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Capital Punishment for Minors: An Eight Amendment Analysis

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CAPITAL PUNISHMENT FOR MINORS: AN EIGHTH AMENDMENT ANALYSIS

I. INTRODUCTION

Throughout American history, children and adolescents have been sentenced to death for their crimes.[1] The imposition of death sentences on these young offenders, far from being a practice of the past, is a reality of the present. Eighteen of the 1,137 inmates currently on the nation's death rows[2] committed their crimes when they were under eighteen years old.[3] It is expected that many more youths will receive death sentences in the years ahead.[4] Until recently, little has been said in the capital punishment debate about the constitutionality of imposing the death penalty on minors.[5] The issue, however, increasingly is

[1] *See infra* notes 22, 34 and accompanying text.

[2] Andersen, *An Eye for an Eye*, 121 Time 28, 28 (January 24, 1983).

[3] Brief for Petitioner at 19a (Appendix E), Eddings v. Oklahoma, 455 U.S. 104 (1982) [hereinafter cited as Brief for Petitioner]; Chicago Tribune, June 20, 1982, § 3, at 4, col. 1. The chart below provides information about these 18 death row inmates.

AGE AT COMMISSION OF CRIME*	NAME*	STATE*
15	Joseph Aulisio**	Pennsylvania
15	Todd Ice	Kentucky
16	Jose High	Georgia
16	Johnny Johnson	Georgia
16	Joseph Marshall	Louisiana
16	Reginald Smith	Louisiana
16	Monty Lee Eddings	Oklahoma
17	Frank Valencia	Arizona
17	Willie Simpson	Florida
17	Sam Gibson	Georgia
17	Andrew Legare	Georgia
17	Joseph Brown	Louisiana
17	Dalton Prejean	Louisiana
17	John Boutwell	Oklahoma
17	James Roach	S. Carolina
17	Rudolph Tyner	S. Carolina
17	Billie Battie	Texas
17	Harvey Earvin	Texas

* Information from Brief for Appellant, *supra*, at 19a (Appendix E).

** Information from Chicago Tribune, *supra*, at 4, col. 1.

[4] *See infra* notes 75-87 and accompanying text.

[5] A plethora of articles and books have been written on capital punishment. But only

coming to the attention of the public,[6] the state courts,[7] and even the United States Supreme Court,[8] as adolescents begin to challenge their death sentences on the ground that capital punishment for minors is unconstitutional.[9]

Although the Supreme Court has held that the death penalty is not unconstitutional per se,[10] it has not yet ruled on the constitutionality of capital punishment when applied to minors.[11] This Comment examines whether sentencing these young offenders to death violates the excessiveness strand[12] of the Cruel and Unusual Punishment Clause of the eighth amendment.[13] The Comment first discusses the history, present status, and likely future of capital punishment for minors.[14] With the necessary background thus provided, the Comment then shows that capital punishment for minors violates the eighth amendment because a death sentence is always excessive punishment when imposed on young offenders.[15]

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two articles have discussed the imposition of the death penalty on minors. *See* Bedau, *Juveniles and Capital Punishment*, in THE DEATH PENALTY IN AMERICA 52 (H. Bedau 2d rev. ed. 1967); Gwin, *The Death Penalty: Cruel and Unusual Punishment When Imposed Upon Juveniles*, 45 KY. BENCH & B. 16 (April 1981).

6 Various civic and professional organizations have taken an interest in the issue. *See, e.g.*, Amici Curiae Brief of the Washington Legal Foundation, Eddings v. Oklahoma, 455 U.S. 104 (1982); Amici Curiae Brief of National Council on Crime and Delinquency, National Legal Aid and Defender Association, and American Orthopsychiatric Association, Eddings v. Oklahoma, 455 U.S. 104 (1982).

7 *See, e.g.*, Eddings v. State, 616 P.2d 1159 (Okla. Crim. App. 1980), *rev'd on other grounds*, 455 U.S. 104 (1982); State v. Valencia, 124 Ariz. 139, 602 P.2d 807 (1979) (en banc).

8 *See* Eddings v. Oklahoma, 455 U.S. 104 (1982). The Supreme Court granted certiorari in *Eddings* to determine whether capital punishment for minors violates the eighth amendment of the Constitution. 450 U.S. 1040 (1981). The Court did not decide the issue, however, as it was able to reverse the juvenile defendant's death sentence on the ground that the sentencer had refused to consider the juvenile's troubled childhood and emotional problems in mitigation of the death penalty. Eddings v. Oklahoma, 455 U.S. at 112-17; *see infra* note 153 and accompanying text. On remand, Eddings again was sentenced to death. Telephone Interview with Mr. Jay C. Baker, Monty Lee Eddings' attorney (December 14, 1982). Because Eddings once again is challenging his sentence on the ground that it is unconstitutional to sentence minors to death, the Supreme Court may soon have another opportunity to resolve this issue. *See infra* note 271 and accompanying text.

9 *See* cases cited *supra* notes 7 & 8.

10 Gregg v. Georgia, 428 U.S. 153 (1976).

11 *See* Brief for Petitioner, *supra* note 3, at 18; *see also supra* note 8 and accompanying text.

12 *See infra* notes 100-02 and accompanying text.

13 *See infra* note 95 and accompanying text.

14 *See infra* notes 16-87 and accompanying text.

15 *See infra* notes 100-259 and accompanying text.

II. CAPITAL PUNISHMENT FOR MINORS: PAST, PRESENT AND FUTURE

A. THE HISTORICAL BACKGROUND

1. The Treatment of Minors at Common Law

The United States, during the late eighteenth to mid-nineteenth century, applied the English common law rules concerning the criminal liability of children and older adolescents.[16] Under these rules, there was an irrebuttable presumption that children below the age of seven were incapable of forming criminal intent.[17] Thus, these minors were never liable for their felonious acts.[18] Children between seven and fourteen also were presumed to be incapable of entertaining criminal intent.[19] But in their case, the presumption could be rebutted by a showing that the child was able to distinguish between right and wrong and had understood the nature of his or her act and that it was wrong.[20] Children fourteen years or older were deemed fully capable of forming criminal intent and therefore always were liable for their criminal offenses.[21] Consequently, during this early period of American history, children and adolescents could be, and were, tried, convicted, and sentenced to death.[22]

2. The Development of the Juvenile Justice System

In the 1820's, a fundamental change in the treatment of young offenders began to develop in the United States, and the seeds of the juve-

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16 *See* A. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 198-99 (2d ed. 1977).

17 Frey, *The Criminal Responsibility of the Juvenile Murderer*, 1970 WASH. U.L.Q. 113, 113.

18 This was the necessary result of the common law view that these children never were capable of forming criminal intent, as such a capability is a prerequisite of criminal liability. *Id.*

19 1 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750: THE MOVEMENT FOR REFORM 12 (1948).

20 *Id.*; Frey, *supra* note 17, at 113.

21 L. RADZINOWICZ, *supra* note 19, at 12; Frey, *supra* note 17, at 113. For further information about the common law rules regarding the criminal liability of children, see W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES § 6.12 (6th ed. 1958); J. MILLER, HANDBOOK OF CRIMINAL LAW § 34 (1934); R. PERKINS, CRIMINAL LAW 837-40 (2d ed. 1969). Today, 34 states retain these common law rules, although in statutory form. The remaining states, while retaining the categories of presumptions, have raised the maximum age at which a child is viewed as incapable of forming criminal intent. Frey, *supra* note 17, at 132. The Model Penal Code recommends that minors under 16 be deemed incapable of entertaining criminal intent. MODEL PENAL CODE § 4.10 (Proposed Official Draft 1962).

22 *See* A. PLATT, *supra* note 16, at 211-12. Many of the death sentences imposed on minors during this period were carried out. It was common for adolescents aged 16 and over to be executed. *See id.* Though there was a tendency to overturn or commute the sentences of young children, at least two minors aged 12 and under were put to death between 1806 and 1882. *Id.*; *see* Godfrey v. State, 31 Ala. 323 (1858); State v. Guild, 10 N.J.L. 163 (1828).

nile justice system known today were planted. Early reformers were appalled that children could be sentenced to death or given long prison sentences and mixed in jails with hardened criminals.[23] These "child savers"[24] of the 1800's

> were profoundly convinced that a society's duty to the child could not be confined to the concept of justice alone. They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent' but 'what is he, how has he become what he is, and what had best to be done in his interest and in the state's to save him from a downward career.' The child essentially good, as they saw it was to be made to feel that he is the object of [the state's] care and solicitude. . . .[25]

Believing that young offenders should be rehabilitated rather than punished, early reformers focused initially on the correctional phase of the criminal justice system. They fought against the execution of minors and advocated the establishment of facilities exclusively for juveniles, where the young offenders could be treated and cared for.[26] Their demands for separate facilities eventually were answered by state legislatures, and the 1820's saw the establishment of numerous juvenile institutions,[27] including the New York House of Refuge[28] and the Chicago Reform School.[29]

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[23] *See* Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1189 (1970).

[24] A. PLATT, *supra* note 16 (coins the term "child savers" for these reformers).

[25] *In re* Gault, 387 U.S. 1, 15 (1967).

[26] One author explains:

> The critical philosophical position of the reform movement was that no formal, legal distinctions should be made between the delinquent and the dependent or neglected. The adolescent who broke the law should not be viewed and treated as an adult offender . . . . He should not be considered an enemy of society but society's child who needs understanding, guidance and protection. The goals of the program are rehabilitation and protection from the social conditions that lead to crime.

Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 9-10.

[27] *See, e.g.*, Act of March 4, 1826, ch. 182, § 3 Mass. Laws 327; Act of March 23, 1826, ch. 47, Pa. Laws 133.

[28] The New York House of Refuge, founded in 1825, was the first juvenile correctional facility established in the United States. Fox, *supra* note 23, at 1187. In chartering the House of Refuge, the New York legislature granted to the Society for the Reformation of Delinquents the "power in their discretion to receive and take into the House of Refuge to be established by them, all such children as shall be . . . convicted of criminal offenses . . . as may . . . be proper objects . . . ." *Id.* at 1190 (quoting Act of March 29, 1824, ch. 126 § 4, N.Y. Laws 111). For further information about the New York experiment, see R. PICKETT, THE HOUSE OF REFUGE (1967); 1 D. SCHNEIDER, THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE 1609-1866 (1938).

[29] The Chicago Reform School rejected the New York House of Refuge's large dormitory or "congregate" format in favor of a program structured along familial lines. As the School's Superintendent stated in his first annual report:

> Our government of the school has been parental. We have labored to introduce as much of the family as possibly [sic] into our management of the school. We have made it our

These efforts to create separate juvenile facilities developed, during the late 1890's and early 1900's, into a juvenile court movement. Recognizing that the establishment of juvenile correctional institutions alone was not sufficient to meet the special needs of children and adolescents, reformers sought to establish courts exclusively for young offenders. These courts were to abandon the rigid procedures and adversarial processes of the criminal courts and to adopt practices sensitive to the needs of children and dispositions suited to the goals of rehabilitation.[30] The first such court was established in 1899 when Illinois passed its Juvenile Court Act.[31] By 1925, every state except Maine and Wyoming had followed Illinois' lead, enacting some type of juvenile court statute.[32] Though the precise formulas varied, all of the juvenile court systems shared three characteristics: a lack of formal adversary proceedings; an extensive prehearing investigation of an offender's background; and an attempt to prescribe for each offender a rehabilitation program most fit for his or her needs.[33]

Although societal attitudes toward young offenders changed dramatically during this period of American history, children and adolescents continued to receive the death penalty. Between 1864 and 1939, at least twenty-eight people under age eighteen were executed.[34] Of course, these minors were not sentenced to death by the juvenile courts, which lacked the power to impose such punishment. Rather, these minors had been transferred from the jurisdiction of the juvenile courts to that of the adult criminal courts.[35]

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chief aim to fill a father's place to these unfortunate youth . . . . The law of kindness has been our rule in regulating its discipline.

Fox, *supra* note 23, at 1208 (quoting FIRST ANNUAL REPORT OF THE OFFICERS OF THE CHICAGO REFORM SCHOOL TO THE BOARD OF GUARDIANS 14-15 (1856)). Although the school's "familial" system followed the goals of the reform movement, the school's efforts were short-lived. Judges developed a practice of sentencing only the most incorrigible youth to the school. An Illinois Supreme Court decision, People *ex rel.* O'Connell v. Turner, 55 Ill. 280 (1870), prevented the school from taking custody of wayward children who had not been charged with crimes. Finally, the Chicago fire in 1871 forced the closing of the school. *See* Fox, *supra* note 23, at 1215-21.

30 *In re* Gault, 387 U.S. at 15-16. For a discussion of the juvenile court movement and its aims, see H. LOU, JUVENILE COURTS IN THE UNITED STATES (1927); A. PLATT, *supra* note 16; Mennel, *Origins of the Juvenile Court: Changing Perspectives on the Legal Rights of Juvenile Delinquents*, 18 CRIME & DELINQ. 68 (1972).

31 Illinois Juvenile Court Act, ILL. LAWS 131 (1899). *See generally* BROUGHT TO JUSTICE? JUVENILES, THE COURTS AND THE LAW 3 (R. Sarri & Y. Hasenfeld eds. 1976).

32 *In re* Gault, 387 U.S. at 14-15; *see also* Fox, *supra* note 23, at 1229.

33 *See generally* Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957); Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

34 Brief for Petitioner, *supra* note 3, at 37 (Table 1).

35 *See* NATIONAL INSTITUTE FOR JUVENILE JUSTICE AND DELINQUENCY, U.S. DEP'T OF JUSTICE, YOUTH IN ADULT COURTS: BETWEEN TWO WORLDS 7 (1982) [hereinafter cited as BETWEEN TWO WORLDS]; *see also infra* notes 43-61 and accompanying text.

B. THE PRESENT SITUATION

1. The Juvenile Justice System and the Transfer of Juveniles to Criminal Court

Today all states have juvenile court acts.[36] These courts have jurisdiction over three types of juveniles: (1) those who commit crimes; (2) those who engage in status offenses;[37] and (3) those who "find themselves in a dependent state of being."[38] In most states, juvenile courts retain jurisdiction over these youths until they reach age eighteen.[39] However, as in the early history of the juvenile court system, some minors who commit crimes can be, and often are, tried in adult courts,[40] where they may receive criminal penalties, including death.[41] In 1978, for example, 261,234 minors were tried in criminal courts on felony charges.[42]

Virtually every state has some process by which minors can be transferred from the jurisdiction of the juvenile courts to that of the criminal courts.[43] The two principal transfer methods used by the states are judicial waiver and legislative waiver.[44]

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[36] Kent v. United States, 383 U.S. 541, 554 n.19 (1966). *See generally* S. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM (2d ed. 1980) (current juvenile statutes in force in each state are cited and summarized); M. LEVIN & R. SARRI, JUVENILE DELINQUENCY: A STUDY OF JUVENILE CODES IN THE UNITED STATES (1974).

[37] Status offenses are acts that would not be crimes if performed by adults, such as being truant, running away from home, and violating curfew regulations. *See generally* A. SUSSMAN, THE RIGHTS OF YOUNG PEOPLE 53-61 (1977).

[38] NATIONAL INSTITUTE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, THE PREVENTION OF SERIOUS DELINQUENCY: WHAT TO DO? 16 (1981) [hereinafter cited as THE PREVENTION OF SERIOUS DELINQUENCY].

[39] Thirty-eight states, the District of Columbia, and the federal government designate 18 as the maximum age for juvenile court jurisdiction. BETWEEN TWO WORLDS, *supra* note 35, at 44, 86 n.2. Eight states specify 17 as the maximum age, *id.* at 44 & 86 n.5 (Georgia, Illinois, Louisiana, Massachusetts, Michigan, Missouri, South Carolina and Texas), and four states designate age 16, *id.* at 44 & 87 n.6 (Connecticut, New York, North Carolina, and Vermont). *See generally* Schornhorst, *The Waiver of Juvenile Court Jurisdiction*: Kent *Revisited*, 43 IND. L.J. 583 (1968).

[40] It is usually teenagers between ages 15 and 17 charged with serious crimes who will be tried in criminal courts. *See* Schornhorst, *supra* note 39, at 592; U.S. Dep't of Justice, *Juvenile Crime Increase is Moderate, Compared to Adults*, 3 JUST. ASSISTANCE NEWS, April 1982, at 2, 13 [hereinafter cited as *Juvenile Crime Increase*].

[41] *See infra* notes 68-74 and accompanying text.

[42] Conrad, *Can Juvenile Justice Survive?*, 27 CRIME & DELINQ. 544, 552 (1981).

[43] Forty-six states and the District of Columbia have statutory systems for prosecuting juveniles in criminal proceedings. Brief for Petitioner, *supra* note 3, at 49 & n.98. The federal government also has provided for the prosecution of some juveniles in federal adult courts. *See* Federal Juvenile Delinquency Act, 18 U.S.C. § 5032 (Supp. 1983) (allows for the transfer of 16- and 17-year-old offenders to adult courts). *See generally* Browne, *Guidelines for Statutes for Transfer of Juveniles to Criminal Court*, 4 PEPPERDINE L. REV. 479, 480-81 (1977); Feld, *Legislative Policies Toward the Serious Juvenile Offender*, 27 CRIME & DELINQ. 497, 500-11 (1981); Schornhorst, *supra* note 39, at 595-98.

[44] *See generally* D. BESHAROV, JUVENILE JUSTICE ADVOCACY: PRACTICE IN A UNIQUE

Under judicial waiver, the method employed by most states,[45] the juvenile courts are empowered to divest themselves of jurisdiction in certain cases and to certify the minor to stand trial in criminal court.[46] The crime and age requirements for judicial waiver vary among the states.[47] There is greater uniformity, however, in the substantive criteria used in making waiver decisions. Most jurisdictions follow the criteria suggested by the Supreme Court,[48] and require that juvenile courts waive their jurisdiction only when the minor is not a suitable candidate for treatment or when a disposition within the juvenile system would prove a threat to public safety.[49]

In determining whether a minor is a suitable candidate for treatment, the courts typically consider the minor's age, the nature of the minor's antisocial conduct, the treatment prognosis, and the available

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COURT 249-64 (1974); Browne, *supra* note 43; Note, *Juvenile Crime: The Misguided Target of the Current Solution*, 4 GLENDALE L. REV. 97 (1979). A third method, which is used by only a few states, is prosecutorial waiver. Under this method, the juvenile and criminal courts have concurrent jurisdiction over minors. The prosecutor chooses the forum in which the juvenile is tried. *See* BETWEEN TWO WORLDS, *supra* note 35, at 61; S. DAVIS, *supra* note 36, at 2-9 to 2-14.

