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Too Young for the Death Penalty: An Empirical Examination of Community Conscience and the Juvenile Death Penalty from the Perspective of Capital Jurors

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ARTICLES

TOO YOUNG FOR THE DEATH PENALTY: AN EMPIRICAL EXAMINATION OF COMMUNITY CONSCIENCE AND THE JUVENILE DEATH PENALTY FROM THE PERSPECTIVE OF CAPITAL JURORS

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PREFACE	610
INTRODUCTION	612
I. COMMUNITY CONSCIENCE AND THE JUVENILE DEATH PENALTY	618
A. <i>Legislative Action</i>	619
B. <i>Expertise of Scientific and Professional Groups</i>	621
C. <i>Public Opinion</i>	624
D. <i>Juries</i>	627
E. <i>A Premium on Actual Jurors in Real Cases</i>	630
F. <i>The Convergence Challenge</i>	632
II. THE CAPITAL JURY PROJECT	633
III. THE EVIDENCE FROM JURORS' RESPONSES TO STRUCTURED QUESTIONS.....	635
A. <i>The Juvenile Cases</i>	635
B. <i>Jurors' Impressions of the Crime</i>	640
1. Objective Crime Characteristics.....	641
2. Jurors' Characterizations of the Killing.....	642
C. <i>Characterization of the Defendant</i>	643
1. Family Background	644
2. Social Adjustment	645
3. Age-Graded Differences.....	645
D. <i>Jurors' Feelings about the Defendant and His Family</i>	646

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E.	<i>The Defendant's Appearance in Court</i>	648
F.	<i>The Punishment Decision</i>	651
	1. Jury Deliberations on Punishment.....	651
	2. The Juror's Own Punishment Decision.....	653
G.	<i>Overview of the Statistical Evidence</i>	655
IV.	EVIDENCE FROM JURORS' NARRATIVE ACCOUNTS.....	657
A.	<i>When Juries Reject the Death Penalty</i>	658
	1. <i>State v. Simmons</i>	658
	2. <i>Villegas v. State</i>	664
	3. <i>State v. Pennington</i>	665
	4. <i>Rea v. Virginia</i>	666
	5. <i>Houchin v. State</i>	667
B.	<i>When Juries Vote for Death</i>	667
	1. <i>Wright v. Commonwealth</i>	668
	2. <i>Commonwealth v. Blount</i>	674
C.	<i>When the Jury Wants Life and the Judge Imposes Death</i>	676
	1. <i>Knotts v. State</i>	676
	2. <i>Flowers v. State</i>	681
V.	DRAWING THE LINE AND CONFIRMING THE EXEMPTION.....	684
A.	<i>Defendant's Age and the Imposition of Death</i>	684
B.	<i>Juveniles, the Mentally Retarded, and the Imposition of Death</i> ..	686
VI.	CONCLUDING PERSPECTIVE.....	687
A.	<i>The Eighth Amendment Challenge:</i> <i>Exemption versus Mitigation</i>	687
B.	<i>The Essence of Community Conscience:</i> <i>Reduced Responsibility</i>	689
	1. Background: Family Dysfunction.....	690
	2. Foreground: Cognitive, Emotional, and Social Immaturity..	690
	CONCLUSION.....	691

PREFACE

As our analysis of jury decisionmaking in juvenile capital trials was nearing completion, the Missouri Supreme Court declared the juvenile death penalty unconstitutional in *Simmons v. Roper*.¹ The court held that the execution of persons younger than eighteen years of age at the time of their crime violates the Eighth and Fourteenth Amendments to the United States Constitution.² This decision patently rejected the U.S. Supreme Court's ruling in *Stanford v. Kentucky*,³ which permitted the execution of sixteen- and seventeen-year-olds.

¹ 112 S.W.3d 397, 399 (Mo. 2003) (en banc) (holding the juvenile death penalty unconstitutional), *cert. granted*, 124 S. Ct. 1171 (Jan. 26, 2004) (No. 03-633).

² *See id.* at 413 (finding that the execution of sixteen- and seventeen-year-olds "is prohibited by the Eighth Amendment to the Constitution as applied to the state through the Fourteenth Amendment").

³ 492 U.S. 361, 380 (1989) (holding that the imposition of capital punishment on sixteen- and seventeen-year-olds is constitutionally permissible since it does not violate the Eighth Amendment's ban on cruel and unusual punishment).

The *Simmons* court stated:

[T]his Court finds that, in the fourteen years since *Stanford* was decided, a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since *Stanford*, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade. Accordingly, this Court finds the Supreme Court would today hold such executions are prohibited by the Eighth and Fourteenth Amendments.⁴

In deciding *Simmons*, the Missouri Supreme Court applied the U.S. Supreme Court's reasoning in *Atkins v. Virginia*⁵ to the juvenile death penalty.⁶ In *Atkins*, the Supreme Court found that there was a national consensus against the death penalty for the mentally retarded that made their execution constitutionally unacceptable.⁷ Similarly, in *Simmons*, the Missouri Supreme Court found that there was a national consensus against the death penalty for juveniles and ruled that juveniles could no longer be executed as a matter of federal constitutional law.⁸ The dissenting judges in this four-to-three decision did not take issue with the substantive findings of the majority, but objected instead to what they regarded as the impropriety of their state supreme court making a federal constitutional ruling that contravened an earlier U.S. Supreme Court decision.⁹

⁴ *Simmons*, 112 S.W.3d at 399-400 (footnote omitted).

