough to validate the execution of juveniles."³¹⁴ Our legal system does not reflect the "very special place in life" that children should occupy according to Justice Frankfurter.³¹⁵ As Justice Brennan noted in his *Stanford* dissent, immaturity should operate as a bar to a disproportionate death sentence, but it does not.³¹⁶ According to

307. See *id.* at 14-15 (citing David Elkind, *Egocentrism in Adolescence*, CHILD DEV. 1025, 1025-34 (1967)).

308. *Id.* at 18 (citing Nancy G. Guerra et al., *Moral Cognition and Childhood Aggression*, in AGGRESSIVE BEHAVIOR: CURRENT PERSPECTIVES 13-33 (L. Huesman ed., 1994); L. Mann, *Stress, Affect, and Risk Taking*, in RISK-TAKING BEHAVIOR 201-30 (J. Yates ed., 1992); E. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW AND HUM. BEHAV. 221-44 (1995); Steinberg & Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 LAW AND HUM. BEHAV. 249-72 (1996)).

309. *Stanford v. Kentucky*, 492 U.S. 361, 395 (1989) (Brennan, J., dissenting) (quoting Twentieth Century Fund on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 7 (1978)).

310. *Id.*

311. Grisso, *supra* note 82, at 18.

312. *Id.* at 18 (citing JOHN H. FLAVELL, COGNITIVE DEVELOPMENT (1985); ROBERT S. SEIGLER, CHILDREN'S THINKING (2d ed. 1991)).

313. DEBRA NEIHOFF, THE BIOLOGY OF VIOLENCE 52 (1999).

314. *Thompson v. Oklahoma*, 487 U.S. 815, 853 (1988) (O'Connor, J., concurring) (citation omitted).

315. *May v. Anderson*, 345 U.S. 528, 536 (1953).

316. See *Stanford v. Kentucky*, 492 U.S. 361, 397 (1989) (Brennan, J., dissenting).

Brennan, “it is constitutionally inadequate that a juvenile offender’s level of responsibility be taken into account only along with a host of other facts that the court or jury may decide outweigh that want or responsibility.”³¹⁷ Because age and immaturity are considered to be mitigating factors that can be outweighed by other factors, a particularly heinous crime could outweigh any immaturity or lack of understanding that a young offender may bring with him or her. For Brennan, this result is unacceptable because a sixteen- and seventeen-year-old offender does not possess the requisite culpability as a matter of constitutional law.³¹⁸

B. Arbitrariness

Although creating any age limit for the imposition of the death penalty draws a somewhat arbitrary line, the current system draws a line that is inconsistent with every other legal assumption regarding juveniles under eighteen years of age. The age of majority in almost every state is eighteen. Every state requires that parents support children who are under eighteen, on the grounds that children need a sanctuary in which they can grow and learn.³¹⁹ Eighteen is the age at which minors can vote, can sit on juries, can consent to medical treatment, and can consent to marriage without an adult’s permission.³²⁰ When the United States had a military draft, a person had to be eighteen to be drafted.³²¹ These restrictions reflect society’s assumption that sixteen- and seventeen-year-olds:

do not yet act as adults do, and thus [the state] acts in their best interest by restricting certain choices that [it] feels they are not yet ready to make . . . It would be ironic if these assumptions that [the state] so readily make about children as a class—about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives—were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for purposes of inflicting capital punishment.³²²

Subjecting sixteen- and seventeen-year-olds to the death penalty, as if they were rational adults making informed choices, seems hypocritical when society does not trust them with the civic responsibilities of an adult. As the *Thompson* majority noted and the *Stanford* dissent reiterated, “[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.”³²³ According to the Court, eighteen is actually “a conservative estimate of the dividing line between adolescence and adulthood [because m]any of the

317. *Id.*

318. *See id.*

319. *See* Richard Burr & Mandy Welch, *Killing Kids Who Kill: Desecrating the Sanctuary of Childhood*, 29 ST. MARY’S L.J. 929, 946 (1998).

320. *See* *Stanford v. Kentucky*, 492 U.S. 361, 395 (Brennan, J., dissenting).

321. *See* Burr & Welch, *supra* note 319, at 946.

322. *Thompson v. Oklahoma*, 487 U.S. 815, 825 n.23 (1988) (Stevens, J., plurality opinion).