[45] Forty-six states, the District of Columbia and the federal government use judicial waiver to make some or all of their transfer decisions. In 28 states and federal jurisdictions, judicial waiver is the only mechanism for criminal prosecution. Feld, *supra* note 43, at 501 & n.12. *See generally* Schornhorst, *supra* note 39, at 597.

[46] Typically, the process is initiated by the state prosecutor, who requests that the juvenile be transferred to criminal court. A hearing is then conducted by the juvenile court to determine whether the minor should be transferred. *See* BETWEEN TWO WORLDS, *supra* note 35, at 46. In 1978, 9,352 youths were transferred to criminal court by means of judicial waiver. Of these, over 70% were 17, over 92% were male, and only 29% were charged with crimes against the person. Conrad, *supra* note 42, at 552.

[47] For example, in some jurisdictions, judicial waiver is permitted only if the minor is accused of a felony. *E.g.*, D.C. CODE ENCYCL. § 11-1553 (West 1966); KY. REV. STAT. §208.170(1) (1977). In others, it is permitted with respect to any criminal offense. *E.g.*, IOWA CODE ANN. §232.45 (West 1982). Most states require that the juvenile be above a certain age. *E.g.*, IOWA CODE ANN. §232.45(6)(a) (West 1982) (14 or older); KY. REV. STAT. §208.170(1) (1977) (over 16 unless charged with a class A felony or capital offense). Eleven states, however, permit judicial waiver at any age, as long as the child is over the age for the irrebuttable presumption of incapacity to form criminal intent. BETWEEN TWO WORLDS, *supra* note 35, at 46. *E.g.*, OKLA. STAT. ANN. tit. 10 § 1112(b) (West 1980); *see supra* notes 17, 18, 21 and accompanying text.

[48] The Supreme Court formally has ruled on only the procedural aspects of the judicial waiver mechanism. *See, e.g.*, Breed v. Jones, 421 U.S. 519 (1975) (states must determine whether to try a minor in juvenile or criminal court before proceeding against the youth on the merits of a specific petition or complaint); Kent v. United States, 383 U.S. 541 (1966) (procedural due process must be observed in judicial waiver determinations). It never has ruled on the substantive criteria used in reaching waiver decisions. However, in Kent v. United States, the Court suggested, in dicta, that a minor should be transferred if "the juvenile . . . [is] beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action." 383 U.S. at 566.

[49] Feld, *supra* note 43, at 502; A.B.A. JUVENILE JUSTICE STANDARDS PROJECT, TRANSFER BETWEEN COURTS, No. 23, at 36 (1977) [hereinafter cited as JUSTICE STANDARDS PROJECT].

treatment resources.[50] The decision focuses on whether the minor can be rehabilitated by the procedures, services and facilities currently available to the juvenile courts.[51] Thus, a determination that a minor is not a suitable candidate for treatment does not necessarily mean that the minor is untreatable or incapable of being rehabilitated completely. Rather, it may mean only that the juvenile justice system does not have the necessary resources.[52] Indeed, two of the most common bases for waiver are inadequate resources and insufficient time to effectuate rehabilitation.[53]

Factors considered in determining whether a disposition within the juvenile system would prove a threat to public safety are the minor's dangerousness and age.[54] In assessing the minor's dangerousness, the courts typically consider the seriousness of the crime with which the minor is charged and the minor's past juvenile record.[55] Age plays a role in these waiver decisions because minors can be retained in the juvenile justice system only until they reach the maximum age of juvenile court jurisdiction, which is usually eighteen.[56] Upon reaching this age, or shortly thereafter, they must be released. Thus, when the juvenile court determines that a minor is "dangerous,"[57] it must consider the period of time it has left in which to treat the youth. If the time is too short for proper rehabilitation or the resources too inadequate to treat the minor within the period of time available, the "dangerous" juvenile is trans-

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[50] Comment, *Juveniles in the Criminal Courts: A Substantive View of the Fitness Decision*, 23 UCLA L. REV. 988, 1012 (1976).

[51] *See* JUSTICE STANDARDS PROJECT, *supra* note 49, at 36; *see also* Kent v. United States, 383 U.S. at 566-67.

[52] *See, e.g.*, *In re* M.E., 584 P.2d 1340 (Okla. Crim. App. 1978) (court did not find that minor was beyond rehabilitation, but held that the length of time that a juvenile is subject to institutional care and the unavailability of adequate treatment resources within the juvenile system are permissible bases for decision to certify minor for criminal prosecution).

[53] Gaspar & Katkin, *A Rationale for the Abolition of the Juvenile Court's Power to Waive Jurisdiction*, 7 PEPPERDINE L. REV. 937, 941 (1980); Note, *Waiver of Juvenile Court Jurisdiction Under Iowa's New Juvenile Justice Act*, 29 DRAKE L. REV. 405, 428-29 (1980); Comment, *supra* note 50, at 1004, 1007-08.

[54] *See* Feld, *supra* note 43, at 502.

[55] *See id.* The more serious a juvenile's present offense and the more prior delinquency referrals the youth has had, the more likely it is that the juvenile will be transferred to criminal court. *Juvenile Crime Increase*, *supra* note 40, at 13.

[56] *See supra* note 39 and accompanying text.

[57] The accuracy of any determination regarding dangerousness is certainly questionable. The evidence overwhelmingly indicates that the capacity to determine dangerousness or to predict future criminal behavior is "quite beyond our present technical ability." N. MORRIS, THE FUTURE OF IMPRISONMENT 62 (1974); *see also* DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH (C. Frederik ed. 1978); J. FLOUD & V. YOUNG, DANGEROUSNESS AND CRIMINAL JUSTICE (1981); Monahan, *The Prediction of Violent Behavior in Juveniles*, in THE SERIOUS OFFENDER 154 (1977); Schlesinger, *The Prediction of Dangerousness in Juveniles: A Replication*, 24 CRIME & DELINQ. 40 (1978).

ferred to criminal court, where he can receive a sentence that would keep him in custody beyond his eighteenth birthday.

The principal alternative to judicial waiver is legislative waiver.[58] Under this method, statutes provide that minors charged with certain specified crimes come automatically within the jurisdiction of the criminal courts.[59] The designated crimes are often capital and other serious offenses.[60] As in the case of judicial waiver, the minimum age at which a youth can be transferred varies among the states.[61]

Serious criticisms have been levelled at both judicial[62] and legislative[63] waiver. However, they have withstood constitutional attack.[64]

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58 Comment, *A Model for the Transfer of Juvenile Felony Offenders to Adult Court Jurisdiction*, 4 J. JUV. L. 170, 174 (1980). Thirty-one jurisdictions use legislative waiver. BETWEEN TWO WORLDS, *supra* note 35, at 97. Virtually all of these jurisdictions, however, have judicial waiver provisions as well. *See, e.g.*, COLO. REV. STAT. §§ 19-1-103(9), 19-1-104, 19-3-108 (1973). Legislative waiver is the mechanism by which most minors are placed in adult courts. In 1978, for example, most of the 261,234 minors tried in criminal courts on felony charges were placed there as a result of legislative waiver. Conrad, *supra* note 42, at 552.

59 Feld, *supra* note 43, at 508; Comment, *supra* note 58, at 174. As juvenile courts are required solely by statute, legislatures are free to modify the court's jurisdiction in a variety of ways. They can raise or lower the maximum age of juvenile court jurisdiction. *See supra* note 39 and accompanying text. Or, as in the case of legislative waiver, they can exclude certain crimes from the court's jurisdiction, thus bringing those offenses under the exclusive authority of the criminal courts. *See* Feld, *supra* note 43, at 508; Comment, *supra* note 58, at 174.

60 Eleven of the 31 legislative waiver jurisdictions exclude only serious crimes from the province of the juvenile courts. BETWEEN TWO WORLDS, *supra* note 35, at 97. Most of these jurisdictions exclude capital offenses or those punishable by life imprisonment, *e.g.*, FLA. STAT. ANN. § 39.02(5)(c) (West 1983); LA. REV. STAT. ANN. § 13:570A(5) (West 1980), but some jurisdictions exclude broader categories of serious offenses, *e.g.*, D.C. CODE ENCYCL. § 16-2301(3) (West 1978). A few exclude juveniles charged with certain repeat offenses, *e.g.*, R.I. GEN. LAWS § 14-1-7.1 (1981). A majority of the legislative waiver jurisdictions, however, do not exclude serious crimes. Twenty of the 31 legislative waiver jurisdictions exclude only minor offenses, such as traffic and watercraft violations. BETWEEN TWO WORLDS, *supra* note 35, at 97. But even in these states, minors charged with serious offenses can be tried in criminal courts, as such states typically have judicial waiver provisions as well. *See supra* note 58 and accompanying text.

61 *See, e.g.*, LA. REV. STAT. § 13:1570A(5) (West 1980) (15 or older); N.Y. PENAL LAW § 30.00 (McKinney 1982) (13 or older for murder; 14 or older for other specified felonies or attempted felonies).

62 The most common criticism of judicial waiver is that the standards of "dangerousness" and "amenability to treatment" used are "in effect broad, standardless grants of discretion." Feld, *supra* note 43, at 507; *see, e.g.*, Schornhorst, *supra* note 39; Note, *supra* note 53; Comment, *supra* note 50.

63 The major criticism of legislative waiver is that it contradicts the entire philosophy of the juvenile justice system, as it allows minors to be transferred solely on the basis of the offense charged, and thus many juveniles who could benefit greatly from the treatment available in the juvenile system and who may pose no future threat to society are subjected to the criminal process. *See, e.g.*, Feld, *supra* note 43, at 508-09; Comment, *Waiver in Indiana: A Conflict with the Goals of the Juvenile Justice System*, 53 IND. L.J. 601 (1978).

64 The substantive criteria of judicial waiver never have been challenged in the Supreme Court. The lower appellate courts that have examined the standards have been unresponsive to the various constitutional attacks, such as "void for vagueness," that have been made. *See*

Even critics of these particular methods of transfer do not deny that minors, in certain circumstances, should be moved to the criminal system.[65] In fact, transfer is viewed as a functional necessity, required for three important purposes: (1) to protect the public from those juveniles whom the juvenile system is incapable of rehabilitating; (2) to deter juveniles from committing serious crimes;[66] and (3) to ease the burden on the juvenile justice system.[67] Thus, though there may be criticism of the particular methods by which transfer decisions are made, transfer itself generally is accepted and is certain to remain a part of the juvenile justice process.

2. *Minors in Criminal Court*

Once transferred to criminal court, a minor typically is eligible for all criminal penalties, including death. In most of the thirty-eight capital punishment states,[68] minors convicted of capital crimes may receive the death penalty.[69] In all such states, youth is a mitigating circum-

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Feld, *supra* note 43, at 507 n.28. The courts also have upheld legislative waiver statutes against repeated due process and equal protection challenges. *See* Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 Minn. L. Rev. 515, 556-71 (1978).

[65] *See, e.g.*, Schornhorst, *supra* note 39, at 602 ("[w]aiver, therefore, remains an unsatisfactory, but nevertheless practical, means of ridding the juvenile court of persons whom it is not equipped to handle, and more likely than not, has mishandled in the first place"); Comment, *supra* note 58, at 179 ("the transfer process clearly is needed to alleviate some of the problems of the overburdened juvenile justice system"); *cf.* Breed v. Jones, 421 U.S. 519, 535 (1975) ("there appears to be widely shared agreement that not all juveniles can benefit from the special features and programs of the juvenile-court system and that a procedure for transfer to an adult court should be available"). That most critics of legislative and judicial waiver object to these particular methods rather than to transfer itself is evidenced further by their tendency to propose new transfer methods or to suggest ways to improve the present ones. *See, e.g.*, Feld, *supra* note 43, at 511-21; Comment, *supra* note 58, at 181-85.

[66] *But see infra* notes 227-43 and accompanying text.

[67] *See* NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION (1976); Comment, *supra* note 58, at 179.

[68] Andersen, *supra* note 2, at 28.

[69] Brief for Respondent at 19, Eddings v. Oklahoma, 455 U.S. 104 (1982). Some death penalty states do forbid the imposition of death sentences on minors, however. *E.g.*, CAL. PENAL CODE § 190.5 (West 1982) (under 18); CONN. GEN. STAT. ANN. § 53a-46a(f)(1) (West 1982) (under 18); ILL. ANN. STAT. ch. 38, § 9-1(b) (Smith- Hurd 1978) (under 18); NEV. REV. STAT. § 176.025 (1973 & Supp. 1977) (under 16); N.H. REV. STAT. ANN. § 630:1(4) (1974) (under 17); N.M. STAT. ANN. § 18-14 (1980) (under 18); N.Y. PENAL LAW § 125.27(b) (McKinney 1975) (under 19); TEX. PENAL CODE ANN. § 8.07(d) (Vernon 1981) (under 17). Although in Kentucky the death penalty presently may be imposed on minors, the Kentucky legislature recently passed a law, which goes into effect in 1984, prohibiting capital punishment for those under 18 at the time of the offense. Amici Curiae Brief of the Kentucky Youth Advocates at 2, Eddings v. Oklahoma, 455 U.S. 104 (1982) [hereinafter cited as Brief of the Kentucky Youth Advocates]. *See* KY. UNIFIED JUVENILE CODE, KY. REV. STAT. § 208A.340, ch. 208 (1980); S.B. 309 §1.1 (1980), *cited in* Brief of the Kentucky Youth Advocates, *supra*; *see also* KY. REV. STAT. § 208E.070(2) (effective July 15, 1984). The general

stance[70] that can be proffered as a reason for a sentence less than death.[71] And the youth of a juvenile defendant tends to be given great weight by sentencing bodies.[72] Nevertheless, the mitigating effect of

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trend, however, seems to be in the opposite direction, with states that previously prohibited capital punishment for minors removing the restriction. *See infra* note 85 and accompanying text.

70 In a series of cases decided in 1976, the Supreme Court held that death penalty statutes that adopt a mitigating-aggravating format are constitutional. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); *cf.* Roberts v. Louisiana, 428 U.S. 325 (1976) (mandatory death penalty statutes held to be unconstitutional); Woodson v. North Carolina, 428 U.S. 280 (1976). Since these decisions, all death penalty states have adopted some form of aggravating-mitigating capital punishment system. Under this system, a capital sentencer must find at least one of the aggravating circumstances listed in the statute before it can impose the death penalty. Aggravating circumstances vary among the jurisdictions, but they usually include factors such as that the capital crime was "especially heinous, atrocious or cruel," committed while the offender was engaged in the commission of another felony, or committed for pecuniary gain. *See* Gregg v. Georgia, 428 U.S. at 161; Proffitt v. Florida, 428 U.S. at 248 n.6. Under this format, the defendant is permitted to proffer mitigating circumstances, which might justify a sentence less than death. These circumstances include the youth of the defendant at the time of the crime, the defendant's cooperation with the police, the defendant's lack of a prior criminal record, and the fact that the defendant's action occurred under duress or the domination of another. *See* Lockett v. Ohio, 438 U.S. 586, 608 (1978); Bell v. Ohio, 438 U.S. 637, 641 (1978); Jurek v. Texas, 428 U.S. 262, 273 (1976); Proffitt v. Florida, 428 U.S. at 249 n.6. The sentencer then balances the mitigating factors against the aggravating ones to determine whether the death penalty should be imposed. *See generally*, Liebman & Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757, 791-806 (1978); Note, *Right of a Defendant to Have Any Relevant Aspect of His Character and Circumstance of Offense Used as Factors Mitigating a Death Sentence*, 25 WAYNE L. REV. 1147 (1979).

71 Twenty-four capital punishment states specifically have designated an offender's youth as a mitigating factor in their death penalty statutes. Brief for Petitioner, *supra* note 3, at 46-47. Though the other death penalty states do not list specific mitigating circumstances in their capital punishment statutes, decisions of the Supreme Court make it clear that capital sentencers in these states are required to consider the defendant's youth in mitigation of the death penalty. *See* Eddings v. Oklahoma, 455 U.S. 104, 115 (1982); Lockett v. Ohio, 438 U.S. at 604, 608 (1978).

72 *See, e.g.*, State v. Maloney, 105 Ariz. 348, 360, 464 P.2d 793, 805, *cert. denied*, 400 U.S. 841 (1970) (court reduces death sentence imposed at retrial on defendant who, at age 15, killed his parents: "The defendant has committed a heinous crime, the sheer brutality of which unquestionably shocked the jury. . . . Had he been of mature age the death penalty would have gone undisturbed by this court. . . . Because of his immaturity we are persuaded that he should not die"); State v. Stewart, 197 Neb. 497, 524-27, 250 N.W.2d 849, 865-66 (1977) (court reduces death sentence of 16-year-old: "[T]he defendant's age at the time of the crime and the absence of any significant criminal record mitigate strongly against the imposition of the death penalty"); Commonwealth v. Green, 396 Pa. 137, 147-48, 151 A.2d 241, 246 (1959) (court vacates death sentence imposed on youth age 15: "[That] his age is an important factor in determining the appropriateness of the penalty . . . is greatly illustrated by the fact that . . . no person under the age of 16 years and only one person under the age of 19 years has ever suffered the death penalty in this Commonwealth"). *But see* People v. West, 54 Ill. App. 3d 903, 909-10, 370 N.E.2d 265, 270-71 (1977) (affirming 56-100 year sentence imposed on 16-year-old murderer: "[Y]outh and rehabilitation . . . are proper considerations in the fixing of sentences, but they are not the sole elements. The nature of the crime, the protection of the public, deterrence and punishment have equal status in the consideration").

youth may be, and sometimes is, outweighed by the aggravating circumstances[73] established in the case.[74] When the scale so tips, the minor is sentenced to death.

C. THE FUTURE

Various factors strongly suggest that more and more juvenile offenders will be sentenced to death in the decades ahead. First, an increasing number of minors charged with capital offenses probably will be tried in criminal courts. The common perception that the United States is in the grip of a massive juvenile crime wave[75] has produced a "get tough" attitude toward juvenile crime,[76] leading many states to

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[73] *See supra* note 70 and accompanying text.