⁵ 536 U.S. 304, 321 (2002) (prohibiting the execution of mentally retarded criminals as unconstitutionally excessive punishment).

⁶ See *Simmons*, 112 S.W.3d at 399 (agreeing with the *Atkins* analysis and applying the same approach to juveniles).

⁷ See *Atkins*, 536 U.S. at 314-16 (assessing the legislative trend toward prohibition of mentally retarded executions and concluding that there is no reason to disagree with the consensus).

⁸ See *Simmons*, 112 S.W.3d at 399-400 (finding a national consensus against executing juveniles and holding that such executions are constitutionally prohibited).

⁹ See *id.* at 419 (Price, J., dissenting) ("This Court is bound by the United States Supreme Court's decision in *Stanford v. Kentucky* and simply has no authority to overrule that decision."). Judge Price further argued that "[t]his Court's solemn duty to abide by decisions of the Supreme Court of the United States is not abridged simply because we disagree with that Court's decision or even if it appears that a decision was clearly in error." *Id.* at 420. Judge Price concluded:

While the majority of this Court might believe that *Stanford v. Kentucky* has been abandoned in light of *Atkins* and in light of their perception of a national consensus regarding capital punishment of juvenile offenders, their belief and perception are not sufficient to preempt the Supreme Court of the United States concerning its existing precedent.

It is the prerogative of the Supreme Court of the United States, and its alone, to

The U.S. Supreme Court has granted certiorari for a Fall 2004 review of the *Simmons* case¹⁰ in which it will have an opportunity to consider new evidence on the constitutionality of the juvenile death penalty—evidence of a kind it has lamented not having in earlier death penalty challenges,¹¹ including specifically a challenge to the juvenile death penalty's constitutionality.¹² This is evidence regarding real capital jurors' exercise of sentencing discretion in cases where they have actually decided whether defendants, whose crimes were committed when they were juveniles, should live or die. This article presents this newly available evidence from capital jurors in an assessment of the constitutionality of the juvenile death penalty.

INTRODUCTION

One of the most profound and pressing questions confronting the American justice system is whether contemporary mores support capital punishment for defendants who commit their crimes as juveniles. The death penalty has been imposed far less often on defendants who committed their crimes as juveniles than on those who committed their crimes as adults.¹³ Since the reinstatement of capital punishment in the United States during the 1970s, twenty-two juveniles have been executed, which comprise about 2.4% of all executions since that time.¹⁴

Does this infrequent use of capital punishment against juvenile defendants indicate that the juvenile death penalty is "cruel and unusual" in violation of

overrule one of its decisions.

Id. at 421.

¹⁰ See *id.*, cert. granted, 124 S. Ct. 1171 (Jan. 26, 2004) (No. 03-633).

¹¹ See *infra* notes 122-131 and accompanying text (discussing the Court's expressed need for evidence demonstrating how real jurors make their sentencing decisions).

¹² In her concurrence in *Thompson v. Oklahoma*, Justice O'Connor complained that "raw execution and sentencing statistics cannot allow us reliably to infer that juries are or would be significantly more reluctant to impose the death penalty on 15-year-olds than on similarly situated older defendants." 487 U.S. 815, 853 (1988) (O'Connor, J., concurring).

¹³ See VICTOR L. STREIB, THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY 1, 1973 – MARCH 15, 2004, at 11-12 tbl.6, available at <http://www.law.onu.edu/faculty/streib/JuvDeathMar152004.pdf> (last accessed Mar. 16, 2004) (stating that the juveniles currently on death row constitute approximately two percent of the total death row population at 11). Streib provides a comprehensive overview of juvenile death penalty jurisdictions:

Currently, 38 states and the federal government (both civilian and military) have statutes authorizing the death penalty for capital crimes, almost all of which are forms of murder. Of those 40 death penalty jurisdictions, 21 jurisdictions (52%) have expressly chosen age 18 at the time of the crime as the minimum age for eligibility for that ultimate punishment. Another 5 jurisdictions (12%) have chosen age 17 as the minimum. The other 14 death penalty jurisdictions (35%) use age 16 as the minimum age, either through an express age in the statute (4 states) or by court ruling (10 states).

Id. at 7.