323. *Stanford*, 492 U.S. at 395 (Brennan, J., dissenting) (*quoting Thompson*, 487 U.S. at 835).

psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s.³²⁴

Because society has determined that a child under eighteen is not responsible for his or her own actions, society maintains some responsibility for what that child does until that age.³²⁵ In that respect, society is partly to blame when sixteen- and seventeen-year-olds fall into lives of crime and violence.³²⁶ The state, in its protective role, is willing to use its *parens patrie* power to limit what juveniles are permitted to do, yet it denies responsibility when those same children run astray. “[T]he very paternalism that our society shows toward youths and the dependency it forces upon them mean that society bears a responsibility for the actions of juveniles that it does not for the actions of adults who are at least theoretically free to make their own choices.”³²⁷ As a result, “youth crime . . . is not exclusively the offender’s fault; offenses by the young represent a failure of family, school, and the social system, which share responsibility for the development of America’s youth.”³²⁸ By sentencing a juvenile offender to death, the judicial system is imposing society’s worst punishment on a person who is still theoretically under its care and protection.

C. Failure to Consider the Rehabilitative Prospects of Juvenile Offenders

When a person is sentenced to death, society looks at his or her past actions and determines that the future value of his or her life is worth nothing. The future value of a juvenile offender’s life should not be judged by the same backward-looking criteria with which adult offender’s lives are judged. Not only does a death sentence deprive a juvenile of a greater proportion of his or her life, but a juvenile’s future prospects for rehabilitation are greater than an adult’s for many of the same reasons that a juvenile is less criminally culpable than an adult. In the absence of definitive studies concerning juvenile defendants facing the death penalty, child’s rights advocates, like Amnesty International, can provide insights into the individual lives of death row inmates.

A juvenile offender may be more amenable to reform for two main reasons.³²⁹ First, because juvenile offenders are, by definition, still young and immature at the time of their offense, their judgment and behavior can improve over time with proper guidance—guidance that is almost never received in their home environment.³³⁰ Justice Brennan, dissenting in *Stanford*, recognized that juveniles are unlikely to engage in the kind of cost-benefit analysis that adults do before they act.³³¹ People learn how to weigh the costs and benefits of their

324. *Id.* at 396 (Brennan, J., dissenting) (citation omitted).

325. See Amnesty Report, *supra* note 298, at § 5.

326. See *Stanford*, 492 U.S. at 395 (Brennan, J., dissenting).

327. *Id.*

328. *Id.* at 395-96 (Brennan, J., dissenting) (*quoting* Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 7 (1978)).

329. See Amnesty Report, *supra* note 298, at § 5.

330. See *supra* section IV.

331. See *Stanford*, 492 U.S. at 404 (Brennan, J., dissenting).

actions by trial and error as they grow and mature. Neither the future value of a juvenile's life nor his or her prospects for rehabilitation should be judged by one event that occurs when the juvenile still has a lifetime of learning and experiences ahead.

Second, many juvenile offenders have never had the opportunity to get away from their home environments.³³² Prison often provides the first opportunity these juveniles have to live without violence and abuse—or whatever other problems their home lives may present. Prison gives the juvenile a structure for his or her life, as well as time to focus on more than mere survival. Many juveniles undergo profound changes in prison. Death Row

softens them What is more, for the first time in their lives, if they are lucky, they receive some attention from intelligent, caring adults—public defenders, paralegals, investigators. In response, these youngsters often mellow. They let the chip drop from their shoulders and learn to trust a little They do change, and the person executed five or ten years after a murder is not the same person who committed the crime. One person committed a murder, another dies for it.³³³

For example, Joseph Cannon, who entered prison with an IQ of seventy-nine (borderline mentally retarded), “thrived better on death row, where he learned to read and write, than he ever did in his home environment.”³³⁴

A juvenile offender's life has prospective value not only for his or her own self-improvement but also for possible future contributions to society. One example is Paula Cooper, who was sentenced to death for the multiple stabbings of a seventy-eight-year-old woman, the kind of crime “which many people say is beyond rehabilitation or forgiveness and for which the death penalty is the only possible response.”³³⁵ After the Indiana Supreme Court set her death sentence aside, however, Cooper made “substantial progress towards rehabilitation,” earning her high school certificate via correspondence with the support and encouragement of her victim's grandson.³³⁶ Cooper's remarkable transformation occurred because prison offered an escape from the violence she experienced at home where her father beat her with belts and electric cables and forced her and her sisters to watch him beat and rape their mother. Feeling the change that occurred in prison, she decided that she wanted to help other children like her from falling into crime.³³⁷

D. Failure to Address the Goals of Retribution and Deterrence

Although the Eighth Amendment requires that the death penalty make a “measurable contribution” to the acceptable goals of punishment, retribution and deterrence, these goals are not served by imposing the death penalty on ju-

332. *See supra* section IV.