[74] This is demonstrated vividly by the fact that 18 juvenile offenders are currently on death row. *But see infra* notes 180-87 and accompanying text.

[75] *See, e.g.*, Vandall, *The Use of Force in Dealing with Juveniles: Guidelines*, 17 CRIM. L. BULL. 124, 124 (1981) ("Juvenile crime is widespread, growing, and often violent."); Note, *supra* note 44, at 97 (juvenile crime is a very "real and growing problem"); Comment, *supra* note 58, at 170 (problem of serious juvenile crime has reached "epidemic proportions"); *cf.* Weis & Henry, *Crime and Criminals in the United States in the 1970s*, in CRIMINOLOGY REVIEW YEAR BOOK (S. Messinger & E. Bittner eds. 1979) (more than two-thirds of adults in the United States worry about becoming victims of residential burglary, a typical juvenile offense).

Juvenile crime is a serious national problem; juvenile arrests make up almost 40% of all arrests for serious property and violent offenses. U.S. DEP'T OF JUSTICE, SECOND ANNUAL REPORT OF THE JUSTICE SYSTEM IMPROVEMENT AGENCIES 25 (1981) [hereinafter cited as REPORT OF THE JUSTICE SYSTEM IMPROVEMENT AGENCIES]. Recent studies, however, have not supported the public's present perception that the decade of the 1970's produced a dramatic and disproportionate increase in serious and violent juvenile crime. For example, a study sponsored by the National Center for Juvenile Justice found that juvenile crime posted only a modest increase over the last decade when compared with crimes committed by adults, and that personal victimizations committed by juveniles are less serious in terms of weapon use, injury rate, and financial loss than similar crimes committed by adults. *See* H. SNYDER & J. HUTZLER, THE SERIOUS JUVENILE OFFENDER: THE SCOPE OF THE PROBLEM AND THE RESPONSE OF JUVENILE COURTS (1981). Another recent study reports that rates of being victimized by juveniles for both property and personal crimes have remained relatively stable for the past 10 years. *See* McDermott & Hindelang, *Juvenile Criminal Behavior in the United States: Its Trends and Patterns*, in 1 ANALYSIS OF NATIONAL VICTIMIZATION SURVEY DATA TO STUDY SERIOUS DELINQUENCY BEHAVIOR (1981); *cf.* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 55 (1967) [hereinafter cited as THE CHALLENGE OF CRIME] (report notes that figures regarding juvenile contribution to overall crime may be distorted if figures are used as only guide because: (1) juveniles are more easily apprehended than adults, and (2) the tendency of juveniles to act in groups when committing crimes may produce numbers of arrests significantly in excess of crimes actually committed); THE PREVENTION OF SERIOUS DELINQUENCY, *supra* note 38, at ix, 18 (small percentage of all juvenile offenders account for a majority of serious juvenile offenses; serious crime for which juveniles are least arrested is murder).

[76] *See generally* P. STRASBURG, VIOLENT DELINQUENTS (1978); TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME (1978) [hereinafter cited as TASK FORCE 1978]; Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal,"* 65 MINN. L. REV. 167 (1981).

adopt legislative waiver for serious offenses.[77] Moreover, the total abolition of juvenile court jurisdiction over minors accused of criminal offenses may be forthcoming[78] because of growing dissatisfaction with the failure of the juvenile system to rehabilitate young offenders[79] and with the lack of certain constitutional safeguards in the system.[80] The

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[77] *E.g.*, 29 A Judiciary-Courts Acts, § 301.2(8) (West 1983) (in addition to 16-and 17-year-olds who were already subject to adult proceedings, the New York Act specifically targeted 13-, 14- and 15-year-olds who commit violent criminal acts for adjudication in the adult system). *See generally* BETWEEN TWO WORLDS, *supra* note 35, at 81-82. The New York Act provides a clear example of how the "get tough" attitude toward juvenile crime led a state to turn to legislative waiver. New York's tougher stand on juvenile crime resulted in part from its desire that these youths receive "longer sentences, be exposed to adult prisons and face public trials instead of private proceedings" and from its dissatisfaction with the lenient and meaningless dispositions previously imposed on juveniles. Levy, *Violent Juveniles: The New York Courts and the Constitution*, 11 COLUM. HUM. RTS. L. REV. 51, 52 (1979).

[78] *See* Conrad, *supra* note 42; Note, *supra* note 44, at 104.

[79] Many commentators believe that the system is ineffective at rehabilitation and has become purely punitive. *See, e.g.*, C. BARTOLLAS & S. MILLER, THE JUVENILE OFFENDER: CONTROL, CORRECTION AND TREATMENT 419 (1978); Wizner & Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?* 52 N.Y.U. L. REV. 1120, 1121 (1977); Note, *supra* note 44, at 103. These commentators claim that the juvenile justice system does not address itself to the problems and needs of its dependents. They note that the juvenile courts prescribe treatments not suited to the problems from which youngsters suffer, do little to determine exactly what caused an individual's delinquent behavior, and sometimes provide no treatment at all. For example, minors often are placed on home probation, when their unhealthy home situations are largely responsible for their delinquent behavior in the first place. These critics also point out that juvenile correctional facilities are very inadequate and that often juveniles are placed in adult jails and lockups because there is no room for them in the overcrowded juvenile facilities. *See* U.S. Dep't of Justice, *$3.8 Million Awarded to Remove Juvenile From Adult Jails, Lockups*, 3 JUST. ASSISTANCE NEWS, May 1982, at 5 ("about 479,000 juveniles are detained each year in more than 16,000 adult jails and lockups in virtually every state"). Concluding that the juvenile courts are unwilling to address themselves to the problems of juvenile offenders and that the resources currently available are inadequate for the treatment of felony offenders, some commentators suggest that it is better to send these juveniles to criminal courts, where at least they are afforded all the guarantees of due process. *See, e.g.*, Comment, *supra* note 58, at 179; *see also infra* note 80 and accompanying text.

[80] The juvenile justice system denies juveniles certain constitutional guarantees enjoyed by adults in the criminal courts, such as the right to jury. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971). The juvenile justice system has survived repeated legal attacks on such grounds on the theory that "the state is merely acting as *parens patriae* for the youngster's protection in the [same] way as it does in a guardianship matter and not accusing the child with a view to punishment as it does in a prosecution for crime." Paulsen, *supra* note 33, at 549; *see* McKeiver v. Pennsylvania, 403 U.S. at 545. But there is growing recognition that the juvenile justice system is subjecting juveniles to institutionalization without providing adequate treatment and care. *See supra* note 79 and accompanying text. Thus, many believe that the juvenile is getting "the worst of both worlds." *See, e.g.*, A. PLATT, *supra* note 16, at 176-92; S. WHEELER & L. COTTRELL, JUVENILE DELINQUENCY—ITS PREVENTION AND CONTROL 31-36 (1966); Fox, *Juvenile Justice in America: Philosophical Reforms*, 5 HUM. RTS. 63 (1975). The Supreme Court began to be troubled by the situation as long ago as the 1960's:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purposes to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults.

courts[81] and the federal government[82] have made efforts to improve the juvenile justice system. However, judicial decisions alone may be un-

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Kent v. United States, 383 U.S. at 555.

81 For example, the Supreme Court has imposed on the juvenile courts certain basic requirements of due process. *See* Breed v. Jones, 421 U.S. at 528-41 (imposed double jeopardy prohibition); *In re* Winship, 397 U.S. 358 (1970) (observance of standard of proof beyond a reasonable doubt); *In re* Gault, 387 U.S. at 31-58 (imposed procedural protections such as right to counsel, right to confrontation and cross-examination of witnesses, and privilege against self-incrimination). *But see* McKeiver v. Pennsylvania, 403 U.S. at 545 (no right to jury).

Some lower courts have tried to force states to improve the resources and facilities available in their juvenile justice systems by holding that juveniles have a constitutional right to treatment. *See, e.g.*, Nelson v. Heyne, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967); White v. Reid, 125 F. Supp. 647 (D.C. 1954). *See generally* Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEO. L.J. 848 (1969); Renn, *The Right to Treatment and the Juvenile*, 19 CRIME & DELINQ. 477 (1973). The idea of such a constitutional right was borrowed from the mental health area, where some courts have held that when a state involuntarily commits a person to a mental institution in order to cure his or her mental illness the person has a right to treatment. Without such treatment, the deprivation of this person's freedom is unjustified and the patient must be released. *See, e.g.*, Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *vacated*, 422 U.S. 563 (1975); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Stachulak v. Coughlin, 364 F. Supp. 686 (N.D. Ill. 1973). *See generally* Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499 (1960). As applied to the juvenile justice area, the theory is that because the juvenile justice system institutionalizes minors so that they can be rehabilitated, juveniles have a right to rehabilitative treatment. However, this constitutional right may have limited application in the juvenile justice area. It has been argued that the theory behind the constitutional right to treatment is suited only to status offenders and dependent minors, who, like the mental health patients, have not committed any crimes and are thus institutionalized solely for rehabilitative reasons. Renn, *supra*, at 483; *see also* Morales v. Turman, 562 F.2d 993, 998 (5th Cir. 1977). Juvenile law may have a dual purpose with regard to minors who commit criminal acts: treatment and penal custody. In the case of serious juvenile felons, the purpose of penal custody may outweigh completely the purpose of treatment. *See* Morales v. Turman, 562 F.2d at 998; Renn, *supra*, at 483.

82 For example, in 1974 Congress passed the Juvenile Justice and Delinquency Prevention Act (J.J.D.P.), which established programs and projects designed to improve the rehabilitative resources and facilities of the juvenile justice system. *See* 42 U.S.C. §§ 5601-5751 (1976). The Act provides for a dual method of treatment for young offenders: legal control (i.e., juvenile court) for youths who engage in serious crimes, and informal social control (i.e., family, school, church, and community services) for youths who engage in less serious crimes and non-criminal behavior. *See generally* THE PREVENTION OF SERIOUS DELINQUENCY, *supra* note 38, at 2. Under this new method, the juvenile courts should have more time and resources available to handle serious offenders. Moreover, the J.J.D.P. Act of 1974 authorizes both prevention and control of delinquency. 42 U.S.C. § 5602(b) (1976). It created the National Office of Juvenile Justice and Delinquency Prevention, and mandated that the office take steps to improve the juvenile justice system and to develop programs to prevent juvenile delinquency. *Id.* at § 5611. The 1980 amendments to the Act authorized the Office to develop programs focusing on serious and violent offenders. *Id.* at § 5601(8) (Supp. V 1981). Particular attention is to be paid to prevention and rehabilitation. A few states and several commentators have followed the federal government's lead and begun to pay increasing attention to the rehabilitation of serious and violent offenders. *See, e.g.*, Calhoun & Wayne, *Can the Massachusetts Juvenile System Survive the Eighties?* 27 CRIME & DELINQ. 522 (1981) (discusses Massachusetts' program of community-based correction for serious juvenile offenders);

able to save it[83] and the government's programs may be short-lived because of recent budget cuts.[84]

That more minors will be sentenced to death also is indicated by the growing willingness, at least on the part of some, to impose this sentence on minors. More and more states are amending their death penalty statutes to permit the imposition of death sentences on offenders under age eighteen.[85] That eighteen juvenile offenders are currently on death row certainly demonstrates that sentencers are willing to impose the penalty.[86] All of these factors, along with the increasingly common imposition of death sentences in general,[87] strongly suggest that more minors will receive capital sentences in the years ahead, unless there is judicial recognition that the death penalty is unconstitutional when imposed on these very young offenders.

Coates, *Deinstitutionalization and the Serious Juvenile Offender: Some Policy Considerations*, 27 CRIME & DELINQ. 477 (1981).

The 1980 amendments to the J.J.D.P. Act also authorized the removal of juveniles from adult jails and lock-ups. 42 U.S.C. § 5602(a)(8) (Supp. V 1981). The statute provides for federal grants to be given to sites participating in the program. Currently, 51 states and territories participate. During 1981, the number of juveniles in regular contact with adults fell from 58,058 to 39,041. REPORT OF THE JUSTICE SYSTEM IMPROVEMENT AGENCIES, *supra* note 75, at 23.

[83] For example, even if the courts were to impose all the procedural guarantees of the Constitution on the juvenile courts, the problem of inadequate treatment resources and facilities would remain. *See supra* note 79 and accompanying text.

[84] Many of the programs created under the Federal Juvenile Justice and Delinquency Prevention Act, *see supra* note 82 and accompanying text, were not slated to receive fiscal year 1983 funding. *See* REPORT OF THE JUSTICE SYSTEM IMPROVEMENT AGENCIES, *supra* note 75, at 28.

[85] BETWEEN TWO WORLDS, *supra* note 35, at 82. *See, e.g.*, COLO. REV. STAT. § 16-11-103 (Supp. 1981) (changing the statute from one that prohibited the imposition of a death sentence on an offender who was under 17 at the time of the crime to one with no age restrictions); *see also State Crack Down on Young Criminals*, U.S. NEWS & WORLD REP., February 1, 1982, at 6 (notes that though 27 states currently permit the execution of minors, the remaining death penalty states are expected to follow suit in the years ahead).

[86] *See supra* note 3 and accompanying text. Indeed, a judge recently commented that these death sentences are "a reflection of the mood of the country." Chicago Tribune, June 20, 1982, § 3, at 4, col. 1; *cf. State Crack Down on Young Criminals*, *supra* note 85, at 6 (suggests that sentences for juveniles will be more severe and the death penalty imposed on them with greater frequency in the future).

[87] The number of people on death row has been rising steadily for the last five years and the death row population at present is the largest it has ever been since the national count began in 1953. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, DEATH-ROW PRISONERS 1 (1981); *see also* Andersen, *supra* note 2, at 28 (current death row population is 200 more than a year ago and twice as many as in 1979); Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 5 (1980) (average of one person every three days currently is added to death row population).

III. A CONSTITUTIONAL ANALYSIS—EIGHTH AMENDMENT CONSIDERATIONS

In recent years, minors have begun to challenge the constitutionality of their death sentences.[88] Though the constitutionality of capital punishment for minors may be challenged on many grounds,[89] the ground primarily relied upon is that sentencing minors to death violates the Cruel and Unusual Punishment Clause of the eighth amendment.[90] So far, all such eighth amendment challenges have failed.[91] However, these prior eighth amendment attacks on capital punishment for minors virtually have ignored the eighth amendment argument that is reviewed in this Comment.[92] The argument examined herein is that sentencing

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[88] *See, e.g.*, State v. Valencia, 124 Ariz. 139, 602 P.2d 807 (1979) (en banc); Eddings v. State, 616 P.2d 1159 (Okla. Crim. App. 1980), *rev'd on other grounds*, 455 U.S. 104 (1982); *see also* Riley, *Ky. Court: Age No Bar to Execution of Juvenile*, Nat'l L.J., Oct. 10, 1983, at 5.

[89] For example, one could challenge the constitutionality of the death penalty in general. But only Justices Marshall and Brennan have taken the position that the death penalty is unconstitutional *per se*. *See* Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); Furman v. Georgia, 408 U.S. 238, 314 (1972) (Marshall, J., concurring); *id.* at 257 (Brennan, J., concurring). Moreover, as this Comment will show, such an attack on the death penalty in general is not necessary.

One also could challenge capital punishment for minors by arguing that juveniles have a constitutional right to treatment. As noted earlier, such a right is based on the theory that because the juvenile justice system institutionalizes minors for the purpose of rehabilitation, juveniles have a right to treatment. *See supra* note 81 and accompanying text. If such a right were held to exist, imposition of the death penalty would be unconstitutional. However, the Supreme Court has not yet recognized such a right. And it is unlikely to do so, at least in regard to those juveniles who have committed serious felonies, as such juveniles are institutionalized not merely for the purpose of rehabilitation, but also for the purpose of penal custody. *See supra* note 81 and accompanying text. It is probably for this very reason that no one has yet challenged capital punishment for juveniles on the ground that these minors, who have committed capital crimes, have a constitutional right to treatment.

[90] *See* cases cited *supra* note 88.

[91] The state courts have dismissed such challenges with little comment. *See, e.g.*, State v. Valencia, 124 Ariz. at 141, 602 P.2d at 809; Eddings v. State, 616 P.2d at 1166-67. Though the Supreme Court has not ruled on the issue, the dissenting opinion in Eddings v. Oklahoma suggests that at least four of the Justices are prepared to reject an eighth amendment argument. 455 U.S. at 128 (Burger, C.J., dissenting). The Supreme Court had granted certiorari in *Eddings* on the question of whether capital punishment for minors violates the eighth amendment. 450 U.S. 1040 (1981). The Court did not decide the issue, however, as it was able to reverse the juvenile defendant's death sentence on other grounds. 455 U.S. at 112-17. *See supra* note 8 and accompanying text. In his dissenting opinion, Chief Justice Burger, who was joined by Justices White, Blackmun and Rehnquist, objected to the grounds on which the majority reversed Eddings' sentence. 455 U.S. at 120-28. Although he did not elaborate on the certiorari issue regarding the constitutionality of imposing the death penalty on minors, at the conclusion of his dissent Chief Justice Burger stated that if it were up to him he would "decide the sole issue on which we granted certiorari and *affirm the judgment*." *Id.* at 128 (emphasis added). The lower appellate court had upheld Eddings' death sentence and ruled that capital punishment for minors was constitutional. Eddings v. State, 616 P.2d at 1166-67.

[92] In Eddings v. State, 616 P.2d 1159 (Okla. Crim. App. 1980), *rev'd on other grounds*, 455 U.S. 104 (1982), for example, the petitioner relied primarily on the argument that capital

minors to death violates the excessiveness strand[93] of the Cruel and Unusual Punishment Clause. Such an argument deserves greater attention; for, as will be shown, sentencing minors to death is excessive punishment and thus violates the Cruel and Unusual Punishment Clause of the eighth amendment.[94]

A. THE EXCESSIVENESS STRAND OF THE EIGHTH AMENDMENT

The eighth amendment provides that "[e]xcessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted."[95] Since the amendment was added to the Constitution in 1791, the Supreme Court has struggled to ascertain the meaning of its Cruel and Unusual Punishment Clause.[96] Though the Court never has provided a precise definition,[97] it has articulated several principles inherent in the clause.[98] One of the principles that is relevant in analyzing the constitutionality of imposing the death penalty on minors[99] is that a

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punishment for minors violates the eighth amendment because it is unacceptable to contemporary society. *See* Brief for Petitioner, *supra* note 3, at 18-59; *see also infra* note 99 and accompanying text.