¹⁴ See *id.* at 4 (examining juvenile and adult execution statistics from 1973-2003).

contemporary standards of decency in American society? The Eighth Amendment's focus on cruel and unusual punishment is central to the U.S. Supreme Court's modern death penalty jurisprudence. Beginning more than four decades ago with *Trop v. Dulles*,¹⁵ the Court articulated the test it applies to determine whether a punishment is cruel and unusual. The test is simply an analysis of America's "evolving standards of decency that mark the progress of a maturing society."¹⁶ This "evolving standards" approach was used in the key juvenile death penalty case of *Thompson v. Oklahoma*,¹⁷ in which the Court held that the death sentence of a fifteen-year-old defendant violates the Constitution.¹⁸ In this case, the juvenile offender was involved with three adult accomplices in the brutal murder of his former brother-in-law.¹⁹ The *Thompson* Court explained that the "conscience of the community" must be evaluated in determining whether the juvenile death penalty was a cruel and unusual punishment.²⁰ Looking to both legislative enactments and jury determinations as indicators of whether evolving standards of decency required Oklahoma to refrain from imposing the death penalty on the fifteen-year-old,²¹ the plurality concluded:

While it is not known precisely how many persons have been executed during the 20th century for crimes committed under the age of 16, a scholar has recently compiled a table revealing this number to be between 18 and 20. All of these occurred during the first half of the century, with the last such execution taking place apparently in 1948. . . . The road we have traveled during the past four decades—in which thousands of juries have tried murder cases—leads to the unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community.²²

The U.S. Supreme Court reversed course only a year later in *Stanford v. Kentucky*,²³ holding that the Constitution permitted states to impose capital punishment on sixteen- and seventeen-year-olds. The *Stanford* challenge failed because the juvenile offender in that case relied extensively on public

¹⁵ 356 U.S. 86, 101 (1958) (plurality opinion) (finding that the Eighth Amendment bars denationalization as a punishment).

¹⁶ *Id.*

¹⁷ 487 U.S. 815 (1988).

¹⁸ *See id.* at 838 (holding that the Eighth Amendment prohibits the execution of a juvenile who was under the age of sixteen at the time of the crime).

¹⁹ *See id.* at 819 (reciting the brutal facts of the case).

²⁰ *See id.* at 832 (concluding that juries' infrequent imposition of the death penalty indicates that capital punishment for a fifteen-year-old would be "abhorrent to the conscience of the community").

²¹ *See id.* at 822-23 (explaining that the process of evaluating an Eighth Amendment claim involves looking first to legislative actions, then to jury determinations).

²² *Id.* at 832 (footnotes omitted).

²³ 492 U.S. 361 (1989).

opinion polls and the views of interest groups.²⁴ The *Stanford* plurality pointed to numerous state statutes permitting juvenile executions as unequivocal evidence of such standards.²⁵ The plurality, led by Justice Scalia, rejected Stanford's contention that public opinion polls and views of interest groups should also be considered as indicators of a consensus, and instead relied on *Coker v. Georgia*²⁶ in framing its argument that state legislatures, prosecutors, and sentencing juries were the only reliable indicia of the "evolving standards of decency."²⁷ Scalia belittled the value of other indicators, observing:

Having failed to establish a consensus against capital punishment for 16- and 17-year-old offenders through state and federal statutes and the behavior of prosecutors and juries, petitioners seek to demonstrate it through other indicia, including public opinion polls, the views of interest groups, and the positions adopted by various professional associations. We decline the invitation to rest constitutional law upon such uncertain foundations. A revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved.²⁸

In the recent landmark case of *Atkins v. Virginia*,²⁹ which struck down the death penalty for mentally retarded offenders as cruel and unusual, the justices were again presented with multiple indicators of evolving public standards, including legislative trends,³⁰ public opinion,³¹ expert opinion,³² and international opinion.³³ The decision was especially interesting because the Court had upheld the constitutionality of the death penalty for mentally retarded offenders in 1989.³⁴ What had changed to convince the Court that

²⁴ *Id.* at 377 (asserting that these forms of public opinion indicators are too uncertain to be used as a foundation for constitutional law).

²⁵ *Id.* at 370-72 (stating that "a majority of the States that permit capital punishment authorize it for crimes committed at age 16 or above").

²⁶ 433 U.S. 584 (1977) (examining the attitude of state legislatures and sentencing juries in determining that death is a disproportionate penalty for rape).

²⁷ *Stanford*, 492 U.S. at 369, 377 (stating that the Court will look to objective evidence of the conceptions of American society when determining whether a punishment violates the Eighth Amendment).

²⁸ *Id.* at 377.

²⁹ 536 U.S. 304 (2002).

³⁰ *See id.* at 314-16 (addressing the trend by state legislatures to exempt mentally retarded criminals from the death penalty).

³¹ *See id.* at 316-17 n.21 (citing polling data that shows a consensus among Americans that mentally retarded criminals should not be executed).

³² *See id.* (citing amicus curiae briefs from professional and religious organizations).

³³ *See id.* (citing an amicus curiae brief from the European Union).

³⁴ *See Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that, while executing mentally retarded defendants is not categorically prohibited, the jury instructions in this case—which

such executions violated contemporary standards?