333. *See* DOROTHY OTNOW LEWIS, *GUILTY BY REASON OF INSANITY* 313 (paperback ed. 1998).

334. Amnesty Report, §§ 4,6 (visited Sept. 19, 2000) <www.amnesty-usa.org/amnesty/rightsforall/juvenile/dp/section6.html>.

335. *Id.*

336. *Id.*

337. *See id.*

venile offenders.³³⁸ As an expression of society's moral outrage, the retributive value of a punishment depends very much on the culpability of the offender.³³⁹ Because of their youth and generally limited intelligence at the time of the offenses, juveniles cannot be considered fully responsible for their actions, "rendering their lethal like-for-like punishment disproportionate in the extreme."³⁴⁰ The *Thompson* court agreed that these factors, plus the "teenager's capacity for growth, and society's fiduciary obligations to its children," made retribution inapplicable to the execution of a fifteen-year-old offender.³⁴¹ Justice Brennan's dissent in *Stanford* found that drawing a line between the culpability of offenders who are fifteen and offenders who are sixteen or seventeen made no sense. Because juveniles under eighteen, as a group, "lack the culpability that makes a crime so extreme that it may warrant . . . the death penalty," executing juvenile offenders "does not measurably contribute to the retributive end of ensuring the criminal gets his just desert."³⁴²

For juveniles, imposing the death penalty is equally ineffective as a deterrent. Because juvenile offenders make up only 2% of the death row population,³⁴³ "excluding [them] from the class of persons eligible to receive the death penalty will have little effect on any deterrent value capital punishment may have for potential offenders who are over eighteen."³⁴⁴ Deterrence is successful only if the person to be deterred is a rational informed decision-maker who carefully considers the gains and the losses involved.³⁴⁵ Given "the characteristics associated with childhood—impulsiveness, lack of self control, poor judgment, feelings of invincibility—the deterrent value of the juvenile death penalty is likely of little consequence."³⁴⁶ Because juveniles do not usually think in long-range-terms, "their careful weighing of a distant, uncertain, and highly unlikely consequence prior to action is most improbable."³⁴⁷ As the *Thompson* court noted, "it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent, who may be deterred by the harshest of sanctions."³⁴⁸

Deterrence is also ineffective for juvenile offenders because many do not believe, or do not care about, the possibility that they will be caught and punished. "[J]uveniles have little fear of death because they have 'a profound con-

338. See *Stanford v. Kentucky*, 492 U.S. 361, 403 (1989).

339. See *id.*

340. Amnesty Report, *supra* note 298, at § 6.

341. *Thompson v. Oklahoma*, 487 U.S. 815, 836-37 (1988).

342. *Stanford*, 492 U.S. at 404-05 (Brennan, J., dissenting).

343. See Death Penalty Information Center Home Page (visited Sept. 19, 2000) <<http://www.essential.org/dpic/juvchar.html>>.

344. *Stanford*, 492 U.S. at 404 (Brennan, J., dissenting).

345. See *id.*

346. Amnesty Report, *supra* note 298, at § 5 (quoting a 1989 report by the ABA Section on Criminal Justice).

347. *Stanford*, 492 U.S. at 404 (Brennan, J., dissenting).

348. *Thompson*, 487 U.S. at 815 n.23 (Stevens, J., plurality opinion).

viction of their own omnipotence and immorality.’”³⁴⁹ Because they see themselves as invincible, juveniles do not believe there will be any long-term negative consequences for their actions. Even if they do consider the consequences from a long-term perspective, the alternatives they have are rarely any better:

They face death every day on the street and even at school, so why should they be afraid that maybe the police will catch them and maybe they will be executed? The threat of sanctions can seem very insignificant when compared with the harsh realities and immediate conditions of life on the street.³⁵⁰

For those juvenile offenders who live in high crime areas, “their future prospects are so bleak that potential criminal sanctions seem meaningless.”³⁵¹ When one “takes it for granted that they will not live past their twentieth birthday,” the state cannot deter much by imposing harsh punishments.³⁵²