93 *See infra* notes 100-02 and accompanying text.

94 Certain Supreme Court Justices are likely to be particularly sympathetic to an excessiveness argument such as the one described in this Comment. For example, Justice Powell might be sympathetic, as he repeatedly asserted in his majority opinion in *Eddings* that minors are less mature and less responsible than are adults. *See* 455 U.S. at 115-16. Of course, Justices Brennan and Marshall will be supportive of an excessiveness argument, as they have taken the position that a death sentence is excessive punishment in all cases. *See* Eddings v. Oklahoma, 455 U.S. at 117 (Brennan, J., concurring); Furman v. Georgia, 408 U.S. 238, 314 (1972) (Marshall, J., concurring).

95 U.S. CONST. amend. VIII. The eighth amendment applies to the states through the Due Process Clause of the fourteenth amendment. Robinson v. California, 370 U.S. 660, 666 (1962).

96 *See generally* L. BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT (1975); Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839 (1969); Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause*, 126 U. PA. L. REV. 989 (1978); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972).

97 *See* Trop v. Dulles, 356 U.S. 86, 99 (1958) ("[t]he exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court"); *see also* Furman v. Georgia, 408 U.S. at 376 (Burger, C.J., dissenting); Weems v. United States, 217 U.S. 349, 368 (1910); Wilkerson v. Utah, 99 U.S. 130, 135-36 (1879).

98 First, the Cruel and Unusual Punishment Clause forbids punishments that are inherently cruel, inhuman, or barbarous. *In re* Kemmler, 136 U.S. 436, 447 (1890); Wilkerson v. Utah, 99 U.S. at 136. Second, it places substantive limits on what can be made criminal and punished as such. Robinson v. California, 370 U.S. 660 (1962) (cannot punish individuals because of their status or condition). Third, it forbids punishments that are not acceptable to contemporary society. Gregg v. Georgia, 428 U.S. at 173. *But see infra* note 99 and accompanying text. Fourth, it prohibits excessive punishment. Enmund v. Florida, 102 S. Ct. 3368, 3372 (1982); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion); Gregg v. Georgia, 428 U.S. at 173.

99 Most of the other principles are not relevant to this issue. For example, the Supreme Court has held that the death penalty is not inherently cruel. Gregg v. Georgia, 428 U.S. at

punishment must not be excessive.[100] A punishment is excessive if it is disproportionate to the crime[101] or if it makes no measurable contribution to acceptable goals of punishment.[102] The death penalty in general has passed both tests.[103] When applied to minors, however, the death penalty is disproportionate[104] and fails to make a measurable contribution to acceptable goals of punishment.[105]

B. DISPROPORTIONALITY

1. The Nature of the Standard

A punishment is disproportionate if it is more punishment than the offender deserves.[106] The Supreme Court has developed a two-step

178. Also, the limitations of the Cruel and Unusual Punishment Clause on what may be made criminal and punished as such are entirely irrelevant to the inquiry of this Comment.

There is, however, one principle that will not be discussed in detail in this Comment that is relevant to the issue at hand; namely, that a punishment must not be unacceptable to contemporary society, or, as is sometimes said, that it must not offend society's "standards of decency." *See* Gregg v. Georgia, 428 U.S. at 179. In determining whether a punishment is acceptable to contemporary society, the Court is to look at "objective" indicia such as the history of the particular punishment, current legislation, and jury verdicts. *Id.* at 176-82. Based on such objective indicia, the Supreme Court has held that the death penalty, in general, is not unacceptable to contemporary society. *Id.* However, society may take quite a different view toward capital punishment when it is applied to children and adolescents. *See* Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1250 (1974) (citing Erskine, *The Polls: Capital Punishment*, 34 PUB. OPINION Q. 290, 297 (1970)) (a 1965 Gallup survey found that while 45% of respondents supported capital punishment for murder, only 23% favored it for persons under 21). Indeed, this is the position commonly taken by those who maintain that capital punishment for minors is "cruel and unusual" punishment. *See, e.g.*, Brief for Petitioner, *supra* note 3, at 18-59; Gwin, *supra* note 5.

It is doubtful, however, that the "standards of decency" test actually adds very much to an analysis of the constitutionality of imposing death sentences on minors. First, the objective indicia do not demonstrate conclusively whether capital punishment for adolescents is acceptable to Americans. *See infra* note 108 and accompanying text. Second, it is unlikely that the Supreme Court any longer considers the "standards of decency" test an independent eighth amendment principle, as it did when the test was formally articulated in *Gregg*. In the Court's most recent decisions, contemporary attitude toward a particular punishment has been relegated to the role of merely a factor to be considered in determining whether a penalty is proportionate under the eighth amendment's excessiveness standard. *See infra* notes 107-09 and accompanying text. Thus, even if the evidence showed that society opposed capital punishment for minors, it is not likely that this by itself would render it unconstitutional. *See generally* Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1147 n.11 (1980).

100 Enmund v. Florida, 102 S. Ct. at 3372; Coker v. Georgia, 433 U.S. at 392; Gregg v. Georgia, 428 U.S. at 173. This is also known as the "dignity of man" principle. *See id.* at 173, 182; *see also* Liebman & Shepard, *supra* note 70, at 763; *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 64-65 (1976).

101 Coker v. Georgia, 433 U.S. at 592; Gregg v. Georgia, 428 U.S. at 173.

102 *Id.*

103 Gregg v. Georgia, 428 U.S. at 176-87.

104 *See infra* notes 106-90 and accompanying text.

105 *See infra* notes 191-259 and accompanying text.

106 *See* Coker v. Georgia, 433 U.S. at 592.

analysis for determining whether a punishment is disproportionate. The first step is to examine the history of the punishment, current legislation, and jury sentences to determine whether the imposition of the punishment for a particular crime or on a particular class of offenders is acceptable to contemporary society.[107] Unfortunately, an examination of these factors does not indicate whether capital punishment for minors is acceptable.[108] But even if it did, this would not be determinative of the issue. The Court has stated repeatedly that "in the end our own judgment must be brought to bear on the question of the acceptability of the [punishment] under the eighth amendment."[109] This is the second, and

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[107] *See* Enmund v. Florida, 102 S. Ct. at 3372; Coker v. Georgia, 433 U.S. at 592.

[108] A review of the history of capital punishment for minors suggests that society has had a very ambivalent attitude toward sentencing these young offenders to death. Although the United States adopted a rehabilitative, rather than penal, approach to juvenile crime over a century ago, some juvenile offenders always have been and continue to be sentenced to death. *See supra* notes 3, 22, 34 and accompanying text.

Current legislation indicates that society still is undecided about the acceptability of capital punishment for minors. Though most death penalty states permit capital punishment for minors, virtually all of them specifically designate youth as a mitigating circumstance in their death penalty statutes. *See supra* notes 68-71 and accompanying text. Further, while all states have juvenile court systems, they also have mechanisms by which juveniles can be transferred to criminal courts. *See supra* notes 36, 43 and accompanying text.

Jury sentencing decisions, at least at the present time, shed little light on the matter because the information about the ages of persons sentenced to death that has been collected systematically does not distinguish between minors and adults sentenced to death. For example, the annual reports on capital punishment prepared by the Department of Justice prior to 1974 grouped together all offenders "under 21." *See, e.g.*, U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL PRISONER STATISTICS BULLETIN, NO. SD-NPS-CP-2, CAPITAL PUNISHMENT 1973, at 26, Table 7 (March 1975). Since 1974, the lowest age grouping reported for all offenders has been "under 20 years." *See, e.g.*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STANDARDS, NATIONAL PRISONER STATISTICS BULLETIN, NCJ-70945, CAPITAL PUNISHMENT 1979, at 72, Table 29 (Dec. 1980). Moreover, the information about persons sentenced to death does not distinguish between those sentenced by juries and those sentenced by judges. If one were to rely on this information, however, one would probably conclude that sentencers, in general, are far more reluctant to impose the death penalty on offenders under 20 than they are on those over 20. *See id.* (of the 567 offenders under sentence of death as of December 31, 1979, 11 were in the under 20 category; 145 were in the 20- to 24-year-old category and 151 were in the age category from 25 to 29 years). This conclusion also is supported by the fact that only 18 of the 1,137 inmates currently on death row are juvenile offenders. *See supra* notes 2, 3 and accompanying text. Yet, these low numbers could be attributable to the fact that a significantly smaller percentage of minors than adults commit capital crimes. *See* Adams, *The Child Who Murders: A Review of Theory and Research*, 1 CRIM. JUST. & BEH. 51 (1974) (the homicide rate for those under 18 is lower than for every other age group except males over age 66); BETWEEN TWO WORLDS, *supra* note 35, at 4 (350,529 adults were arrested for violent crimes such as murder, forcible rape, robbery and aggravated assault in 1978; only 95,593 juveniles were arrested for such crimes); *cf.* THE PREVENTION OF SERIOUS DELINQUENCY, *supra* note 38, at ix, 18 ("small percentage of all juvenile offenders account for a majority of serious offenses; serious crime for which juveniles least arrested is murder"). Further, the very fact that 18 juvenile offenders are on death row indicates that there is a willingness, at least on the part of some, to sentence minors to death. *See supra* note 86 and accompanying text.

[109] Coker v. Georgia, 433 U.S. at 597; *see also* Enmund v. Florida, 102 S. Ct. at 3376 (even

crucial, step in the analysis. It is thus on this step that this Comment focuses.

The Court, in exercising its own judgment, has looked to the culpability of the offender to determine whether the punishment is deserved and therefore proportionate.[110] An actor's culpability is a factor of both the severity of the harm caused and the actor's degree of responsibility for the harm.[111] As the death penalty is the harshest punishment American society imposes, it will be deserved, and thus proportionate, only when the offenders are among the most culpable actors; that is, when their acts have caused the most harm and the offenders are among the most responsible for the harm. Until recently, however, the Supreme Court has focused primarily on the harm caused in determining the proportionality of the punishment to the crime.[112] Its analysis has been based on a comparison of the consequences of the punishment for the offender with the consequences of the crime for the victim. In *Coker v. Georgia*,[113] for example, the Court held that the death penalty always is disproportionate to the crime of rape because, though rapists violate the "personal integrity and autonomy" of their victims,[114] they do not take their victims' lives.[115] Using such an analysis, the Court also has held that when someone kills another it cannot be said that death is *per se* a disproportionate penalty.[116] Under such a test, which only looks to the harm done, capital punishment for minors who kill their victims is not a disproportionate penalty: the victims are dead, whether adults or minors commit the offense.

The Court always has recognized the possibility, however, that it would consider the responsibility of the offender for the harm done in its

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though the evidence indicated that the punishment was unacceptable to contemporary society, the Court stated that this was not determinative: "Although the judgments of legislatures, juries and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the . . . penalty on one such as Enmund"); Note, *Eighth Amendment—The Death Penalty and Vicarious Felony Murder: Nontriggerman May Not Be Executed Absent a Finding of an Intent to Kill*, 73 J. CRIM. L. & CRIMINOLOGY 1553, 1563-64 (1983). At one time, the Court did suggest that a punishment would be unconstitutional if it was unacceptable to contemporary society. *See supra* note 99 and accompanying text. As indicated, however, in recent decisions contemporary attitude has been treated as merely a factor to be considered.

110 *See* Enmund v. Florida, 102 S. Ct. at 3377; Coker v. Georgia, 433 U.S. at 597-600.

111 R. NOZICK, PHILOSOPHICAL EXPLANATIONS 363 (1981); A. VON HIRSCH, DOING JUSTICE 69 (1976).

112 *See, e.g.*, Coker v. Georgia, 433 U.S. at 266; Trop v. Dulles, 356 U.S. 86, 100 (1958) (denationalization disproportionate to crime of desertion for one day); Weems v. United States, 217 U.S. 349, 381 (1910) (hard labor and chains for 12 years disproportionate to crime of record falsification).

113 433 U.S. 584 (1977).

114 *Id.* at 597.

115 *Id.* at 597-600.

116 Gregg v. Georgia, 428 U.S. at 187.

disproportionality analysis. In *Woodson v. North Carolina*,[117] for example, the Court reserved the question of whether the punishment of death is disproportionate for a murderer acting under duress.[118] In the recent capital punishment case of *Enmund v. Florida*,[119] the Court finally did extend its analysis to include an examination of whether the punishment is proportionate in light of the offender's responsibility. In *Enmund*, the Court held that capital punishment for felony murderers[120] is disproportionate and therefore unconstitutional.[121] That the Court extended its earlier harm-based analysis is clear: Enmund was convicted of first-degree murder[122] and two people were dead because of his participation in a felony.[123] However, the Court explained:

> The focus must be on [the defendant's] culpability, not on that of [his accomplices] who [actually] shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence' . . . which means that we focus on 'relevant facets of the character and record of the individual offender.' . . . Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the state treated them alike. . . .[124]

As Enmund's culpability could not be distinguished from that of his accomplices on the basis of the harm done, the Court's conclusion must rest on its perception of Enmund's responsibility for the harm.[125]

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117 428 U.S. 280 (1976).

118 *Id.* at 305 n.40. In *Woodson*, the Court held that the North Carolina mandatory death penalty statute was unconstitutional. *See infra* note 239 and accompanying text. As the Court was able to overturn the petitioner's death sentence on that ground, it did not reach the disproportionality question.

119 102 S. Ct. 3368 (1982).

120 At early common law, one whose conduct brought about an unintended death in the commission or attempted commission of a felony was guilty of murder, even though the felon did not perform the actual killing. Today, many states retain the rule of felony murder, although in statutory form. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 545-61 (1972).

121 102 S. Ct. at 3377.

122 *Id.* at 3370. During the course of a robbery in which Enmund was involved, his accomplices shot and killed two people. Under Florida law, the killing of a human being while engaged in the perpetration of or in the attempt to perpetrate the offense of robbery is murder in the first degree, even though there is no premeditated design or intent to kill. The only requirements are that the defendant actually was present, actively aiding and abetting the robbery or attempted robbery, and that the unlawful killing occurred in the perpetration or attempted perpetration of the robbery. *See* FLA. STAT. ANN. § 782.04(1)(a) (West 1976); *see also* Enmund v. Florida, 102 S. Ct. at 3370 (quoting Florida trial court). *See generally* W. LAFAVE & A. SCOTT, *supra* note 120, at 555-56. Because Enmund was constructively present, aiding and abetting the crime of robbery, he was held responsible under the felony murder rule for the acts of his accomplices. Enmund v. State, 399 So. 2d 1362, 1370 (Fla. 1981), *rev'd*, 458 U.S. 782 (1982).

123 102 S. Ct. at 3370.

124 *Id.* at 3377 (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978), and Woodson v. North Carolina, 428 U.S. 208, 304 (1976)).

125 *See* Note, *supra* note 109, at 1564.

Although Enmund facilitated the crime, his responsibility for the deaths was not as great as that of his accomplices who intended the deaths and actually pulled the trigger. Felony murderers therefore never could be as deserving of the death penalty as other murderers upon whom death sentences are imposed.

Enmund obviously is distinguishable from the case of a minor who intentionally kills another. The thrust of *Enmund*, however, is a focus on individuals and their responsibility for the harms done, rather than on the crimes for which the offenders were convicted or the consequences to the victims.[126] Thus, if it can be established that minors who intentionally kill are always less responsible for the harm than adults who intentionally kill, then minors never will be as culpable as adults, and the state never may impose its maximum penalty, death, on minors: it may not treat minors and adults[127] alike.[128] And, as will be shown, minors are in all cases less responsible than adults.

2. *The Responsibility of Minors who are in the Juvenile Justice System*

While minors are in the juvenile justice system, they are viewed and treated as being less responsible than adults. Most contemporary commentators observe that there is a separate justice system for minors not only so that young offenders can be rehabilitated, but also because minors do not deserve to be punished as severely as adults.[129] These commentators do not posit that minors lack all responsibility for their criminal acts but rather that they are never as responsible for their crimes as adults are for theirs.[130]

There are several reasons why minors are less responsible, and thus

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126 *See id.*

127 For the purposes of this Comment, an "adult" is an average person over 18 years of age. The term does not include, for example, the mentally retarded, the mentally ill, or those with diminished capacity.

128 This argument applies with equal force to any penalty that is the maximum the state inflicts for a particular crime. For example, in non-death penalty states, life without parole may be an excessive punishment when imposed on the juvenile murderer.

129 One commentator explains:

> The very existence of a dual criminal justice system is evidence of a two-fold societal judgment that: children do not bear the same degree of responsibility for their antisocial behavior as adults and therefore should not be subject to the harsh penalties of criminal trial and penal incarceration; and juvenile delinquents are, by virtue of their youth, responsive to rehabilitative treatment.

S. FOX, THE JUVENILE COURT: ITS CONTEXT, PROBLEMS AND OPPORTUNITIES 11-13 (1967); *see also* PRESIDENT'S TASK FORCE ON JUVENILE DELINQUENCY, THE COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 41 (1967) [hereinafter cited as TASK FORCE REPORT].

130 *See, e.g.*, TASK FORCE REPORT, *supra* note 129, at 47 ("the juvenile justice system, while holding minors responsible for their misconduct, . . . acknowledges that the level of juvenile responsibility is lower than for adults"); S. FOX, *supra* note 129, at 11-13.

less culpable, than their elders.[131] First, minors are less mature than adults. Both legal studies and the courts have recognized that minors are less mature in their ability to make sound judgments.[132] Psychological research reveals that minors are less mature in terms of their moral development as well.[133]

Second, minors are less responsible because they are less able to control their conduct and to recognize the consequences of their acts than are adults. The Supreme Court has acknowledged that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."[134] That our society also recognizes this fact is evidenced by those laws that prohibit minors from buying alcohol[135] and cigarettes[136] and from marrying without the consent of their parents.[137] Legal and sociological studies also support the

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131 As will be shown, these reasons apply with equal force to minors who have been transferred to criminal courts. *See infra* notes 156-79 and accompanying text.

132 *E.g.*, Parham v. J.R., 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions"); TASK FORCE 1978, *supra* note 76, at 7 ("it is . . . unrealistic to treat young offenders as if they have fully mature judgment and control"); *see also* Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982); Bellotti v. Baird, 443 U.S. 622, 634 (1979); Haley v. Ohio, 332 U.S. 596, 599 (1948).