In *Atkins*, the Court found that trends in state legislation prohibiting executions of the mentally retarded and the infrequency of such executions were the most important evidence of evolving public standards.³⁵ Yet, the majority buttressed these legislative judgments with the conclusions of professional organizations and the results of public opinion polls showing declining support for the death penalty for mentally retarded offenders.³⁶

Only a month after its decision in *Atkins*, the Court had an opportunity to consider an Eighth Amendment challenge to the death sentence for juvenile offenders in *Patterson v. Texas*,³⁷ but declined to review the case. Justices Stevens, Ginsburg, and Breyer dissented from the denial of certiorari, expressing a desire to consider this question.³⁸ In his dissent, Justice Stevens observed:

Given the apparent consensus that exists among the States and in the

did not allow the jury to give mitigating effect to the defendant's mental retardation and childhood abuse—violated the Eight Amendment).

³⁵ *Atkins*, 536 U.S. at 312, 316 (asserting that the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures” (quoting *Penry*, 492 U.S. at 331)). The Court summarized more than a decade of legislative trends prohibiting the execution of the mentally retarded:

[S]tate legislatures across the country began to address the issue [more than ten years ago]. In 1990 Kentucky and Tennessee enacted statutes similar to those in Georgia and Maryland, as did New Mexico in 1991, and Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994. In 1995, when New York reinstated its death penalty, it emulated the Federal Government by expressly exempting the mentally retarded. Nebraska followed suit in 1998. There appear to have been no similar enactments during the next two years, but in 2000 and 2001 six more States—South Dakota, Arizona, Connecticut, Florida, Missouri, and North Carolina—joined the procession. The Texas Legislature unanimously adopted a similar bill, and bills have passed at least one house in other States, including Virginia and Nevada.

Id. at 314-15 (footnotes omitted).

³⁶ *See id.* at 316-17 n.21. The Court stated:

Additional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. For example, several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. . . . Finally, polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong. Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.

Id. (citations omitted).

³⁷ 536 U.S. 984 (2002) (mem.) (denying petitioner’s application for stay of death sentence and petition for writ of habeas corpus).

³⁸ *See id.* at 984 (Stevens, J., dissenting) (concluding that it is appropriate to address the issue in light of the apparent consensus among states and the international community against the juvenile death penalty); *id.* at 985 (Ginsburg, J., dissenting) (asserting that, in light of *Atkins*, it is appropriate to reevaluate this issue).

international community against the execution of a capital sentence imposed on a juvenile offender, I think it would be appropriate for the Court to revisit the issue at the earliest opportunity. I would therefore grant a stay of this execution to give the Court an opportunity to confront the question at its next scheduled conference in September. Accordingly, I respectfully dissent from the denial of a stay.³⁹

Three months later, in a dissent from another denial of certiorari in *In re Stanford*,⁴⁰ Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, elaborated on the view that there is a growing public consensus that the juvenile death penalty violates evolving standards of decency.⁴¹ The dissent pointed to parallels between public sentiments about the appropriateness of the death penalty for mentally retarded offenders and for juvenile offenders.⁴² For instance, Justice Stevens noted that twenty-eight states expressly forbid the execution of juvenile offenders, compared to thirty that prohibited the execution of the mentally retarded at the time that *Atkins* was decided.⁴³ Stevens also cited public opinion survey findings that the majority of Americans believe that the death penalty should not apply to juvenile offenders.⁴⁴

As additional support for his view, Justice Stevens quoted extensively from Justice Brennan's dissenting opinion in *Stanford v. Kentucky*,⁴⁵ which Stevens had joined.⁴⁶ Stevens pointed to many legislative actions that differentiate between those below the age of eighteen and those eighteen and older in arenas as diverse as voting, marriage, jury service, and consent to medical treatment.⁴⁷ Stevens agreed with Brennan's argument that these legislative distinctions

³⁹ *Id.* at 984 (Stevens, J., dissenting).

⁴⁰ 537 U.S. 968 (2002) (mem.) (denying writ of habeas corpus for a petitioner who was under eighteen at the time of his crime).

⁴¹ *See id.* at 968-71 (Stevens, J., dissenting) (supporting his opinion with state legislative trends, public opinion polls, and legal obligations that apply to eighteen-year-olds).

⁴² *See id.* (asserting that the reasons supporting the prohibition of the death penalty for the mentally retarded apply equally to the juvenile death penalty).

⁴³ *See id.* at 968-69 (examining the recent legislative trend toward prohibition of the juvenile death penalty and comparing it to the jurisdictional evidence from *Atkins*); *see also infra* Part I (discussing legislative action since *Stanford* was decided).

⁴⁴ *See id.* at 972 (citing Tom W. Smith, Public Opinion on the Death Penalty for Youths 2, 6 (Dec. 2001) (unpublished manuscript), available at http://www.norc.uchicago.edu/issues/Death_Penalty.pdf (last accessed May 10, 2004) (pointing out that legislative treatment on the subject aligns with public views)).

⁴⁵ 492 U.S. 361, 382-405 (Brennan, J., dissenting) (asserting that imposing capital punishment on sixteen- and seventeen-year-olds is unconstitutional because it violates the Eighth Amendment's ban on cruel and unusual punishment).

⁴⁶ *Stanford*, 537 U.S. at 969-71 (Stevens, J., dissenting) (citing *Stanford*, 492 U.S. at 394-96 (examining legislative restrictions on juvenile participation in a variety of activities and linking this to a public consensus on maturity levels)).