Imposing the death penalty on sixteen- and seventeen-year-old offenders also fails to take account of other important themes which emerged from the Court’s post-*Furman* decisions.³⁵³ Allowing the death penalty for juveniles does not narrow the class of eligible offenders to the “worst” offenders.³⁵⁴ Because of the unique characteristics of juvenile offenders discussed above, sixteen- and seventeen-year-old offenders lack the criminal culpability required to place them in the category of “worst” offenders. Although the crimes that adolescents may commit are just as harmful to the victims, adolescents “deserve less punishment because [they] may have less capacity to control their conduct and to think in long-range terms than adults.”³⁵⁵ Imposing death sentences on sixteen- and seventeen-year-old offenders does not meet the Court’s standard of “heightened procedural reliability.”³⁵⁶ Because age is only a mitigating factor, juries are left with a significant amount of discretion in determining how much weight to give it. Because trial counsel may not effectively present the reasons a sixteen- or seventeen-year-old should not be criminally culpable as a matter of law, and because juries may chose to ignore such arguments even when they are effectively made, the imposition of juvenile death sentences cannot be reliable. Whether two children of the same age convicted of the same crimes in the same county received the death penalty would turn on the counsel they were appointed and the jury that was impaneled—despite the fact that neither should be found sufficiently culpable as a matter of law.

349. *Stanford*, 492 U.S. at 405 (Brennan, J., dissenting) (citation omitted).

350. Elsea, *supra* note 77, at 142.

351. Ruttenberg, *supra* note 217, at 1908.

352. *Id.*

353. *See infra* section II.

354. *See Steiker & Steiker*, *supra* note 19, at 57 and accompanying text (discussing the post-*Furman* goals of death penalty statutes).

355. Amnesty Report, *supra* note 298, at § 5 (quoting a Presidential Commission reporting on youth crime in the 1970s).

356. *See Steiker & Steiker*, *supra* note 19, at 56.

E. Breakdown in Implementing Established Rules

Because of the many differences between juvenile and adult offenders, age should not be considered only as a mitigating factor that can be outweighed by other aggravating factors during the sentencing phase. A jury will often find the future dangerousness of a sixteen- or seventeen-year-old to be a serious aggravating factor, one that youth, even when coupled with other mitigating factors, will not likely overcome. Even though the Supreme Court requires that all mitigating evidence be considered at the sentencing phase, factors such as the offender's age, history of abuse or neglect, and the presence of physical brain damage or personality disorders do not seem to carry much weight in capital trials.³⁵⁷ Looking at the backgrounds of twenty-three juvenile offenders sentenced to death, Amnesty International found these extraordinary similarities:

the majority came from acutely deprived backgrounds; over half had been seriously physically or sexually abused; 10 were known to have been regularly taking drugs or alcohol from an early age; in many cases, the parents had histories of alcoholism, mental illness or drug agues; at least 14 of the prisoners suffered from mental illness or brain damage; and most were of below average intelligence.³⁵⁸

The discrepancy between what the law requires and what occurs at trial may be explained by the tendency of jurors—and even a few judges—to make emotional decisions. One study found that in “reviewing hypothetical murder cases, 60% of a jury-roll sample in one mid-Atlantic state recommended execution for 10-year-olds.”³⁵⁹ Other studies of the public perception of adolescents' culpability “suggest that age may be only a weak mitigating factor in juries' sentencing decisions for serious offences.”³⁶⁰ These hypothetical studies are supported by the experiences of the following three juvenile offenders.

The case of Sean Sellers³⁶¹ provides an excellent example of the legal system's failure to consider adequately the mitigating factors or to appreciate the psychological problems of juvenile offenders in an individualized case. Although “it seems reasonable if not essential to question the mental health of [a] juvenile” who becomes obsessed with Satanism and then kills another person,³⁶² this did not occur in Sellers' case. The trial judge did not allow the defense to introduce expert testimony of the developmental differences between adults and children because he felt “all jurors would know this anyway.”³⁶³ Nor did the jury hear evidence of Sellers' disturbed childhood, which showed that after his mother left with his step-father, Sellers was left in the care of an uncle

357. See Amnesty Report, *supra* note 298, at § 5.

358. *Id.*

359. Grisso, *supra* note 82, at 6 (citing Catherine A. Crosby et al., *The Juvenile Death Penalty and the Eighth Amendment: An Empirical Investigation of Societal Consensus and Proportionality*, LAW & HUMAN BEHAVIOR 19, 245-61 (1995)).