133 Psychologists generally agree that by the time a person reaches age 15 or 16, he or she usually has achieved significant cognitive ability and is able to deal with abstract concepts and ideas. *See, e.g.*, J. PIAGET, THE MORAL JUDGMENT OF THE CHILD (1932). However, a person's ability to think abstractly and to engage in moral judgment continues to develop further during late adolescence and early adulthood. *See* E. A. PEEL, THE NATURE OF ADOLESCENT JUDGMENT 131-34 (1971); M. RUTTER, CHANGING YOUTH IN A CHANGING SOCIETY 83 (1980). A considerable body of research demonstrates that a person's ability to think in moral terms and to engage in moral judgments develops significantly during middle and late adolescence, reaching a plateau only after leaving school or reaching early adulthood. *See, e.g.*, G. MANASTER, ADOLESCENT DEVELOPMENT AND THE LIFE TASKS (1977); Kohlberg, *Development of Moral Character and Moral Ideology*, in REVIEW OF CHILD DEVELOPMENT RESEARCH 404-05 (M. Hoffman & L. Hoffman eds. 1964); Rest, Davison & Robbins, *Age Trends in Judging Moral Issues: A Review of Cross-Sectional Studies of the Defining Issues Test*, 49 CHILD DEV. 263 (1978).

Research also shows that the ability to make moral judgments depends, at least in part, on the broader factor of social experience. Most adolescents simply do not have the breadth and depth of experience essential to making sound value judgments. *See* M. RUTTER, *supra*, at 238; Kohlberg, *supra*, at 404-05. This appears to be particularly true of adolescents who engage in delinquent behavior. A recent study suggests that delinquent minors have a particularly low moral maturity level. The mean moral maturity level of delinquents ages 15 to 17 was found to be that of the average 10- to 12-year-old. *See* Scharf, *Law and the Child's Evolving Legal Conscience*, in ADVANCES IN LAW AND CHILD DEVELOPMENT 17 (R. Sprague ed. 1982).

134 Bellotti v. Baird, 443 U.S. at 635; *see also* Gallegos v. Colorado, 370 U.S. 49, 54 (1962).

135 *E.g.*, ARIZ. REV. STAT. ANN. § 4-241 (West Supp. 1982); FLA. STAT. ANN. § 562.11 (West Supp. 1983).

136 *E.g.*, CAL. PENAL CODE § 308 (West Supp. 1983); MINN. STAT. ANN. § 609.685 (West Supp. 1983).

137 *E.g.*, ALA. CODE § 30-1-5 (1975); CAL. CIV. CODE § 4101 (West 1983); WIS. STAT. ANN. § 765.02 (West Supp. 1982).

Supreme Court's observation. For example, a Presidential committee reporting on youth crime has concluded that

> adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents have less capacity to control their conduct and to think in long-range terms than adults.[138]

The responsibility of minors also is diminished because they are in a developmental stage characterized by defiance of authority and conducive to criminal activity. It has been noted, for example, that

> [t]he American adolescent, struggling with the biological and psychological pressures of youth, seeks status and reassurance in the company of his peers. Rebellion against parental authority and restrictions is combined with pressure to conform to the expectations of other adolescents. The teen years are a period of experiment, risk taking and bravado. Some criminal activity is part of the patterns of almost all youth subcultures.[139]

That the developmental period of adolescence and the turmoil it produces for minors play a part in youth crime further is evidenced by crime statistics, which show a strong correlation between age and criminal activity with the rates of many kinds of criminality peaking in mid-adolescence.[140] Statistics show that as people pass from the turbulent years of adolescence to the calmer period of the early twenties, they commit fewer offenses, whether or not they were apprehended or partic-

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138 TASK FORCE 1978, *supra* note 76, at 7. There also is a considerable body of research showing that minors do not have the breadth and depth of experience essential to understanding the long-range consequences of their decisions. *See, e.g.*, M. RUTTER, *supra* note 133, at 238; Kohlberg, *supra* note 133, at 404-05; Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 AM. J. ORTHOPSYCHIATRY 446 (1980) (minors making abortion decisions are less likely than adults to consider the effects of having a child on the quality of their lives).

139 TASK FORCE 1978, *supra* note 76, at 3; *see also* THE CHALLENGE OF CRIME, *supra* note 75, at 55 (Presidential Commission noted that perhaps 90% of all young persons have committed at least one act for which they could have been brought before the juvenile court); TASK FORCE 1978, *supra* note 76, at 7 ("[m]any forms of youth crime are a product of the special pressures and vulnerability of adolescence"); M. WOLFGANG, R. FIGLIO & T. SELLIN, DELINQUENCY IN A BIRTH COHORT (1972); *cf.* Haley v. Ohio, 332 U.S. 596, 599 (1948) (Court acknowledges that the teen years are "the period of great instability which the crisis of adolescence produces"). Congress also has recognized that the teen years are a time when special factors operate to produce criminal behavior. It was primarily for this reason that it enacted the Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (1976 & Supp. V 1981), which authorizes federal courts to give special consideration to placing offenders in this age bracket into rehabilitative programs rather than prisons. *See* H.R. REP. NO. 2679, 81st Cong., 2d Sess. 2-3 (1950); *see also* Dorszynski v. United States, 418 U.S. 424 (1974).

140 *See* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES: 1978, at 194-96 (1979); Zimring, *American Youth Violence: Issues and Trends*, in CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 67 (N. Morris & M. Tonry eds. 1979).

ipated in a rehabilitation program.[141]

Of course, some minors may be exceptionally mature,[142] fully capable of controlling their conduct and realizing the consequences of their acts, and capable of withstanding the special pressures of adolescence. Yet, there is still a reason why even these minors are less responsible than adults for their crimes. Minors are always less responsible because their crimes are never their fault alone. Society shares responsibility for their crimes,[143] and it bears a greater responsibility for the crimes of minors than for those of adults. Legal and sociological studies reveal that juvenile crime often results from the failure of the juvenile's family to provide proper guidance and attention. The main characteristic shared by juveniles who commit serious crimes is membership in a family that provides inadequate supervision and in which there are conflicts, disharmony, and poor parent-child relationships.[144] Moreover,

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141 *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, ASSESSING THE RELATIONSHIP OF ADULT CRIMINAL CAREERS TO JUVENILE CAREERS: A SUMMARY 4 (1982) [hereinafter cited as THE RELATIONSHIP OF ADULT CRIMINAL CAREERS TO JUVENILE CAREERS]; THE CHALLENGE OF CRIME, *supra* note 75, at 55-56.

142 It must be admitted that while the Supreme Court has recognized that most minors are less mature than adults, it also has noted that there may be exceptions. In regard to the admissibility of juvenile confessions, for example, the Court has adopted a "totality of the circumstances" test to determine whether the minor knowingly and intelligently waived his or her fifth amendment right and voluntarily consented to interrogation. *See* Fare v. Michael C., 442 U.S. 707 (1979). Instead of assuming that all minors are too immature to make such a decision, the Court considers the age, actual maturity, family environment, education, and emotional and mental stability of each minor to determine his or her particular ability to make an informed choice. Moreover, in Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion), the Supreme Court held that states may not blanketly require parental consent in order for a minor to have an abortion. Rather, the states must provide a minor the opportunity to demonstrate that she is sufficiently mature and informed to make an abortion decision without parental guidance.

143 TASK FORCE 1978, *supra* note 76, at 7 (concluding that minors deserve less punishment than adults: "youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school and social system, which share responsibility for the development of America's youth"); S. WHEELER & L. COTTRELL, JUVENILE DELINQUENCY—ITS PREVENTION AND CONTROL 6 (1966) (youth crime is the result of society's failure to provide the conditions, services and experiences that enable a person to participate successfully in American life).

144 *See* THE PREVENTION OF SERIOUS DELINQUENCY, *supra* note 38, at 24. The classic formula of juvenile delinquency put forth by the President's Commission on Law Enforcement and the Administration of Justice also indicates the substantial role the family plays in juvenile crime:

> He is 15 or 16 years old . . . one of numerous children—perhaps representing several different fathers—who live with their mother in a home that the sociologists call female-centered. It may be broken; it may never have had a resident father . . . . He may never have known a grownup man well enough to identify with him or imagine emulating him. From the adults and older children in charge of him he has had leniency, sternness, affection, perhaps indifference, in erratic and unpredictable succession. All his life he has had considerable independence, and by now his mother has little control over his comings and goings, little way of knowing what he is up to until a policeman brings him home or a summons from court comes in the mail.

research has validated the connection between a violent family environment and adolescent violent crime.[145] Numerous lawmakers also have recognized that parents share in the responsibility for the crimes and other wrongful acts committed by their children. For example, many municipalities have enacted ordinances that make parents liable for the criminal acts of their children.[146]

Juvenile crime also results from the failure of the school and social systems to counteract the negative influences to which the minor was exposed at home or in the community. A recent study reports that juveniles who commit serious crimes almost always come from "communities with the worst delinquency and gang problems and with diminished capacity of social service agencies and of the traditional institutions . . . school, church, and the law, to help keep these minors out of trouble."[147]

Sociological theories on the causes of juvenile crime support the conclusion that society must share responsibility for a juvenile's offense. For example, the control theory attributes the cause of delinquency to a failure of the family, school, and community to socialize and control the youth.[148] The cultural deviance theory maintains that the cause of

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THE CHALLENGE OF CRIME, *supra* note 75, at 60.

145 For example, a recent study, to be published in a forthcoming issue of *The American Journal of Psychiatry*, suggests that the violent criminal behavior of adolescents is linked to the effects of abuse and violence in their families. *See* Collins, *The Violent Child: Some Patterns Emerge*, New York Times, Sept. 27, 1982, § B (Style), at 10; *see also* K. MENNINGER, THE CRIME OF PUNISHMENT 214-15 (1966); McCord, McCord & Howard, *Family Interaction as Antecedent to the Direction of Male Aggressiveness*, 66 J. ABNORMAL & SOC. PSYCHOLOGY 239 (1963); Note, *supra* note 44, at 103.

146 In Deerfield, Illinois, for instance, a 1975 parental responsibility ordinance makes parents liable for failing to prevent their children from committing crimes and violating local laws. Parents may be fined up to $500 for not controlling their children's behavior. Deerfield, Ill., CODE § 15-S-64 (1975). In Naperville, Illinois, a vandalism ordinance requires that parents or legal guardians make restitution to victims for the vandalism of their children. Naperville, Ill., CODE § 24.031 (1978). *See generally* F. LUDWIG, YOUTH AND THE LAW 131-67 (1955); Lipinski, *A Growing Movement: Making Parents Pay When Kids are Bad*, Chicago Tribune, Sept. 26, 1982, § 12 (Tempo), at 1.

147 THE PREVENTION OF SERIOUS DELINQUENCY, *supra* note 38, at 25; *see also* TASK FORCE 1978, *supra* note 76, at 7.

148 The basic premise of this theory is that "*social* behavior requires socialization." G. NETTLER, EXPLAINING CRIME 217 (1974) (emphasis in original). In other words, people become social (moral) to a greater or lesser degree through various socialization processes administered by the family, the schools, and the community. Proper socialization leads to conformity. Improper socialization leads to nonconformity, of which juvenile delinquency is one of the consequences. Under this theory, delinquent behavior occurs because the social process of making the youth moral has been interrupted by uncaring parents, schools, and communities and by delinquent associates. Youngsters who do not develop a bond to the conventional order feel no moral obligation to conform. Thus, they are free to engage in criminal behavior; special delinquent motivation is unnecessary to account for their behavior—they do not know how to act any other way. *See generally* T. HIRSCHI, CAUSES OF DELINQUENCY (1969); F. NYE, FAMILY RELATIONSHIPS AND DELINQUENT BEHAVIOR (1958); W.

youth crime is the existence of deviant subcultures within our society and of unconventional aspects of the dominant culture.[149]

Of course, society may be at fault, to some degree, for adult crime as well. But here again the distinction between minors and adults is clear: society may be blamed for youth crime far more than it may be for the crimes of adults. Adults have more freedom to leave the turbulent family or neighborhood environment that contributed to their criminal behavior[150] than do minors.[151] Moreover, adults have had a

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RECKLESS, THE CRIME PROBLEM (3d ed. 1961); Reiss, *Delinquency as the Failure of Personal and Social Controls*, 16 AM. SOC. REV. 196 (1951); Weiss, *Comparative Analysis of Social Control Theories of Delinquency—The Breakdown of Adequate Social Controls*, in 1 NATIONAL TASK FORCE TO DEVELOP STANDARDS AND GOALS FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, PREVENTING DELINQUENCY, A COMPARATIVE ANALYSIS OF DELINQUENCY PREVENTION PROGRAMS (1977).

149 The cultural deviance theory proposes that juvenile delinquency is a result of a desire to conform to cultural values that are in conflict with those of the conventional moral order. Under this theory, delinquent behavior is caused by proper socialization within a "deviant" social group or culture. *See generally* C. SHAW & H. MCKAY, JUVENILE DELINQUENCY AND URBAN AREAS (1942); E. SUTHERLAND & D. CRESSEY, CRIMINOLOGY (8th ed. 1970); Burgess & Akers, *A Differential Association—Reinforcement Theory of Criminal Behavior*, 14 SOC. PROBS. 128 (1966).

Different versions of the cultural deviance theory focus on different kinds of deviant culture. For example, Walter Miller's version of the theory focuses on lower class culture. He has found that certain lower class cultural values are not only in conflict with, but are antithetical to, dominant middle class values. Therefore, those individuals who conform to lower class culture undergo a normal socialization, but almost automatically become deviant in relation to legal and general community standards. *See* Miller, *The Impact of Community Group Work Program on Delinquent Corner Groups*, 31 SOC. SERV. REV. 390 (1957).

Marvin Wolfgang and Franco Ferracuti have focused on what they call the "subculture of violence." They define this subculture as a set of values, attitudes, beliefs and behavior patterns that is shared in high population density urban areas and supports the use of physical aggression and violence as a form of interaction and a way to solve problems. This subculture is generated and sustained in the lower class, where violent behavior is both tolerated and prescribed, from childrearing practices to street murders. The value system of those affected by this subculture calls for quick resort to aggression at relatively weak provocation. *See* M. WOLFGANG & F. FERRACUTI, THE SUBCULTURE OF VIOLENCE: TOWARDS AN INTEGRATED THEORY IN CRIMINOLOGY (1967). Moreover, the subculture of violence is "transmitted" from generation to generation—it is learned behavior that is normal within that cultural environment. In fact, it has functional, adaptive survival value for those who live in the communities where the subculture of violence is influential.

Richard Cloward and Lloyd Ohlin, who have studied "delinquent subculture," have found that different types of delinquency are generated in different types of communities. The type of delinquency depends on the extent to which the illegitimate opportunity structure has "integrated" age levels of offenders and carriers of conventional and criminal values in the community. Delinquent gangs and subcultures emerge in communities where the illegitimate opportunity structure is organized for involvement in and maintenance of criminal activities. This tradition of crime is passed on to younger generations and new residents. *See* R. CLOWARD & L. OHLIN, DELINQUENCY AND OPPORTUNITY (1960).

150 Though adults may not have the resources to leave, they, at least, have the legal right to do so. *See infra* note 151 and accompanying text.

151 Generally, the law requires that minors remain in the custody of their parents or legal guardians until they reach the age of majority. A. SUSSMAN, *supra* note 37, at 15-23. And, in

greater opportunity, simply by virtue of time, to outgrow the negative experiences of their youth and to learn appropriate behavior.[152] Minors, on the other hand, are in the midst of experiencing the negative influences of their families or communities; they have not had the chance to change. For this very reason, the Supreme Court has recognized that evidence of a turbulent childhood and of beatings by a harsh father is always "particularly relevant" in determining the appropriate punishment for a minor, whereas such evidence may be unimportant in arriving at the appropriate penalty for an adult.[153] Still another reason why society shares a greater responsibility for youth crime is that adolescents are more impressionable than adults.[154] Thus, people are more likely to be affected by those negative influences they encounter during their youth than those encountered as adults. That society recognizes this is evidenced by the existence of laws that punish adults who "contribute to the delinquency of minors."[155]

3. Transfer and the Responsibility of Minors

As has been shown, minors, in general, are less responsible than adults. The inquiry into juvenile responsibility is far from over, however. Although one of the reasons for having a juvenile justice system is that minors, for the reasons discussed above, are less responsible than are their elders, the fact remains that virtually every state permits the transfer of minors to criminal court.[156] The specific question of whether transfer to criminal court indicates that some minors, at least those transferred, are as responsible as adults therefore must be examined.

The existence of the mechanism of transfer does not indicate, by

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fact, the juvenile courts often place juveniles on home probation, when their unhealthy home situation is largely responsible for their delinquent behavior in the first place. *See* Note, *supra* note 44, at 103.

152 Studies show that delinquent behavior tends to decline when people reach the age of majority and are able to quit school, leave home and strike out on their own. *See* U.S. Dep't of Justice, 3 JUST. ASSISTANCE NEWS, Sept. 1982, at 14; THE RELATIONSHIP OF ADULT CRIMINAL CAREERS TO JUVENILE CAREERS, *supra* note 141, at 10; *see also supra* note 138 and accompanying text.

153 *See* Eddings v. Oklahoma, 455 U.S. at 115.

154 *See* Note, *supra* note 44, at 101; Comment, *supra* note 58, at 178; *see also* Eddings v. Oklahoma, 455 U.S. at 115 ("youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence").

155 *See, e.g.*, CAL. PENAL CODE ANN. § 272 (West Supp. 1983); IOWA CODE ANN. § 233.1 (West Supp. 1983). The Supreme Court has recognized this fact as well. For example, it repeatedly has upheld statutes designed to protect minors from their own impressionability, even when these laws have infringed upon minors' constitutional rights. *E.g.*, Ginsberg v. New York, 390 U.S. 629 (1968) (Court upholds statute that limits minors' first amendment rights by restricting their access to reading materials that the state defines as obscene for minors, but not for adults).

156 *See supra* note 43 and accompanying text.

itself, that transferred minors are as responsible as their elders. As discussed earlier, one reason for having the juvenile justice system is that minors are less responsible than adults and thus deserve less punishment.[157] But this does not mean that minors deserve no punishment at all. Thus, when minors are found to be dangerous or unsuitable candidates for treatment, there is no reason to keep them in a rehabilitative system that can neither control nor help them.[158] Similarly, it is acceptable to transfer automatically those juveniles who commit certain serious crimes so that they may receive some punishment or so that others might be deterred.[159] It also may be acceptable to transfer juveniles in order to alleviate the massive burden on the juvenile courts.[160] But none of these reasons commonly given to justify transfer suggest that it has been adopted because some juveniles are as responsible as their elders and deserve to receive the maximum penalties an adult can receive.