⁴⁷ *See id.* (discussing the various rights that are granted upon the age of majority).

reflect a consensus that those under eighteen are not as mature as those above that age.⁴⁸

Conspicuously missing from Justice Stevens's Eighth Amendment arguments in both dissents is any assessment of the behavior of capital juries in juvenile cases. He rests his argument on state legislative trends and declining public support.⁴⁹ Chief Justice Rehnquist's dissenting opinion in *Atkins* suggests that any thorough consideration of an Eighth Amendment argument concerning the juvenile death penalty must also take account of how jurors in such cases behave.⁵⁰

Rehnquist was especially critical of the majority's failure to appraise the sentencing jury's behavior in capital cases involving mentally retarded offenders.⁵¹ Relying on the Court's approach in *Coker v. Georgia*⁵²—which held it unconstitutional to impose the death penalty for rape⁵³—Justice Rehnquist, joined by Justices Scalia and Thomas, argued that the actions of state legislatures and capital juries are the most appropriate indicators for determining the community's evolving standards of decency.⁵⁴ Chief Justice Rehnquist wrote:

[D]ata concerning the actions of sentencing juries, though entitled to less weight than legislative judgments, "is a significant and reliable objective index of contemporary values," because of the jury's intimate involvement in the case and its function of "maintain[ing] a link between contemporary community values and the penal system." In *Coker*, for example, we credited data showing that "at least 9 out of 10" juries in Georgia did not impose the death sentence for rape convictions. . . . [I]ndividual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.⁵⁵

This article responds directly to the Chief Justice's request and takes up the

⁴⁸ See *id.* (concluding that society has decided that juveniles have not attained the level of maturity needed for a full grant of the rights of an adult).

⁴⁹ See *supra* notes 41-48 and accompany text.

⁵⁰ *Atkins v. Virginia*, 356 U.S. 304, 323-24 (2002) (Rehnquist, C.J., dissenting) (stressing the importance of jury determinations as a significant indicator of contemporary values).

⁵¹ See *id.* at 324 (criticizing the majority's lack of comprehensive statistics considering the behavior of juries in capital cases for the mentally retarded).

⁵² 433 U.S. 584 (1977) (examining the attitude of state legislatures and sentencing juries in determining that death is a disproportionate penalty for rape).

⁵³ *Id.* at 598 (concluding that the imposition of capital punishment for rape violates the Eighth Amendment).

⁵⁴ *Atkins*, 356 U.S. at 324 (Rehnquist, C.J., dissenting) (identifying these sources as "the only objective indicia of contemporary values firmly supported by our precedents").

⁵⁵ *Id.* 323-24 (alteration in original) (citations omitted).

challenge of determining how sentencing juries in capital cases involving juvenile offenders “giv[e] effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.”⁵⁶ Are capital jurors substantially less likely to impose death in cases involving defendants who are younger than eighteen years of age? Are capital jurors more likely to impose death in cases involving the mentally retarded or in cases involving juveniles?⁵⁷ And what are the implications for the constitutionality of the death penalty for juveniles?

In light of the Court’s indications about what is relevant evidence of the community conscience and evolving standards of decency for the Eighth Amendment test of “cruel and unusual” punishment, we are in a unique position to contribute empirical evidence for those considering the constitutionality of the juvenile death penalty. Drawing upon interviews conducted by the Capital Jury Project with persons who served as capital jurors, we are able to compare jurors who served on cases where the defendant was less than eighteen years of age at the time of the crime with those who served on cases with defendants eighteen years of age and older. We can contrast how capital jurors in these cases assessed the culpability of the defendants and the appropriateness of the death sentence.

In Part I we review the existing evidence concerning the constitutionality of the juvenile death penalty and consider the strengths and weaknesses of various indicators, including legislative action, opinion polls, scientific and professional expertise, and capital jury behavior. Part II introduces and describes the juror interview data from the Capital Jury Project on which this article is based. Part III reports the findings of our statistical analysis, contrasting juror responses to structured questions about the crime and the defendant in cases involving juvenile offenders and older offenders. In Part IV, we examine jurors’ narrative responses to open-ended questions in the twelve juvenile cases in the Capital Jury Project sample for a more refined picture of the thinking of jurors in juvenile cases. Part V considers where the line between juvenile and adult cases should be drawn and how juveniles compare with the mentally retarded in jurors’ minds. Part VI draws upon the strong differentiation between juveniles and adults in the capital punishment context to reach a conclusion about contemporary standards relating to the juvenile death penalty.

I. COMMUNITY CONSCIENCE AND THE JUVENILE DEATH PENALTY

What are contemporary standards concerning the death penalty for juveniles? The conscience of the community is an intangible concept that we can understand only through various indicators, any one of which provides only an imperfect reflection. The Supreme Court itself has referred to

⁵⁶ *Id.* at 324.