360. *Id.* at 6 (citing P. Gerstenfeld & A. Tomkins, Age as a Mitigating Circumstance in Juvenile Homicide Sentencing (1994) (unpublished manuscript, on file at University of Nebraska)); P. ROBINSON & J. DARLEY, JUSTICE, LIABILITY, AND BLAME (1995).

361. See *supra* section III.

362. EWING, *supra* note 60, at 73.

363. Amnesty Report, *supra* note 298, at § 6.

who made him wear diapers at age twelve and thirteen because he still wet the bed. If he wet the bed two nights in a row, he had to wear dirty diapers on his head as punishment.³⁶⁴ Furthermore, Sellers' mother and stepfather both carried knives and guns, exposing him to violence at an early age. As he grew older, the violence continued when his uncle also tried to teach him to kill animals while hunting by stepping on their heads and pulling their legs.³⁶⁵

Sean Sellers also suffered from Multiple Personality Disorder ("MPD"), "a mental condition in which 'alter' personalities manifest themselves in the sufferer," as well as physical brain damage that resulted from head injuries experienced as a child.³⁶⁶ Uncontroverted expert affidavits received by the U.S. Court of Appeals stated that Sellers suffered from MPD at the time of the killings and that one of the alter personalities, unlikely to have understood the difference between right and wrong, "must have been in executive control of [Sellers'] person or body at those times."³⁶⁷ Because a federal habeas petition was restricted to determining whether a sentence violates the Constitution, and because the testimony had not been subject to cross-examination at trial, the federal appellate court could not conclude that one juror would not have convicted him, the standard required to overturn the decision.³⁶⁸ The claim of MPD could not be invoked in the state appeals process because the Oklahoma Court of Criminal Appeals ruled that the claim was waived, as it had not been raised at trial.³⁶⁹ In doing so, the court refused to treat MPD as newly-discovered evidence despite the fact that the clinical tests for discovering and confirming its presence had not been developed at the time of trial.³⁷⁰

Another example of the legal system's failure is the case Robert Carter. One of six children living in an impoverished Houston neighborhood, Carter had been whipped and beaten with wooden switches, belts, and electric cords by both his mother and step-father.³⁷¹ When he was five, he was hit on the head with a brick; when he was ten, a baseball bat smashed his head so hard that the bat broke; and when he was seventeen, his brother shot him in the head, lodging a bullet near his temple.³⁷² When he was arrested for the murder of an eighteen-year-old female, the police held this seventeen-year-old brain damaged boy incommunicado and convinced him to confess to the murder as well as to waive his right to a lawyer.³⁷³ At sentencing, the jury "was not invited to consider as mitigating evidence Robert Carter's age at the time of the crime; the fact that he was mentally retarded (in 1986, he was found to have an IQ of seventy-four),

364. *See id.*

365. *See id.*

366. *Id.*

367. *Sellers v. Ward*, 135 F.3d 1333, 1337 (10th Cir. 1998).

368. *See id.* at 1339.

369. *See id.*

370. *See id.*

371. *See Amnesty Report, supra* note 298, at § 6.

372. *See id.*

373. *See id.*

brain damaged, and had suffered brutal physical abuse as a child; or that this was his first offence.”³⁷⁴ After ten minutes of deliberation, the jury sentenced Carter to death.³⁷⁵

VI

PROPOSED SOLUTIONS

The United States must stop executing juvenile offenders. It is time for legislatures and courts to follow the recommendations of legal scholars, the ABA, other national organizations, and international organizations to end this policy. Although these organizations and individuals strongly oppose a juvenile death penalty, their positions do not necessarily represent a general anti-death penalty stance. For example, in 1983, the ABA opposed the death penalty only as it was imposed on “offenders who were under eighteen at the time of their offenses.”³⁷⁶ The ABA continues its strong opposition to the juvenile death penalty, and although the organization is currently calling for an overall moratorium until the death penalty can be administered fairly and impartially, it does not believe that, once stopped, the juvenile death penalty should ever be reinstated.³⁷⁷

Ending the death penalty for juvenile offenders will require either legislative or judicial action, as well as the support of public opinion.³⁷⁸ Legislators and their constituents must be educated about the problems inherent in the execution of juvenile offenders.³⁷⁹ The experience of one radio talk show host, as described by Garabino, is illustrative. After first learning of the Jonesboro school shootings, this individual “had thought the death penalty was justified for such an act but [] now, as she had learned about the boys’ backgrounds (including the report that at least one of them had been sexually abused), she was changing her mind.”³⁸⁰ This talk show host “was learning about the life experiences of boys who kill, [a] kind of learning is essential if we as a society are to choose the path of understanding, which leads to humane treatment and rehabilitation, rather than savage punishment to feed our hunger for revenge.”³⁸¹

Public opinion can also play an important, if indirect role, in a judicial prohibition on imposing the death penalty on juvenile offenders. If a sufficient number of state legislatures prohibit the execution of sixteen- and seventeen-year-old offenders, a national consensus against the practice will be established.