Nor do the criteria used in making transfer decisions indicate that transferred minors are as accountable for their crimes as adults are for theirs. Under legislative waiver, minors are transferred solely on the basis of the crime they allegedly committed.[161] These crimes are usually very serious offenses, such as murder.[162] But just because a minor commits murder or rape or any other violent offense does not indicate that society is less responsible for the minor's act. Nor is it evidence that the minor is more mature than his peers or is able to control his conduct and understand the consequences of his actions.

Under judicial waiver, minors are transferred because they are not suitable candidates for treatment or because a disposition within the juvenile system would prove a threat to society.[163] The responsibility of society for the juvenile's crime is not considered in making the waiver decision, except perhaps to the extent that factors such as family background might be taken into account in making a treatment prognosis. Indeed, it may be that those who are transferred are the very minors who have suffered most from parental and community neglect and mistreatment. Likewise, an assessment of a juvenile's maturity, if one is made at all,[164] is only one of the numerous factors considered in deter-

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157 *See supra* notes 129-30 and accompanying text.

158 *See supra* note 49 and accompanying text.

159 *See supra* notes 58-60, 66 and accompanying text. *But see infra* notes 227-43 and accompanying text.

160 *See supra* note 67 and accompanying text.

161 *See supra* note 59 and accompanying text.

162 *See supra* note 60 and accompanying text.

163 *See supra* note 49 and accompanying text.

164 Most statutes do not require that the minor's maturity be considered. *E.g.*, ILL. ANN. STAT. § 702-7(3)(a) (West 1982); IOWA CODE ANN. § 232.45(6)-(7) (West Supp. 1983). *See generally* BETWEEN TWO WORLDS, *supra* note 35, at 150, 162. But even if an assessment of maturity is made, it often is performed by a general trial judge rather than a juvenile court

mining whether the minor is a suitable candidate for treatment.[165] The juvenile court need not find that minors are mature in order to transfer them.[166] In fact, maturity rarely, if ever, plays a part in transfer decisions.[167] Indeed, as noted earlier, the most common bases for waiver are inadequate resources and insufficient time to effectuate rehabilitation.[168] Thus, most transfer decisions do not indicate that the minors are mature or even that they cannot be rehabilitated; rather, they reflect the inadequacies of the system.[169]

Age plays a role in transfer decisions that are based on a finding that a juvenile court disposition would prove a threat to society.[170] That a minor is fifteen or sixteen years old, however, does not by itself indicate that the minor is as mature as an adult. The courts make no separate assessment of maturity. The only other factors besides age that are

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judge because of the heavy workloads of the juvenile court judges. General trial judges tend to have little knowledge of the needs of minors and their levels of maturity. "Their in-service training tends to be in areas such as criminal procedure and evidence," *id.* at 229, and their professional memberships rarely include juvenile justice associations, *see id.* at 229-30.

165 *See supra* note 50 and accompanying text.

166 Indeed, Monty Lee Eddings, one of the 18 juvenile offenders currently on death row, was found to be even less mature than he should have been for his chronological age but was transferred nonetheless. *See* Eddings v. Oklahoma, 455 U.S. at 107; *see also* Sherfield v. State, 511 P.2d 598, 601 (Okla. Crim. App. 1973) ("The contention that before there can be a proper certification there must be a showing that the juvenile has advanced emotional maturity and a behavioral pattern greater than his chronological age is, in our view, without foundation in the provisions of the Juvenile Act."); *cf.* Scharf, *supra* note 133 (study found that the mean moral maturity level of delinquents ages fifteen to seventeen was similar to that of the average ten- to twelve-year-old).

167 A recent study of waiver decisions found that the most important factors in the decision to transfer are the seriousness of the offense, the extent of prior delinquency records, and the results of previous treatment efforts within the juvenile justice system. *See* BETWEEN TWO WORLDS, *supra* note 35, at 211. Moreover, another recent study found that there are rarely any psychological or intellectual differences between those youths for whom the courts grant waiver and those youths for whom the waiver petitions are denied. Solway, Hays, Schreiner & Cansler, *Clinical Study of Youths Petitioned for Certification as Adults*, 46 PSYCHOLOGICAL REP. 1067 (1980). The study concluded that the personal characteristics of minors are of little importance in waiver decisions. *See id.* at 1073. It also has been suggested that the juvenile courts are particularly eager to transfer minors who have been charged with murder and other serious offenses. Considering such cases "too hot to handle," the juvenile courts tend to ignore the personal characteristics of the minors involved and to focus solely on the seriousness of the offense. *See* Sacin & Sarri, *Due Process—Reality or Myth*, in BROUGHT TO JUSTICE? JUVENILE COURTS AND THE LAW, *supra* note 31, at 187.

168 *See supra* note 53 and accompanying text.

169 One commentator explains:

> The basic [difficulty] is [the] assumption that responsibility for the failure of a juvenile to respond to services bespeaks universally of a deficiency on the part of the juvenile. No recognition whatever is given to the fact that in personnel, in facilities and in knowledge we are sadly lacking in our ability to help children change their behavior patterns. To put the problem in terms of the 'imperviousness of individuals' is to obscure this important segment of reality.

S. FOX, *supra* note 129, at 31-32; *see also supra* note 79 and accompanying text.

170 *See supra* notes 54, 56-57 and accompanying text.

considered are the seriousness of the crime with which the minor is charged and the minor's prior juvenile record.[171]

Further evidence supporting the position that transferred minors are no more mature or able to control their conduct than their peers who remain in the juvenile system is provided by the way society and the criminal courts treat them. For example, transferred minors are still subject to all the laws that society has enacted to protect them from their own immaturity and inability to understand the consequences of their actions. They cannot buy alcohol or cigarettes, they cannot marry without the permission of their parents, and they cannot enter into contracts, except for necessities.[172] Moreover, once convicted of a crime in criminal court, their youth is given great weight by sentencers in determining the appropriate penalty.[173] In capital punishment states, in particular, youth universally is recognized as mitigating against the imposition of a death sentence.[174] Youth is recognized as a mitigating factor precisely because it is presumed to evidence a lack of maturity and an inability to control conduct and understand the consequences of actions.[175] It thus appears that criminal courts and society in general acknowledge that minors "are not irresponsible children one day and responsible adults the next."[176]

Furthermore, the courts have recognized that the responsibility of society for the minor's crime does not diminish when the minor is in criminal court. The Supreme Court has held that a minor's troubled childhood is a mitigating factor worthy of considerable weight, whereas an adult's troubled youth may be of little importance in determining the appropriate punishment.[177]

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171 *See supra* note 55 and accompanying text.

172 *See supra* note 135-37 and accompanying text.

173 *See supra* note 72 and accompanying text; *cf. Juvenile Crime Increase*, *supra* note 40, at 13 (reports that only two percent of the serious juvenile offenders referred to criminal courts will receive criminal sanctions following judicial waiver and conviction in criminal court); P. GREENWOOD, J. PETERSILIA & F. ZIMRING, AGE, CRIME AND SANCTIONS: THE TRANSITION FROM JUVENILE TO ADULT COURT (1980) (evidence indicates that for about two years following their graduation from juvenile court, young adults are treated more leniently than are older offenders).

174 *See supra* note 71 and accompanying text. Youth also plays a major role in clemency decisions. *See* Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 25 (1964). Bedau reports that in New Jersey, the youngest age group (15-19) had a significantly higher rate of commutation compared to older age groups. For example, only three people in the youngest age group were executed and four had their sentences commuted. The next age group (20-24), on the other hand, saw 34 executed and only two received commutations. *Id.*

175 *See supra* note 72 and accompanying text.

176 Feld, *supra* note 43, at 511.

177 *See supra* note 153 and accompanying text. Lower appellate courts repeatedly have reduced a juvenile defendant's sentence on the ground that the youth's troubled childhood and unstable family life mitigated against the imposition of a harsh penalty. *E.g.*, People v. Howell, 16 Ill. App. 3d 989, 993-94, 307 N.E.2d 172, 175-76 (1974); State v. Blanton, 166 N.J.

Thus, the reasons why minors are less responsible than adults hold for transferred juveniles. Even if particular minors are mature and do understand the consequences of their acts, they are still less accountable than adults for their crimes, because society still shares greatly in the responsibility for their criminal acts. Indeed, this is one factor that remains true in regard to all juvenile crime.[178] As the Supreme Court has pointed out, "Not only is it difficult to define, let alone determine maturity, but the fact that a minor may be very much an adult in some respects does not mean that his need and opportunity for growth under parental guidance and discipline have ended."[179]

4. The Responsibility of Minors when Aggravating Factors are Established

For the death penalty to be imposed on an adult or a minor, one or more aggravating circumstances must exist.[180] Therefore, before it may be concluded that juveniles accused of capital crimes are always less responsible than their adult counterparts, this Comment must examine whether the existence of an aggravating factor increases the responsibility of minors, making them as responsible as adults.

One of the aggravating circumstances commonly found in death penalty statutes is that the killing was "especially heinous, atrocious or cruel,"[181] meaning that the killing involved torture or some aggravated battery to the victim.[182] That a minor commits a "heinous" murder certainly indicates that he has caused more harm than did the adult who committed a nonheinous killing.[183] It can never indicate, however, that the minor is as responsible as an adult. That a minor commits a murder in an especially cruel manner does not indicate that the youth is as mature as an adult or that the minor is able to control his conduct or appreciate the consequences of his act. Nor does it indicate that society

Super. 62, 73-75, 398 A.2d 1328, 1334-35 (1979); Mattino v. State, 539 S.W.2d 824, 827 (Tenn. Crim. App. 1976).

178 Even where minors come from wealthy homes with caring parents, something clearly went awry in their socialization process or they would not have engaged in antisocial behavior. *See supra* note 148 and accompanying text. Their parents and society both share in the responsibility for their crimes, as they failed to prevent the youths from engaging in such behavior. *See supra* note 143 and accompanying text.

179 Bellotti v. Baird, 443 U.S. 622, 643-44 n.23 (1979).

180 *See supra* note 70 and accompanying text.

181 *See, e.g.*, FLA. STAT. ANN. § 921.141(5)(h) (West Supp. 1983); N.C. GEN. STAT. § 15A-2000(e)(9) (1978).

182 *See* Godfrey v. Georgia, 446 U.S. 420, 428-33 (1980).

183 However, as noted earlier, under Enmund v. Florida, 102 S. Ct. 3368 (1982), the death penalty is disproportionate no matter how much harm was caused by the act if the offender was not sufficiently responsible for the harm. *See supra* notes 119-26 and accompanying text; *see also* A. VON HIRSCH, *supra* note 111, at 69 (in determining culpability, "we are *not* looking exclusively to the act, but also to how much the actor can be held to blame for his act and its consequences") (emphasis in original).

is in any way less responsible for the minor's crime. Thus, a minor who commits a murder that is heinous, atrocious and cruel is still less responsible for the crime than is an adult who commits a murder that is not.

The other aggravating factors found in death penalty statutes tend to be motivated wholly by utilitarian considerations.[184] A finding that the offender poses a future threat to society;[185] that the murder victim was a police officer, judge, or some other government official;[186] or that the murder was committed by a person in, or who had escaped from, the lawful custody of a police officer[187] never can increase the responsibility of a minor, making him as responsible as an adult.

5. Conclusion Regarding the Disproportionality Test

As this examination of juvenile responsibility has evidenced, minors are never as responsible as adults, even if they have been transferred and even if aggravating factors have been found. Thus, under the *Enmund* disproportionality analysis, which focuses on the responsibility of a class of persons rather than on the consequences to the victim and the category of the crime,[188] the death penalty always will be disproportionate punishment for children and adolescents.[189] This does not mean that

184 At least one commentator has suggested that such aggravating factors can never justify the imposition of the death sentence as they have no bearing on culpability and thus in no way indicate that one defendant deserves the death penalty more than another. *See* Radin, *supra* note 99, at 1154 n.36; *cf.* Rummel v. Estelle, 445 U.S. 263, 288 (1980) (Powell, J., dissenting) ("The inquiry [about the proportionality of the punishment] focuses on whether a person deserves such punishment, not simply on whether punishment would serve a utilitarian goal").

185 *See, e.g.*, OKLA. STAT. ANN. tit. 21, § 701.12(7) (West 1983).

186 *See, e.g.*, GA. CODE ANN. § 27-2534.1(b)(5) (1983).

187 *See, e.g.*, GA. CODE ANN. § 27-2534.1(b)(9) (1983).

188 *See supra* notes 119-26 and accompanying text.

189 The blanket exclusion of minors from death sentences on the basis of this disproportionality analysis does not contradict those Supreme Court decisions that establish that in death penalty cases there must be individualized consideration of the circumstances of the particular offense and the character of the particular offender to determine whether the particular offender deserves a death sentence. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. at 110-12; Lockett v. Ohio, 438 U.S. at 604-09; *see supra* note 70 and accompanying text. To exclude all minors from capital sentencing at first glance may appear to contradict this requirement: some minors, for example, may be more responsible than others and thus more deserving of the death penalty. This observation, however, misses the mark. The disproportionality principle operates as a sort of *per se* rule, making individualized consideration unnecessary. In other words, if the punishment is disproportionate, it will remain disproportionate regardless of the circumstances of the particular offense or the characteristics of the particular defendant. For example, in Coker v. Georgia, 433 U.S. 584, 598-600 (1978) (plurality opinion), the Supreme Court held that capital punishment is a disproportionate penalty for the crime of rape, because no matter how responsible the particular offender may be and no matter how atrocious the circumstances of a particular rape, death always will be a disproportionate penalty. *See supra* notes 113-15 and accompanying text. Also under *Enmund*, it is irrelevant that a sentencer may consider the felony murderer's lack of intent and limited participation in the killing in determining whether he or she deserves the death penalty, as the Court has held

minors may not be tried in criminal courts or that they may not be punished. What it does mean is that the criminal justice system must recognize the distinct differences between minors and adults and never may treat them as if they are alike by imposing that maximum penalty, death, on minors.[190]

C. CONTRIBUTION TO ACCEPTABLE GOALS OF PUNISHMENT

For a punishment to be constitutional under the excessiveness strand of the eighth amendment, it not only must be proportionate to the offense; it also must make a measurable contribution to acceptable goals of punishment.[191] In elaborating on this second requirement, the Supreme Court has said that the punishment in question does not have to serve a goal better than a less severe punishment, but that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering."[192]

Many purposes conceivably are served by capital punishment.[193]

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that those factors always indicate diminished responsibility and thus that death always would be a disproportionate punishment. *See Enmund*, 102 S. Ct. at 3377; *see also* Note, *supra* note 109, at 1570-71. It is therefore equally unnecessary for the courts to consider the circumstances of a minor's particular offense or the characteristics of the individual minor, because, as has been shown, minors are in all cases less responsible than adults, and thus never as deserving of the death penalty as the adult offender. Death therefore always will be a disproportionate punishment when imposed on minors.

190 Punishing minors differently from adults who commit the same crimes does not raise fourteenth amendment equal protection problems. Age is not a suspect classification. Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam). Thus, different treatment based on age will not violate the Equal Protection Clause if there is a rational basis for the distinction. *Murgia*, 427 U.S. at 312, 314. As minors are always less responsible for their crimes than adults are for theirs, there is certainly a rational justification for punishing them differently.

191 *See supra* notes 100-02 and accompanying text.

192 Gregg v. Georgia, 428 U.S. at 182-83.

193 In addition to retribution and general and specific deterrence, which are discussed in the text, capital punishment conceivably could serve the goals of encouraging guilty pleas and confessions, eugenics, and economy. *See* Furman v. Georgia, 408 U.S. at 142 (Marshall, J., concurring).

The encouragement of guilty pleas and confessions never could justify the infliction of capital punishment on anyone, minor or adult. In the first place, if the death penalty is used to encourage guilty pleas and thus to deter suspects from exercising their fifth amendment rights to jury trials, it is unconstitutional. *See* United States v. Jackson, 390 U.S. 570, 581 (1968). (*Jackson* applies to the states under the criteria articulated in Duncan v. Louisiana, 391 U.S. 145, 149 (1968).) In the second place, life imprisonment is a severe sanction that can be used as leverage for bargaining for pleas or confessions in exchange for either charges of lesser offenses or recommendations of leniency. Thus, the death penalty is unnecessary for bargaining purposes. A life sentence is an especially useful tool in regard to minors who would face potentially 50 or 60 years in prison. Furthermore, the only possible reason for wanting to encourage guilty pleas and confessions is to save court time and reduce the burdens on the courts. It cannot be to save investigatory time or to prevent the guilty from going free, because no one is likely to be encouraged to confess or plead guilty unless the case

But only three purposes have been offered formally by courts and legis-

against him or her is strong. But if the only purpose is to save the court time and energy, then the death penalty is a particularly inappropriate bargaining instrument. Courts admittedly spend more time with death cases. *See* Stein v. New York, 346 U.S. 156, 196 (1953), *overruled on other grounds*, Jackson v. Denno, 378 U.S. 368, 391 (1964); *cf.* Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J., concurring in the result). Also death sentences invariably are appealed, thus increasing the burden on the appellate courts. Therefore, whatever court time may be saved by obtaining confessions or pleading agreements is unlikely to counter the additional time spent by the courts on those cases in which the defendants refuse to plea bargain or confess and are thus tried for capital offenses where the death penalty is sought.

Virtually everyone agrees that capital punishment cannot be defended solely on the basis of any eugenic purpose. *See, e.g.*, Barzun, *In Favor of Capital Punishment*, in THE DEATH PENALTY IN AMERICA 154 (H. Bedau ed. rev. ed. 1967); Caldwell, *Why is the Death Penalty Retained?* 284 ANNALS 45, 49-50 (1952); Johnson, *Selective Factors in Capital Punishment*, 36 SOC. FORCES 165, 169 (1957); Sellin, *Capital Punishment*, 25 FED. PROBATION, Sept. 1961, at 3. Fortunately, our nation never has proffered eugenic goals.