⁵⁷ See *supra* notes 40-43 and accompanying text (alluding to the parallel that Justice Stevens enunciated between treatment of the mentally retarded and juvenile offenders).

legislative action, public opinion polls, the opinions of scientific and professional groups, and the decisionmaking of jurors as indicators of public sentiment.⁵⁸

A. *Legislative Action*

According to some justices, legislators (or more precisely the legislation they enact) are the most favored indicators of the conscience of the community.⁵⁹ The assumption is that, because representative bodies are chosen by the broader community and their tenure in office supposedly depends upon their sensitivity to community sentiments, they are the best barometer of community conscience. An additional advantage of relying on legislators as the index of community sentiments is that the statutes they enact will typically draw a bright definitional line, such as a specific IQ for retardation or a specific age for death-eligible convicted murderers.

While simply reviewing legislation and ascertaining trends in statutory provisions may appear to be a reliable way of answering a constitutional question, it is by no means an unbiased reflection of community sentiments.⁶⁰ Legislation reflects special interests, often those of politically organized interest groups, and it is frequently a balance of competing interests.⁶¹ In times of public concern over crime, for instance, legislators will often campaign for strong and extreme punishments, and even whip up public support for laws that the public, sitting as jurors, would resist applying. Professor Craig Haney elaborates:

Legislatures are a cauldron of political motivations and electoral concerns whose members play at least as large a role in creating and exploiting

⁵⁸ See *infra* notes 59-121 and accompanying text (describing the methods used by the Supreme Court to evaluate the conscience of the community).

⁵⁹ See, e.g., *Atkins*, 536 U.S. at 312 (stating that “the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures” (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989))).

⁶⁰ See William Bowers, *Capital Punishment and Contemporary Values: People’s Misgivings and the Court’s Misperceptions*, 17 *LAW & SOC’Y REV.* 157, 162 (1993) (discussing the difficulty of ascertaining true public sentiment on the death penalty); Craig Haney, *Commonsense Justice and Capital Punishment: Problematizing the “Will of the People”*, 3 *PSYCHOL. PUB. POL’Y & L.* 303, 318-22 (1997) (identifying and analyzing the inherent problems of relying on legislative action to infer popular sentiment).

⁶¹ Political scientists and other scholars have examined the multiple factors that affect state legislative decisionmaking. See, e.g., MALCOLM E. JEWELL, REPRESENTATION IN STATE LEGISLATURES 103-34 (1982) (studying the process by which legislators make choices on policy matters); Malcolm E. Jewell, *Editor’s Introduction: The State of U.S. State Legislative Research*, 6 *LEGIS. STUD. Q.* 1, 14-17 (1981) (surveying the studies done on various aspects of legislative decisionmaking); Gary Moncrief, Joel A. Thompson & William Cassie, *Revisiting the State of U.S. State Legislative Research*, 21 *LEGIS. STUD. Q.* 301, 317-20 (1996) (updating Jewell’s 1981 survey of the state of legislative decision-making research).

popular opinion as they do attempting to objectively assess it. The crass politicization of criminal justice issues over the last several decades has rendered the typical legislature “a dubious barometer” of public opinion on the death penalty.⁶²

Another concern with relying on legislation to accurately reflect the public’s view is the potential for legislators to misread the attitudes and preferences of their constituents regarding the death penalty.⁶³ That said, legislative action over the last several years has been decidedly unidirectional. A number of legislatures have addressed the issue of capital punishment for young offenders and, according to a recent analysis, they “have voted overwhelmingly to set that age at eighteen.”⁶⁴ Professor Streib notes that over a dozen state legislatures have recently considered raising the minimum age for death penalty eligibility from sixteen- or seventeen-years-old to eighteen, and several have already done so.⁶⁵ Kansas resurrected its death penalty in 1994, and the new statute included a minimum age of eighteen; the same was true of New York’s new death penalty statute enacted in 1995.⁶⁶ Montana raised its minimum death penalty eligibility age to eighteen in 1999, and Indiana followed suit in 2002.⁶⁷ Currently, legislatures are considering raising the age of eligibility in Arizona, Arkansas, Delaware, Florida, Kentucky, Mississippi, Missouri, Nevada, Pennsylvania, South Dakota, and Texas.⁶⁸ Vote tallies in legislatures in Indiana, Montana, Florida, and Texas all show that when legislators are given an opportunity to vote on the juvenile death penalty, the vast majority of legislators either vote to ban it entirely or favor a minimum age of eighteen.⁶⁹ Thus, the overall thrust of legislative activity regarding the

⁶² Haney, *supra* note 60, at 332-33 (footnote omitted).

⁶³ See Edmund F. McGarrell & Marla Sandys, *The Misperception of Public Opinion Toward Capital Punishment: Examining the Spuriousness Explanation of Death Penalty Support*, 39 AM. BEHAV. SCIENTIST 500, 508-09 (1996) (reporting data from Indiana legislators showing that lawmakers misread their constituents’ views on capital punishment); see also William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77-150 (1994) (finding that legislators in New York and Massachusetts underestimated receptivity to death penalty alternatives among their constituents).

⁶⁴ Edmund P. Power, *Too Young to Die: The Juvenile Death Penalty After Atkins v. Virginia*, 15 CAP. DEF. J. 93, 101 (2002).