374. *Id.*

375. *See id.* Carter’s final habeas petition was denied. *See Carter v. Johnson*, 131 F.3d 452 (5th Cir. 1997), *cert. denied* 523 U.S. 1099 (1998).

376. American Bar Association, Report No. 107, *supra* note 14.

377. *See id.*

378. *See* Robert M. Bloom, *American Death Penalty Opinion: Past, Present, and Future*, in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT* 25 (James R. Acker et al. eds., 1998).

379. *See id.*

380. GARBARINO, *supra* note 2, at 21.

381. *Id.*

Because the lack of such a consensus was a determinative factor in *Stanford*,³⁸² the establishment of one today may influence the Supreme Court to reach the opposite result. Additionally, a decrease in public support may influence district attorneys—particularly elected district attorneys—when they decide whether to seek the death penalty for a juvenile offender. If district attorneys seek few, or no, death sentences for juvenile offenders, this too may affect the Court's determination of whether a national consensus exists regarding the execution of sixteen- and seventeen-year-old offenders.

Another method the judiciary could use to prohibit the practice of imposing the death penalty on juvenile offenders would be to reinstate the proportionality analysis used by the *Thompson* majority³⁸³ and the *Stanford* dissent.³⁸⁴ Such an analysis compares the punishment imposed with the criminal culpability of the offender in order to ensure that the punishment is not excessive. Although Scalia's *Stanford* plurality opinion rejected the use of proportionality analysis, it is not clear that a majority of the Court would do the same if presented with a similar situation, as both O'Connor and the four dissenters believed that such analysis was critical in making any constitutional decision regarding the death penalty.³⁸⁵ If the Court were to use proportionality analysis in the future, continued research about the mental processes of juvenile offenders, specifically involving how they make decisions and the types of factors they consider, would be valuable in determining the retributive and deterrent effect of juvenile death sentences. If such studies reaffirm Justice Brennan's conclusion that juveniles "very generally lack the degree of blameworthiness" required for imposing the death penalty,³⁸⁶ a statute that allows juvenile offenders to be sentenced to death may fail the Court's proportionality review.

Arguing against imposing a juvenile death sentence does not mean that juveniles who kill should not face serious punishment. Punishments should deter future juvenile offenders, prevent repeat offenders, and contribute to society's desire for retribution. In creating those punishments, however, judges and juries must recognize the important fundamental differences between adults and juveniles that have been discussed earlier in this note. While incarcerated, juvenile offenders must have the opportunity to rehabilitate themselves. One commentator proposes "an incarceration alternative of about twenty-five years followed by the possibility of parole," which would "permit us to protect ourselves in the short term from presently violent teenagers," while allowing them a chance for rehabilitation.³⁸⁷ Setting a specific "magic number" for the length

382. See *Stanford v. Kentucky*, 492 U.S. 361 (1989).

383. See *Thompson v. Oklahoma*, 487 U.S. 815, 833 (1988) (Stevens, J., plurality opinion); see also *Thompson*, 487 U.S. at 853 (O'Connor, J., concurring).

384. See *Stanford*, 492 U.S. at 382 (O'Connor, J., concurring); see *id.* at 391-94 (Brennan, J., dissenting).

385. Both O'Connor and the dissenters in *Stanford* would have used the proportionality analysis. According to O'Connor, "this Court does have a constitutional obligation to conduct proportionality analysis." *Stanford*, 492 U.S. at 382 (O'Connor, J., concurring).

386. *Id.* at 402-03 (Brennan, J., dissenting).

387. Streib, *Moratorium on the Death Penalty*, *supra* note 51, at 74.

of time a juvenile offender should be incarcerated is less important than recognizing that juvenile offenders need the chance to reverse the violent patterns that may have been established in their lives and that this chance cannot occur if life is taken from them.