Saving money rarely is given as a reason for having the death penalty. It does appear to be a concern of some, however, as this dialogue between lawyer Jay Baker and Justices Rehnquist and Marshall during oral argument in Eddings v. Oklahoma, 455 U.S. 104 (1982), evidences:

> [Justice Rehnquist wondered what counsel would have the state do with the defendant if it is unable to execute him. Should he be confined for life under a psychiatrist's care? the Justice asked.]
>
> Baker: Yes.
>
> Justice Rehnquist: Why should the taxpayers have to foot the bill?
>
> Baker: It would be cheaper than executing him.
>
> Justice Rehnquist: From the taxpayers' point of view?
>
> Baker: More will have been spent on the defendant's case than would have been spent had he received some other sentence.
>
> Justice Rehnquist: Only because of the protracted litigation.
>
> Justice Marshall: It would have been cheaper still to have shot the defendant at the time of his arrest.
>
> Baker: That's correct.

30 CRIM. L. REP. (BNA) 4086-87 (Nov. 11, 1981).

Even if economy were given as a reason for having the death penalty, the evidence indicates that it does cost more to execute a person than to keep the offender in prison for life. *See* B. ESHELMAN & F. RILEY, DEATH ROW CHAPLAIN 226 (1962); Caldwell, *supra*, at 48; McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROBATION, June 1964, at 11, 13. This applies equally to minors, even though they will on average spend a longer time in prison if sentenced to life without parole, as the costs of carrying out a death sentence are enormous. For example, a disproportionate amount of the money spent on prisons is attributable to death row. *See* Caldwell, *supra*, at 48; McGee, *supra*, at 11. Condemned adults and minors are not productive members of the prison community, although they could be. McGee, *supra*, at 13-14; Bailey, *Rehabilitation on Death Row*, in THE DEATH PENALTY IN AMERICA 556 (H. Bedau ed. rev. ed. 1967). Moreover, executions themselves are very expensive. T. THOMAS, THIS LIFE WE TAKE 20-22 (3d ed. 1965). Appeals often are automatic and courts admittedly spend more time with death cases. *See* Stein v. New York, 346 U.S. 156, 196 (1953), *overruled on other grounds*, Jackson v. Denno, 378 U.S. 368, 391 (1964). "At trial, the selection of jurors is likely to become a costly, time-consuming problem in a capital case . . . ." Furman v. Georgia, 408 U.S. at 358 (Marshall, J., concurring); *see, e.g.*, Witherspoon v. Illinois, 391 U.S. 510 (1968). During the period between conviction and execution, there are a number of collateral attacks on conviction and attempts to obtain executive clemency, all of which exhaust the time, money, and efforts of the state. Minors are particularly likely to seek clemency as they have had much success in the past. *See supra* note 174 and accompanying text. Continual assertions that the condemned prisoner has gone insane are made. *See*

latures: retribution, general deterrence, and specific deterrence.[194] Capital punishment for minors cannot pass eighth amendment scrutiny because it fails to make a "measurable contribution" to any of these goals.

1. Retribution

The question of whether retribution is an appropriate purpose of punishment has been, and continues to be, hotly debated.[195] But retribution has gained increasing support in the last decade,[196] and the Supreme Court has held that it is not "a forbidden objective" of punishment.[197]

Retribution may take various forms.[198] The Supreme Court's analysis of the retributive foundations of capital punishment incorporates

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Slovenko, *And the Penalty is (Sometimes) Death*, 24 ANTIOCH REV. 351 (1964). Because there is a formally established policy of not executing insane persons, *see* Caritativo v. California, 357 U.S. 549 (1958) (per curiam), great sums of money may be spent on detecting and curing mental illness in order to perform the execution. As no one wants the responsibility for the execution, the condemned person is likely to be passed back and forth from doctors to custodial officials to courts like a ping-pong ball, and all at state expense. Slovenko, *supra*, at 363.

194 *See* Bayer, *Crime, Punishment and the Decline of Liberal Optimism*, 27 CRIME & DELINQ. 169, 187 (1981); Radin, *supra* note 99, at 1145 n.7; *see also* Gregg v. Georgia, 428 U.S. at 183 & n.28.

195 *See, e.g.*, 1 J.F. ARCHBOLD, ON THE PRACTICE, PLEADING, AND EVIDENCE IN CRIMINAL CASES §§ 11-17, xv-xix (T. Waterman ed. 7th ed. 1860); C. BECCARIA, ON CRIMES AND PUNISHMENT (H. Paolucci trans. 1963); M. COHEN, REASON AND LAW 41-44 (1950); H.L.A. HART, LAW, LIBERTY AND MORALITY 60-69 (1963); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 37-39 (1968); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958)..

196 *See* W. BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY (1979); G. NEWMAN, THE PUNISHMENT RESPONSE (1978); E. VAN DEN HAAG, PUNISHING CRIMINALS (1975); A. VON HIRSCH, *supra* note 111; J. MURPHY, *Cruel and Unusual Punishments*, in RETRIBUTION, JUSTICE AND THERAPY 223 (1979).

197 Gregg v. Georgia, 428 U.S. at 183. *But see* Furman v. Georgia, 408 U.S. at 343-45 (Marshall, J., concurring) (argues that retribution is not a proper justification for punishment).

198 One view toward retribution, not discussed in the text, is that punishment of those who break the law is required to vindicate or restore some transcendant order. *See* W. BERNS, *supra* note 196, at 172; E. VAN DEN HAAG, *supra* note 196, at 11-12. According to this view, punishment of criminals is good in itself, aside from its instrumental effect on the community. This is what Kant's famous pronouncement about the last murderer suggests:

> Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment . . . .

I. KANT, *The Metaphysical Elements of Justice*, Part I of THE METAPHYSICS OF MORALS 102 (J. Ladd trans. 1965). This traditionally theological view of retribution rarely emerges in modern writing as a goal of capital sentencing, *see* E. EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT 9 (1906), and it has been largely discredited. *See* Bedau, *Concessions to Retribution in Punishment*, in JUSTICE & PUNISHMENT 68 (J. Cederblom & W. Blizek eds. 1977);

two models of retribution: an institutional revenge model and a "just deserts" model.[199]

a. The institutional revenge model

The institutional revenge model of retribution justifies punishment as necessary to ensure that citizens will not take the law into their own hands and personally satisfy their desire for vengeance.[200] It is very unlikely, however, that members of society will seek personal vengeance if minors do not receive the death penalty for their capital crimes. As minors are less responsible than adults for their crimes,[201] there should be less moral outrage toward a juvenile's offense than toward that of an adult.[202] But even if there is such moral outrage, the transfer itself and a

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Hughes, *License to Kill*, 26 N.Y. REV. BOOKS 22 (1979); Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217 (1973).

Another notion of retribution, not discussed in the text, is that criminals owe a debt to the community. Assuming that the criminal had a free choice to break the social compact, punishment evens the score by counterbalancing the unfair gains the criminal secured against others who restrained themselves. *See* Morris, *Persons and Punishment*, 52 MONIST 475, 476-79 (1968). This "debt" approach has been subjected to the criticism that its notion of law abiders restraining themselves because of reliance on others doing likewise makes more sense for traffic offenses and shoplifting than for murder and rape. *See, e.g.*, G. FLETCHER, RETHINKING CRIMINAL LAW 417 (1978).

A variant of the "debt" view of retribution is one that posits that some extent of the criminal's personal interests are forfeited to the community as payment for the personal interests of which he deprived the victim. However, as Hugo Bedau points out, it is hard to see why the criminal should "pay" the community rather than the victim. *See* Bedau, *supra*, at 68.

199 *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 55, 65-66 & n.25; *see* Gregg v. Georgia, 428 U.S. at 183-84.

200 *See* Gregg v. Georgia, 428 U.S. at 183. The notion that the purpose of retribution is to obviate personal revenge can take two forms: social contract notions or deterrence notions. Under the social contract notion, people in a civilized society agree not to take personal revenge only because the government has been constituted as an agent to do it for the people. *See, e.g.*, J. BUCHANAN, THE LIMITS OF LIBERTY (1975). Under the deterrence notion, "governmental revenge is necessary to deter those who commit private acts of violence in the name of revenge." H. PACKER, *supra* note 195, at 37-38. In both forms, the implicit idea is that the social costs of systematic governmental revenge will be less than the social costs of random private revenge. *See generally* Radin, *supra* note 99, at 1169-70. Numerous commentators have argued that such utilitarian notions of retribution never can justify punishment because they fail to take the offender's culpability into account. *See* H. PACKER, *supra* note 195, at 38-39; A. VON HIRSCH, *supra* note 111, at 70; Greenawalt, *"Uncontrollable" Actions and the Eighth Amendment: Implications of* Powell v. Texas, 69 COLUM. L. REV. 927, 939 & n.64, 940 (1969). For example, under this utilitarian rationale, a man whom the authorities knew to be innocent could be punished, if members of the community believed him guilty and threatened to seek personal revenge unless he were punished. *See* E. VAN DEN HAAG, *supra* note 196, at 12-13.

201 *See supra* notes 129-90 and accompanying text.

202 *See* Hertz & Weisberg, *In Mitigation of the Penalty of Death*: Lockett v. Ohio *and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L. REV. 317, 388 (1981) (a person who is less responsible for a crime is likely to invoke less moral outrage than the person who is more responsible for a crime); Liebman & Shepard, *supra* note 70, at 812 (to the

sanction short of death should appease it. Adult first-degree murderers usually will receive life sentences or the death penalty, but juvenile murderers could have received rehabilitative dispositions from the juvenile courts. Thus, the very fact that they are tried in criminal courts and eligible for life sentences should soothe the anger of many. Furthermore, the execution of a minor itself will be a source of outrage and protest among some members of the populace,[203] thus creating the very problem it was supposed to prevent.

b. The "just deserts" model

The other model of retribution used by the Supreme Court in its analysis assumes the necessity of punishment as the "just deserts" for a criminal action.[204] "Just deserts" may not be an adequate justification for executing minors, however. Although the Supreme Court has held that this type of retribution is not a "forbidden objective" of punishment,[205] its decision was made in the context of adult punishment. Quite a different conclusion may be reached in the context of punishing minors.

Retribution never has been given as a reason for judicial waiver. The justifications offered have been the protection of society, the deterrence of juvenile crime, the alleviation of the juvenile court's massive workload,[206] and the inability of the juvenile justice system to rehabilitate the offender with the resources currently available in the juvenile system.[207] When minors are transferred for these reasons, it does not mean that they are beyond rehabilitation or always will be dangerous.[208] It usually means only that the facilities of the juvenile justice system are inadequate or otherwise unsuited to treating their delinquency or dangerous tendencies.[209] Because the system cannot serve them, they are passed on to the criminal courts. It is therefore questionable whether the criminal system is justified in punishing these minors

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extent the defendant's responsibility is reduced, societal need for vengeance is diminished correspondingly and the mitigation of punishment is warranted).

203 *See* Vandall, *The Use of Force in Dealing with Juveniles: Guidelines*, 17 CRIM. L. BULL. 124, 143 (1981) (using "physical force in dealing with juveniles is likely to inflame the community unless clearly justified"); *cf.* Bedau, *supra* note 174, at 24 (reports that prior to 1958, there had been only one serious effort in New Jersey to replace the death penalty with imprisonment and that this effort was prompted by the execution of a 16-year-old boy. In 1953, after an unsuccessful effort to indict a youth under 16 for first-degree murder, it became the law in New Jersey that no one under 16 could be sentenced to death).

204 *See* Gregg v. Georgia, 428 U.S. at 183-84.

205 *Id.* at 183.

206 *See supra* note 67 and accompanying text.

207 *See supra* notes 49-51 and accompanying text.

208 *See supra* notes 50-53 and accompanying text.

209 *See supra* notes 52-53 and accompanying text.

for retributive reasons when they were not placed in the system for such purposes, but were sent there largely because the juvenile justice system was incapable of doing its job.[210]

Similarly, the "just deserts" model of retribution never has been offered formally as a reason for legislative waiver.[211] Of course, one of the reasons for this waiver method, which automatically transfers minors accused of certain serious crimes, is so that juveniles will receive harsher punishments than they would in the juvenile system.[212] This does not mean, however, that they are transferred so that they will receive their "just deserts." Indeed, once minors are in the criminal system, every effort is made to see that they do not receive their "just deserts.". In many states, minors sentenced by criminal courts may be placed in juvenile facilities[213] and in a few states the criminal courts are prohibited from placing minors in adult prisons.[214] Moreover, numerous legislatures have enacted rehabilitative programs for minors sentenced by the criminal courts.[215] Appellate courts have reduced sentences on the ground that the retributive punishment imposed failed to reflect the young defendant's potential for rehabilitation.[216] And trial courts generally treat minors more leniently than older offenders.[217]

But even if one of the purposes of judicial and legislative waiver is for juveniles to get their "just deserts," capital punishment for minors never can make a "measurable contribution" to this goal. Because this model of retribution is based on desert, it is imperative that the punish-

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210 Of course, it could be argued that retribution is an implicit purpose of judicial waiver, even if it is not an explicit one. Legislatures that have enacted judicial waiver statutes certainly are aware that when minors are transferred they typically are eligible to receive retributive punishments from the criminal system. However, it certainly is questionable whether this implicit acceptance of the possibility of retributive punishment amounts to a legislative desire that transferred minors be punished for retributive purposes. Indeed, many legislatures have enacted rehabilitative programs for minors sentenced by the criminal courts and have passed statutes that allow the criminal courts to place convicted minors in juvenile correctional facilities. *See infra* notes 213-15 and accompanying text.

211 *See supra* note 67 and accompanying text.

212 *See supra* note 77 and accompanying text.

213 BETWEEN TWO WORLDS, *supra* note 35, at 73-77.

214 Both Kentucky and Delaware require that offenders under 18 years old be placed in facilities established exclusively for minors. *Id.*

215 *See, e.g.*, The Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (1976 & Supp. V 1981). Under the Act, federal judges are obligated to consider the special rehabilitative sentencing alternatives created by the Act before sentencing any person between the ages of 16 and 22. The Act was expressly "designed to provide a better method for treating young offenders convicted in federal courts in that vulnerable age bracket, to rehabilitate them and restore them to normal behavior patterns." Dorszynski v. United States, 418 U.S. 424, 432-33 (1974).

216 *See, e.g.*, Ahvik v. State, 613 P.2d 1252 (Alaska 1980); People v. Wilkins, 36 Ill. App. 3d 761, 767, 344 N.E.2d 724, 729 (1976).

217 *See Juvenile Crime Increase*, *supra* note 40, at 13.

ment be proportionate to the culpability of the offender and the offense.[218] As juvenile murderers are always less responsible, and thus less culpable, than adult murderers,[219] they never will deserve the maximum penalty that may be imposed on adults.[220]

2. *General Deterrence*

Those who justify capital punishment on grounds of general deterrence claim that the adoption of this punishment will dissuade people from committing capital crimes.[221] There is no agreement as to whether capital punishment accomplishes this result.[222] Even the Supreme Court has admitted that proof of the death penalty's deterrent effect is "inconclusive."[223] But, "in the absence of more convincing evidence," the Court has held that it would defer to the judgment of those legislatures that maintain that capital punishment is a deterrent to crime.[224] The debate over the deterrent effect of capital punishment, as well as the Supreme Court's decision, however, have focused on the deterrent effect of capital punishment when imposed on adults. There is "more convincing evidence" that the death penalty when imposed on minors is not a deterrent to crime.

The execution of minors will not deter the general population from committing capital crimes. Many have suggested that potential murderers are most likely to be deterred by the execution of a murderer with

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218 *See* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 25 (1968); Gardner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 798; Gibbs, *The Death Penalty, Retribution and Penal Policy*, 69 J. CRIM. L. & CRIMINOLOGY 291, 293-96 (1978); Greenawalt, *supra* note 200, at 938; Wasserstrom, *H.L.A. Hart and the Doctrines of Mens Rea and Criminal Responsibility*, 35 U. CHI. L. REV. 92, 93 (1967).

219 *See supra* notes 129-90 and accompanying text.

220 Retributivists who have discussed the mechanics of administering retribution in individual cases have recognized that the retribution imposed must reflect the degree to which the offender and offense are more or less blameworthy than other offenders and offenses. *See, e.g.*, A. VON HIRSCH, *supra* note 111, at 74, 79, 82; Hospers, *Retribution: The Ethics of Punishment*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION AND THE LEGAL PROCESS 181, 188-90 (R. Barnett & J. Hagel eds. 1977).

221 H. PACKER, *supra* note 195, at 39; Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 950-51 (1966).

222 *See, e.g.*, C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 25-27 (1974); DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (A. Blumstein, J. Cohen & D. Nagin eds. 1978); Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975); Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 J. POL. ECON. 741 (1977); Forst, *The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's*, 61 MINN. L. REV. 743 (1977); Passel & Taylor, *The Deterrent Effect of Capital Punishment: Another View*, 67 AM. ECON. REV. 445 (1977); Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS 54 (1952); Sellin, *Homicides in Retentionist and Abolitionist States*, in CAPITAL PUNISHMENT 135 (T. Sellin ed. 1967).

223 Gregg v. Georgia, 428 U.S. at 183.

224 *Id.* at 184-87.

whose character and action they can readily identify.[225] It is therefore extremely doubtful that the execution of minors will deter adults. Moreover, numerous commentators have concluded that when an offender is particularly distinguishable from other members of the population, the failure to punish him or her does not impair the deterrent effect of the threatened punishment on "normal" members of the population.[226] Thus, not only is the execution of minors unlikely to deter adults from committing capital crimes, but failure to execute them will have no effect on the success of capital punishment as a deterrent.

Capital punishment for minors also will fail to deter minors from committing crimes. In the first place, it is doubtful that minors are capable of being deterred. Proponents of the concept of deterrence who have attempted to identify the particular individual most likely to be deterred by the threat of punishment[227] have found that in order to respond to deterrence an individual must have the intellectual capacity to understand the threat of punishment and control mechanisms to conform to that understanding.[228] Minors lack both. Children and adolescents tend to live for today, giving little thought to the future consequences of their actions.[229] They are particularly unlikely to understand the legal consequences of their crimes.[230]

Moreover, most minors have no fear of death. They simply have not learned to accept its finality and believe that old people die, not

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225 *See, e.g.*, A. GOLDSTEIN, THE INSANITY DEFENSE 13 (1967); Liebman & Shepard, *supra* note 70, at 813-17.