⁶⁵ STREIB, *supra* note 13, at 8 (detailing recent legislative activity seeking to raise the minimum age to eighteen for capital punishment).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* (demonstrating the recent legislative attention given to the issue).

⁶⁹ See Power, *supra* note 64, at 101-02 (arguing that these votes constitute forceful evidence of the “evolving standards of decency” against executing those under the age of eighteen).

juvenile death penalty suggests an emerging consensus among legislators that those who commit crimes as juveniles should not be eligible for the death penalty.

B. *Expertise of Scientific and Professional Groups*

In identifying a societal consensus about the execution of the mentally retarded, the *Atkins* Court observed that “[a]dditional evidence makes it clear that this legislative judgment reflects a much broader social and professional consensus. For example, several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender.”⁷⁰ Therefore, when considering societal views of capital punishment for juveniles, it is important and appropriate to look to the opinions of scientific and professional groups with expertise in juvenile psychology, decisionmaking, and crime.

Interestingly, scientific groups have drawn parallels between a mentally retarded defendant and a juvenile defendant facing capital charges.⁷¹ For example, the American Psychological Association and others argued in an amicus brief:

[W]ith respect to the potential blameworthiness that can attach to their actions, children and persons with mental retardation share the same critical characteristic: diminished intellectual and practical capacities compared to non-retarded adults. The constitutional bar and national consensus against execution of juvenile offenders reflects the fact that “inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.”⁷²

Overwhelmingly, the relevant professional groups—the American Bar Association, the American Psychiatric Association, the American Academy of Child and Adolescent Psychiatry, the American Society for Adolescent Psychiatry, and others—have recommended abolishing the juvenile death penalty.⁷³

Scholars specializing in juvenile neurological, psychological, and social

⁷⁰ *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

⁷¹ See, e.g., Brief of Amici Curiae American Psychological Association et al. at 2, 4-5, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727) (arguing that the diminished mental capacity of both groups mandates prohibiting their execution).

⁷² *Id.* at 4 (quoting *Thompson v. Oklahoma*, 487 U.S. 813, 835 (1988)).

⁷³ For a summary of professional groups and religious organizations that recommend abolition of the juvenile death penalty, see A.B.A. JUVENILE JUSTICE CENTER, NATIONAL ORGANIZATIONS THAT OPPOSE THE JUVENILE DEATH PENALTY, available at <http://www.abanet.org/crimjust/juvjus/nationalorgs.pdf> (last visited Mar. 4, 2004). See also Power, *supra* note 64, at 106-07 (listing the organizations that have taken a stand against the juvenile death penalty).

development have summarized the pertinent research underlying opposition to the juvenile death penalty.⁷⁴ Professors Scott and Steinberg outline the factors that mitigate adolescent responsibility:

[C]ognitive and psycho-social immaturity undermines youthful decision-making in ways that reduce culpability. Moreover, due to their immaturity, adolescents may be more vulnerable to coercive pressures than are adults. Finally because their criminal acts are influenced by normal developmental processes, typical adolescent law breakers are different from fully responsible adults whose crimes are assumed to be the product of bad moral character.⁷⁵

First, adolescents are cognitively and socially immature when compared to adults. Although certain comprehension and reasoning processes are fairly close to the level of adults, teens are not as experienced or skilled in using these processes in actual decisionmaking.⁷⁶ Furthermore, since their psycho-social capacities are not fully developed, adolescents are more apt to make impulsive, immature, and risky decisions.⁷⁷ Teens are also highly responsive to peer influence.⁷⁸ Scott and Steinberg observe that these developmental factors all lessen the autonomous quality of adolescents' decisionmaking.⁷⁹ Finally, "[b]ecause adolescents lack legal and practical autonomy, they are in a real sense trapped in whatever social setting they occupy and are more restricted in their capacity to avoid coercive criminogenic influences than are adults."⁸⁰ Arguably, they may need additional protection to ensure fair

⁷⁴ See, e.g., Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 834-35 (2003) (concluding that, due to developmental factors, juveniles may have a lesser culpability); Elizabeth S. Scott et al., *Evaluating Adolescent Decision-Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 229-32 (1995) (outlining development and contextual differences between adolescent and adult decisionmaking); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decisionmaking*, 20 LAW & HUM. BEHAV. 249 (1996); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009 (2003) (drawing on developmental psychology to argue for lower criminal culpability for juveniles); see also Power, *supra* note 64, at 107-14 (summarizing physiological, social, and psychological research supporting lower culpability for juvenile defendants).

⁷⁵ Scott & Steinberg, *supra* note 74, at 829.

⁷⁶ *Id.* at 811 (arguing that adolescents are less blameworthy than adults because they have different judgment patterns).

⁷⁷ *Id.* (explaining why adolescents make "immature judgments").

⁷⁸ Scott and Steinberg write: "As the typical adolescent matures into adulthood, he becomes a more experienced and competent decision-maker; susceptibility to peer influence attenuates, risk perception improves, risk averseness increases, time perspective expands to focus more on long-term consequences, and self-management improves." *Id.* at 816.