When children become killers, it is much easier to impose the death penalty than to address the underlying societal problems that contribute to their violence in the first place. However, a policy focusing solely on punishment will never effectively remove violent youths from society. Although society's immediate attention is often focused on how to deal with juvenile offenders once they have committed violent acts, it is equally, if not more, important to address the societal problems that cause them to be violent in the first place.

[Society's] primary attention should be not on sixteen-year-old Johnny who rapes and kills people, but on Johnny's younger brothers who will grow up to be just like him. We not only have to take Johnny out of circulation for as long as necessary, but we have to work with our communities to change the lives of all of these children.³⁸⁸

Because the problems of juvenile violence are so complex, solutions are not easy. It is also clear, however, that an effective solution requires recognizing some basic facts. First, in cases of juvenile violence, early intervention is essential because when children are young, they develop the emotional connections to family and community that determine the patterns, either healthy or unhealthy, which govern their way of functioning in society.³⁸⁹ Second, to be effective, intervention will require the participation of a broad range of social institutions:³⁹⁰

388. *Id.*

389. *See* GARBARINO, *supra* note 2, at 52. Without strong emotional connections, children will have a hard time learning to empathize with, sympathize with, or care for, other human beings.

Early intervention must begin at home due to the profound effect a parent has on his or her child. Helping parents learn to be parents is not only an important step towards reducing abuse and/or neglect, it is also an important step towards reducing the number of children who kill. *See* Heide, *supra* note 293, at 46. "[P]arenting must again become a priority for Americans." *Id.* at 46. Educational opportunities, community support groups, and social welfare programs can all encourage good parenting. Parents must come to understand the very important role they have in the life of their child, and the community must provide impoverished parents with the financial and emotional support they need to ensure that their children are supervised and well cared for. *See id.* at 48. Parenting classes should be made available to help parents with the difficulties of raising children and should increase parental awareness about home and child management, as well as the importance of developing open lines of communication and strong parent-child ties. *See id.* at 47.

Hawaii Healthy Start is an example of a successful government program that teaches effective parenting. In this program, home visitors work with mothers shortly after the child's birth, teaching parenting skills, facilitating the government programs, and establishing a relationship with a primary care physician for the baby. *See* Judy Briscoe, *Breaking the Cycle of Violence: A Rational Approach to At-Risk Youth*, 61 FED. PROBATION 3, 6 (1997).

390. Adults need to stimulate the development of empathy to help juveniles "connect to the abstract principles of morality with real-life situations and feelings." GARBARINO, *supra* note 2, at 142. Adults who work with children, especially at-risk children, need to be prepared to intervene if they see any of the following signs which often indicate that a child is prone to violence: social withdrawal, often stemming from feelings of unworthiness and rejection; excessive feelings of isolation and being alone; excessive feelings of rejection; feelings of being picked on and persecuted, which can include ridicule or teasing; low school interest and poor academic performance; expressions of violence in drawings and writings; patterns of impulsive and chronic hitting, intimidation and bullying behaviors, intolerance for differences and prejudicial attitudes; possession of firearms or other lethal objects; and affiliation with

community organizations,³⁹¹ schools,³⁹² churches, social welfare agencies, and the juvenile justice system.

Third, tougher weapons laws are needed to keep handguns and other weapons out of juveniles' hands, which will help to improve the safety of many neighborhoods and schools. Fourth and finally, the juvenile justice system needs to emphasize rehabilitation by providing counseling and guidance to juvenile offenders.³⁹³ Every one of these basic facts needs to be addressed if a solution to juvenile violence is to be effective.

VII

CONCLUSION

Some boys get lost because they are systematically led into a moral wilderness by their experiences at home and on the streets, where they are left to fend for themselves. These are the boys upon whose behalf I testify in court, trying to help judge and jury see the injustice of their experiences and how they have been robbed of their childhood by abusive and neglectful parents, by malevolent drug dealers, and by the sheer viciousness of their daily life. And I argue that to simply punish them with death . . . only compounds the injustice imposed upon them by the world in which the grew up.³⁹⁴

gangs. See Tia Schneider Denebert et al., *Reducing Violence in U.S. Schools*, 53 DISP. RESOL. J. 28, 30 (Nov. 1998).

Community classes can teach older children about the effects of abuse at home and the effects of parental alcoholism and chemical dependency. This education is critical if juveniles are to understand that such parental behavior is not considered normal—or healthy—by society. If children can learn to recognize physical abuse or substance abuse at its early stages, they can be encouraged to “take appropriate action if victimized or threatened.” Heide, *supra* note 293, at 47.