226 *See, e.g.*, A. GOLDSTEIN, *supra* note 225, at 13; G. WILLIAMS, CRIMINAL LAW 467 (1961); Wechsler & Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701, 752-57 (1937).

227 Current proponents of deterrence have focused far more on this subject than did their utilitarian predecessors. *Compare* Chappell, Geis & Hardt, *Explorations in Deterrence and Criminal Justice*, 8 CRIM. L. BULL. 514, 520-24 (1972) (reviewing theorists' attempts to identify individuals who will be deterred by threats of punishment) *and* Geerken & Gove, *Deterrence: Some Theoretical Considerations*, 9 LAW & SOC'Y REV. 497, 509-12 (1975) (discussing potential offenders' perception of risk as a deterrent mechanism) *with* J. BENTHAM, *Principles of Penal Law*, in WORKS 396 (1943) (making an example of offender should be chief end of punishment).

228 *See* A. GOLDSTEIN, *supra* note 225, at 12-13; Andenaes, *supra* note 221, at 958; Silving, *Mental Incapacity in Criminal Law*, 2 CURRENT L. & SOC. PROBS. 3, 25 (1961); van den Haag, *On Deterrence and the Death Penalty*, 60 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 141, 143 (1969); *cf.* Gardiner, *The Purpose of Criminal Punishment*, 21 MOD. L. REV. 117, 122 (1958) (theories regarding the deterrent value of punishment rest "on the assumption that we are rational beings who always think before we act, and then base our actions on a careful calculation of the gains and losses involved").

229 *See* Kastenbaum, *Time and Death in Adolescence*, in THE MEANING OF DEATH 99 (H. Feifel ed. 1959); *see also supra* notes 134-38 and accompanying text.

230 U.S. Dep't of Justice, *Program Offers Juvenile Offenders A Second Chance*, 3 JUST. ASSISTANCE NEWS, Oct. 1982, at 3 (most juveniles, even those who are streetwise, do not know their rights and responsibilities or the legal consequences of their criminal acts) [hereinafter cited as *Program Offers Juvenile Offenders A Second Chance*].

teenagers.[231] In fact, the threat of capital punishment may make crime more appealing and exciting to youths. Adolescents are in a developmental stage of defiance toward death and danger that produces much risk-taking behavior,[232] and minors often play games of chance with death out of a feeling of omnipotence.[233] That minors commonly flirt with death is evidenced by their propensity toward reckless driving and experimentation with dangerous drugs.

Even if minors understand the threat of punishment and fear death, they have not developed sufficient control over their behavior to conform to that understanding and fear.[234] Minors, for example, tend to seek the approval of their peers, responding to dangerous dares even when they fear the consequences.[235] It is for this reason that most youth crimes are committed in groups.[236] Capital punishment for minors very well may give gang leaders the leverage necessary to persuade members to participate in the gang's illegal activities; there may be no more effective way of gaining the cooperation of unwilling adolescents than by calling them "chicken" in front of their peers.[237]

Yet another reason why capital punishment will not deter minors is that it is particularly uncertain whether they will receive the death pen-

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231 *See* R. LONETTO, CHILDREN'S CONCEPTIONS OF DEATH 134-41 (1980); Hostler, *The Development of the Child's Concept of Death*, in THE CHILD AND DEATH (O. Sahler ed. 1978). *See generally* Kastenbaum, *supra* note 229.

232 *See* E. ERICKSON, CHILDHOOD AND SOCIETY 261-63 (2d ed. 1963); Fredlund, *Children and Death from the School Setting Viewpoint*, 47 J. SCH. HEALTH 533 (1977); *see also supra* notes 139-141 and accompanying text.

233 Miller, *Adolescent Suicide: Etiology and Treatment*, in 9 ADOLESCENT PSYCHIATRY 327 (S. Feinstein, J. Looney, A. Schwartzberg & A. Sorosky eds. 1981); *see also* Anthony, *The Child's Idea of Death*, in THE WORLD OF THE CHILD 336 (T. Talbot ed. 1967); Fredlund, *supra* note 232, at 534 ("many [adolescents] . . . have a tremendous need to prove over and over again that they are immune [from death]").

234 *See supra* notes 134-38 and accompanying text.

235 *See* E. ERICKSON, *supra* note 232, at 261-63; *cf. Program Offers Juvenile Offenders A Second Chance*, *supra* note 230, at 3 (reports on a Washington, D.C. program that teaches juveniles " 'how not to rob the grocery store when the gang wants to but you don't' ").

236 *See* PREVENTION OF SERIOUS DELINQUENCY, *supra* note 38, at 1, 24, 25, 61; Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. LAW & CRIMINOLOGY 867, 867 (1981). *See generally* NATIONAL INSTITUTE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, CRIME BY YOUTH GANGS AND GROUPS IN THE UNITED STATES (preliminary version 1981).

237 *See* Malmquist, *Premonitory Signs of Homicidal Aggression in Juveniles*, 128 AM. J. PSYCHIATRY 461, 464 (1971). Malmquist reports that one of the factors commonly leading up to juvenile murders is "threats to manhood" from gang members and girlfriends. *Id.* As an example, Malmquist tells of the case of a 15-year-old boy who had developed a close relationship with a teenage girl:

> The couple decided to obtain money for a vacation by holding up a cab driver. The plan was to tell the cabbie to stop and hand over his money. Instead, the cabbie sped down the street while the girl screamed at the boy: 'Shoot! Kill him! Don't be yellow, you weakling!' He briefly hesitated but then shot the man in the back.

Id.

alty. Research indicates that the certainty of receiving a particular punishment is the primary source of its preventive restraint.[238] Of course, it is never certain that an adult will receive a death sentence.[239] But in the case of minors, the uncertainty is far greater. Most minors, including those who commit violent crimes, do not think that they will get caught,[240] and studies have found that they usually do not.[241] Moreover, even when they are arrested, there is often no assurance that they will be tried in criminal court.[242] Even if they are transferred to criminal court, their youth is always a mitigating factor given great weight in death penalty sentencing decisions.[243]

Thus, capital punishment for minors is very unlikely to deter minors or adults from committing crimes, and may even encourage some minors to do so.

3. Specific Deterrence

Under a specific deterrence justification, the purpose of capital punishment is to protect society from the threat of future crimes by the particular capital offender.[244] In *Gregg v. Georgia*,[245] the Supreme Court

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238 *See* J. GIBBS, CRIME, PUNISHMENT AND DETERRENCE (1975); Andenaes, *General Prevention Revisited: Research and Policy Implications*, 66 J. CRIM. LAW & CRIMINOLOGY 338 (1975).

239 The Supreme Court has held mandatory death penalty statutes, which provide that the death penalty must be imposed on all offenders convicted of certain crimes, to be unconstitutional. *See* Roberts v. Louisiana, 428 U.S. 325, 330 (1976); Woodson v. North Carolina, 428 U.S. 280, 293, 304 (1976).

240 THE RELATIONSHIP OF ADULT CRIMINAL CAREERS TO JUVENILE CAREERS, *supra* note 141, at 10.

241 *See* THE PREVENTION OF SERIOUS DELINQUENCY, *supra* note 38, at 60 (most serious juvenile offenses do not result in arrest); Farrington, *Longitudinal Research on Crime and Delinquency*, in 1 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 289 (N. Morris & M. Tonry eds. 1979) (between 3% to 15% of all delinquent acts ever result in "police contact," much less an arrest); Mann, Friedman & Friedman, *Characteristics of Self-Reported Violent Offenders Versus Court Identified Violent Offenders*, 4 INT'L J. CRIMINOLOGY & PENOLOGY 69-87 (1976) (noting study that found that approximately 60% of a sample of predominantly poor, black high school-aged boys in Philadelphia who reported involvement in "multiple violent acts" never were apprehended).

242 This is particularly true if they reside in a judicial waiver jurisdiction. One author notes:

> Judicial waiver practices have contributed to the erosion of the deterrence associated with the imposition of criminal sanctions. There can be no degree of certainty in a discretionary certification system since every decision is necessarily individualized. A youth may appear in juvenile court on numerous occasions, and there is no way to anticipate whether the next appearance will result in yet another juvenile disposition or a waiver proceeding. Indeed, many waived youths have been the subjects of previous unsuccessful certification proceedings.

Feld, *supra* note 43, at 517-18.

243 *See supra* notes 71, 72 and accompanying text.

244 *See* H. PACKER, *supra* note 195, at 39; Andenaes, *Does Punishment Deter Crime?* 11 CRIM. L.Q. 76, 78 (1968).

245 428 U.S. 153 (1976).

noted that specific deterrence may be one of the purposes of capital punishment.[246] The Court did not rely on this justification in finding that the death penalty served acceptable goals of punishment, however, perhaps because incarceration is equally effective in preventing future crimes by the criminals involved.[247]

Even if capital punishment makes some necessary contribution to the goal of specific deterrence in regard to adult offenders, it is completely unnecessary in order to prevent juvenile offenders from engaging in future criminal conduct. Just because a minor is found to be "dangerous" or incapable of being rehabilitated by the resources available in the juvenile justice system does not mean that he will not reform as he grows older. As has been noted, "It is impossible to make a judgment that a fourteen-year-old, no matter how bad, will remain incorrigible for the rest of his life."[248] In fact, most juvenile crime, including violent crime, abates with age.[249] Many youths may commit only one serious offense and then cease to be criminally active.[250] Although juveniles who commit repeated violent crimes tend to persist in criminal activity into their twenties,[251] their criminal involvement usually reduces gradually and finally ceases shortly thereafter.[252] Indeed, the "possibility of significant character and behavioral changes in young adults ages eighteen to twenty-five is a recognized phenomenon,"[253] and the evidence shows that juvenile murderers are low-rate recidivists.[254]

Nor is the death penalty necessary to prevent a minor sentenced to life imprisonment from committing a subsequent offense while incarcerated. In most states, all life prisoners have the possibility of parole.[255]

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246 *Id.* at 183 n.28.

247 *See* Liebman & Shepard, *supra* note 70, at 813; *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 72 (1976).

248 Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968).

249 *See supra* note 141 and accompanying text.

250 D. HAMPARIAN, R. SCHUSTER, S. DINITZ & J. CONRAD, THE VIOLENT FEW 52 (1978); P. STRASBURG, VIOLENT DELINQUENTS 35-36 (1978); M. WOLFGANG, R. FIGLIO & T. SELLIN, *supra* note 139, at 160; Feld, *supra* note 43, at 509-11.

251 *See* P. STRASBURG, *supra* note 139, at 35-36; M. WOLFGANG, R. FIGLIO & T. SELLIN, *supra* note 139. It is generally agreed, however, that though there is a positive correlation between repeated delinquency and later criminal activity, it is impossible to predict accurately adult criminality based on violent acts of juvenile delinquency. *See* Wenk, Robison & Smith, *Can Violence be Predicted?* 18 CRIME & DELINQ. 393, 401-02 (1972); THE RELATIONSHIP OF ADULT CRIMINAL CAREERS TO JUVENILE CAREERS, *supra* note 141, at 1.

252 Feld, *supra* note 43, at 512.

253 *See* Erwin, *Five Years of Sentence Review in Alaska*, 5 U.C.L.A.-ALASKA L. REV. 1, 18 (1975).

254 *See* T. SELLIN, THE DEATH PENALTY, A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE (ALI) § 72-79 (1959); Vitiello, *Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since* Kent v. United States, 26 DE PAUL L. REV. 23, 39 (1976).

255 *See, e.g.*, N.Y. PENAL LAW §§ 70.00(3), 70.50 (McKinney 1980).

Even in those states in which offenders may be sentenced to life imprisonment without parole, such offenders still may receive commutations of their sentences by the governor.[256] Thus, even life prisoners have something to lose if they commit offenses while in prison.[257] This is especially true in regard to minors, who are very likely to receive parole or commutation if they behave.[258] Juvenile murderers, in fact, tend to be model prisoners.[259]

4. Conclusion Regarding the Contribution of Capital Punishment for Minors to Acceptable Goals of Punishment

The execution of minors fails to make a "measurable contribution" to the goals discussed. Thus, capital punishment for juveniles fails to meet the requirements of this strand of the excessiveness test of the eighth amendment, as well as the requirements of the proportionality strand.

D. THE REMAINING CONSTITUTIONAL PROBLEM: WHERE TO DRAW THE LINE

If the death penalty is unconstitutional when imposed on children and adolescents, the problem of where to draw the line emerges: "Shall it be 12, 15, 18, 20?"[260] Drawing that line will be a difficult task. It certainly will require more precise age-related information than has been provided here. It is possible that even such information may not provide any clear cutoff point. Surely irresponsible seventeen-year-olds do not become responsible adults as soon as they reach age eighteen. Nor does society's responsibility for youth crime suddenly diminish when the sixteen-year-old turns seventeen.

The difficulty of determining a cutoff age for the imposition of the death penalty should not stop the courts from making the determination, however. Line-drawing in cases where there are no bright lines is endemic to constitutional decisionmaking. The Supreme Court has rec-

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256 *See, e.g.*, CAL. CONST. art. VII, § 1.

257 *See generally* H. BEDAU, THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT 49 (1977); Hertz & Weisberg, *supra* note 202, at 323 n.29; Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faiths*, 1976 SUP. CT. REV. 317, 339.

258 *See supra* note 174 and accompanying text. Maintaining that convicted minors are, for these reasons, unlikely to commit crimes while in prison is not to suggest that minors are capable of being deterred by the threat of punishment before they have been arrested and sentenced and the realities of the situation have hit home. *See supra* notes 227-43 and accompanying text.

259 *See* Vitiello, *supra* note 254, at 39; *see also* B. ESHELMAN & F. RILEY, *supra* note 197, at 224; UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS ¶144, at 119 (1968).

260 Brief for Petitioner, *supra* note 3, at 59.

ognized that courts properly may be called upon to draw such lines in eighth amendment cases.[261] Moreover, though psychological and sociological data may not provide the precise cutoff age for the imposition of the death sentence, the laws of our society do, suggesting age eighteen as the appropriate mark. It is at this age that society presumes that a person has become responsible and removes the restrictions that were established to protect the irresponsible young. Upon reaching eighteen, people may purchase cigarettes, marry without the consent of their parents, vote,[262] and enter freely into contracts.[263] The Model Penal Code,[264] several capital punishment states,[265] and numerous foreign countries[266] have chosen age eighteen as the cutoff point for the imposition of capital punishment. Moreover, most states designate eighteen as the appropriate maximum age for juvenile court jurisdiction.[267]

Some nineteen- and twenty-year-olds certainly may be immature and otherwise less responsible than older adults. However, youth will remain a mitigating circumstance in their cases, and a constitutional line drawn at age eighteen is likely to make sentencing bodies particularly sensitive to the maturity and backgrounds of these young adults.

Although a line drawn at age eighteen may prove to be underinclu-

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261 *See* Solem v. Helm, 103 S. Ct. 3001 (1983). In *Solem*, an offender who previously had been convicted of six felonies in South Dakota state courts was convicted of a seventh felony (uttering a "no account" check for $100) and was sentenced to life imprisonment without parole, pursuant to South Dakota's recidivist statute. Solem appealed his life sentence on the ground that it was disproportionate punishment and therefore violated the eighth amendment. The Supreme Court held that the sentence was unconstitutional. In doing so, the Court noted that even where there is no bright line indicating the appropriate sentence length, courts still may draw lines that would make the sentence imposed consistent with the Constitution. *Id.* at 3011-12.

262 The twenty-sixth amendment of the Constitution provides that "[t]he right of citizens of the United States, who are 18 years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. CONST. amend. XXVI, § 1.

263 The sheer inconsistency of sentencing those under 18, who do not have these "adult" rights, to death is demonstrated vividly by the comment made by the mother of a 15-year-old awaiting his execution on death row. When prison officials sought her parental consent to emergency treatment for her son, if he should need it, the mother observed, "Now, isn't that ironic? . . . He's old enough to be put to death, but he's not old enough to get an aspirin without our consent." S. GETTINGER, SENTENCED TO DIE 150 (1979).

264 *See* MODEL PENAL CODE § 210.6(1)(d) (Proposed Official Draft 1962); *see also* MODEL PENAL CODE § 210.6 comment 133 (Official Draft and Revised Comments 1980) (affirming its position that offenders under 18 should not receive the death penalty).

265 *See supra* note 69 and accompanying text.

266 Seventy-three of the 91 countries that have minimum age execution requirements specify that the offender must be at least 18 years old. *See* Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 397, 398-403, 410 & Table 1 (1965). Reports of the Secretary of the United Nations confirm that "[t]he great majority of Member States report never condemning to death persons under 18 years of age." UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, REPORT OF THE SECRETARY GENERAL, CAPITAL PUNISHMENT 17 (1973).

267 *See supra* note 39 and accompanying text.

sive in a few cases, it never will be overinclusive. At age eighteen, people are legally free to leave the custody of their parents and to strike out on their own.[268] Thus, though society may be more responsible for the crime of a nineteen-year-old than a thirty-year-old, it always will be most responsible for the offenses of the sixteen- and seventeen-year-olds whom it forces to remain in bad environments or for whom it fails to find suitable ones. Moreover, in the overwhelming majority of states, those over eighteen are the "natural" constituents of the criminal court's jurisdiction. It was thus with this age group in mind that the legislatures enacted capital punishment statutes to serve the goals of retribution and general and specific deterrence.

But regardless of where the line is drawn, some line must be drawn; for, as has been shown, the death penalty is "cruel and unusual" punishment when imposed on very young offenders.

IV. CONCLUSION

In 1977, the capital punishment critic Hugo Bedau was able to write that "[t]he courts have never drawn a line to protect juveniles as such from the reach of death sentences . . . on the grounds of the unconstitutional cruelty and unusualness of such [sentences]."[269] Though this observation remains true today, the courts increasingly will have the opportunity to draw this line as more and more juveniles are challenging the constitutionality of their death sentences.[270] As the constitutionality of capital punishment for minors presently is being challenged in at least one state appellate court,[271] the Supreme Court may soon have the opportunity to draw this line once and for all.

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268 *See supra* note 151 and accompanying text.

269 H. BEDAU, *supra* note 257, at 33.

270 *See supra* notes 7-9 and accompanying text.

271 Monty Lee Eddings, who committed his capital offense when he was 16 years old, is challenging the constitutionality of capital punishment for minors in the Oklahoma Court of Criminal Appeals. Telephone Interview with Mr. Jay Baker, Monty Lee Eddings' Attorney (Dec. 14, 1982).