391. Preschool programs such as Head Start can provide the support that children need during their most formative years. See Stephen J. Schulhofer, 31 VAL. U. L. REV. 395, 412 (1997). By working with children at very young ages, these programs provide a stable base from which a child can grow. They are often successful at increasing literacy and self-esteem as well as in teaching children societal values like compassion and generosity, which they may not be exposed to at home. See *id.*

Neighborhood recreational centers provide children with a safe place to go after school, keeping them off the streets, and away from violence. See Heide, *supra* note 293, at 47. Community centers can provide academic tutors and encourage extracurricular activities like acting or painting. Community sports leagues not only provide a safe way for children to spend time after school, but also teach children the value of teamwork and good sportsmanship. See Schulhofer, *supra*, at 415.

Neighborhood businesses can be encouraged to provide local teenagers employment opportunities, which will provide them with an opportunity to take on responsibility, successfully hold a job, and earn money for themselves and their families. See Heide, *supra* note 293, at 47.

392. Providing school systems with increased funding and additional resources, including teachers, will equalize educational opportunities and will increase the number of individual academic success stories. Successful education can improve communication skills and encourage peaceful methods of dispute resolution. See *id.* at 47. Improving the school systems can give more students the opportunity to succeed at school. In turn, this educational success will increase the students' self-esteem. See *id.* Improving the school system can also give students more hope for the future. Rather than feeling trapped in the inner city, the prospect of college and/or a future job may provide a goal to work and fight for.

393. See Eric R. Lotke, *Youth Homicide: Keeping Perspective on How Many Children Kill*, 31 VAL. U. L. REV. 395, 416 (1997). For example, beginning or non-violent offenses should be punished immediately with community service or diversion. See *id.* More serious offenses should be punished with intermediate sanctions, “such as intensive supervision or wilderness camps, and truly serious or violent offenders should be placed in secure corrections facilities.” *Id.* All juveniles who enter the juvenile justice system should be placed in “structured after-care” programs to help them understand why they did what they did and why it was wrong. *Id.*

394. GARBARINO, *supra* note 2, at 23.

Imposing the death penalty on sixteen- and seventeen-year-old offenders is wrong and will not solve the root causes of juvenile violence. Not only does it contradict every legal assumption made about juveniles under the age of eighteen, but it fails to address or even consider the many reasons that push juveniles to violence. Executing sixteen- and seventeen-year-old offenders ignores the differences in culpability, maturity, and rationality that distinguish juvenile offenders from adults and that should prevent juveniles from being placed in society's class of "worst offenders," a prerequisite for being death-eligible.³⁹⁵ Because those same differences make juveniles more amenable to rehabilitation, a juvenile offender's life could have some future value to society if he or she were given the opportunity to develop and mature while under state supervision. Life should not be taken when the potential for improvement still exists.

Although the Supreme Court has held that executing sixteen- and seventeen-year-old offenders does not violate the Constitution, the Court has not clearly and strongly endorsed the death penalty for juvenile offenders.³⁹⁶ The two critical juvenile death penalty cases were decided by narrow margins without majority opinions,³⁹⁷ and for this reason, a future challenge to imposing the death penalty on sixteen- and seventeen-year-old offenders may result in a new constitutional standard. This reversal will probably not occur, however, until society understands more clearly why children kill and what factors contribute to juvenile violence. As people learn more about what drives children to kill, as they understand that these children are often victims of the same violence they imitate, perhaps a more compassionate consensus about how to punish youthful offenders will begin to emerge. At that point, society's attention can focus on correcting the underlying problems that create violent children in the first place. Only then will the United States be prepared to deal effectively with children who kill.

395. See Steiker & Steiker, *supra* note 19, at 57.

396. See Streib, *Moratorium on the Death Penalty*, *supra* note 51, at 73.

397. *Thompson v. Oklahoma*, 487 U.S. 815 (1998), resulted in a four justice plurality, a concurring opinion, and a three justice dissent. *Stanford v. Kentucky*, 491 U.S. 361 (1989), resulted in a four justice plurality, a concurring opinion and a four justice dissent.

Some scholars speculate that had Justice Powell retired one year later, waiting until after *Thompson* was decided, the Court would have forbidden the execution of offenders who were under 18 at the time of their crime. See Streib, *Moratorium on the Death Penalty*, *supra* note 51, at 60.