⁷⁹ See *id.* (describing predictable developmental changes as adolescents mature).

⁸⁰ *Id.* at 818.

treatment in the courts.⁸¹ As this article will later demonstrate, the expert conclusions based on scientific findings about the capacities of juveniles are echoed in capital jurors' reactions to young capital defendants.

Experts identify incomplete brain development as the source of immature social behavior and lack of full impulse control in adolescents.⁸² Magnetic resonance imaging of adolescent and adult brains shows that the prefrontal cortex area continues to develop in late adolescence and early adulthood.⁸³ An amicus brief written by the American Society for Adolescent Psychiatry concludes:

We know that the prefrontal cortex is most important for "executive functioning" including planning, and using judgment, controlling impulsiveness, etc. Now we see that there is an objective basis for the common knowledge that teenagers tend to have a lot less of these qualities than adults, both in terms of the structure of the brain (which is manifestly more immature in the prefrontal [sic] area in adolescents than adults) and function of the brain.⁸⁴

Also, research has found that "at puberty, changes in the limbic system—a part of the brain that is central in the processing and regulation of emotion—may stimulate adolescents to seek higher levels of novelty and to take more

⁸¹ See Joseph W. Goodman, *Overturning Stanford v. Kentucky: Lee Boyd Malvo and the Execution of Juvenile Offenders*, 2003 L. REV. M.S.U.-D.C.L. 389, 399-400 (presenting reasons why the death penalty is not a proportional punishment for adolescent crimes). Goodman writes about the police interrogation of the juvenile Lee Boyd Malvo, who was held in connection with the Washington, D.C. sniper killings: "The need for extra constitutional protections for juveniles is demonstrated in the way that prosecutors purportedly took advantage of Malvo's youth, vulnerability, and inexperience to gain his confession." *Id.* at 409. The American Psychological Association makes a similar case for greater protection for juvenile offenders in its statement regarding the death penalty. See American Psychological Ass'n, *The Death Penalty in the United States*, at <http://www.apa.org/pi/deathpenalty.html> (last accessed May 10, 2004) (arguing that procedural problems are of special concern for juvenile defendants).

⁸² See Brief of Amicus Curiae American Society for Adolescent Psychiatry at 4-5, *Stanford v. Parker*, 537 U.S. 831 (2002) (No. 01-10008) [hereinafter ASAP Brief] (offering medical research on adolescent brains in support of abolishing the juvenile death penalty); Adam Ortiz, *Adolescent Brain Development and Legal Culpability*, A.B.A. JUVENILE JUSTICE CENTER (Spring 2003), available at http://www.abanet.org/crimjust/juvjus/factsheets_brain_development.pdf (last accessed May 10, 2004) (explaining that an underdeveloped frontal lobe causes gut reactions to govern behavior rather than sound reasoning in adolescents); Misia Landau, *Deciphering the Adolescent Brain*, FOCUS, Apr. 21, 2000, at http://www.med.harvard.edu/publications/Focus/2000/Apr21_2000/psychiatry.html (last accessed May 10, 2004) (summarizing magnetic resonance imaging ("MRI") research showing that developmental changes in adolescent brains can hinder rational thinking).

⁸³ See ASAP Brief, *supra* note 82, at 5 (presenting MRI research findings).

⁸⁴ *Id.* at 5 (explaining why adolescents and adults think differently).

risks; these changes may also contribute to increased emotionality and vulnerability to stress.”⁸⁵ These data about the biological, cognitive, and social immaturity of adolescents have led many professional organizations to conclude that the juvenile death penalty is inappropriate punishment.

C. *Public Opinion*

Social scientists have developed interviewing and measurement techniques for assessing community sentiments both in the form of straightforward public opinion polls and more sophisticated survey research approaches.⁸⁶ Well-done surveys have the potential to canvas a representative sample of the citizenry about their perceptions, attitudes, and values. Innovative features such as embedding factorial experiments into opinion surveys can provide scientifically-grounded conclusions about the effects of various factors on public attitudes and sentiment. Many believe that these techniques are the best way to assess the heart of community sentiments.⁸⁷

The typical poll provides only a cursory glimpse of public opinion, however. Due to time and budget constraints, most polls are relatively brief in duration, and are unable to probe underlying community values or sentiments. Question wording is a critical element; for example, variations in the way questions about the death penalty are posed can produce marked differences in the level of support for the death penalty. Often, however, opinion polls only ask a single question about support for the death penalty.⁸⁸ Professor Joel Best

⁸⁵ See L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REV. 417, 446 (2000) (concluding that brain changes contribute, at least in part, to characteristic adolescent behavior); see also Ronald Dahl, *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, 6 CNS SPECTRUMS 60 (2001).

⁸⁶ The values and limitations of public opinion polls have long been debated. See, e.g., GEORGE GALLUP & SAUL FORBES RAE, *THE PULSE OF DEMOCRACY: THE PUBLIC-OPINION POLL AND HOW IT WORKS* 313-90 (1940) (evaluating the strengths and weaknesses of public opinion polls); KENNETH F. WARREN, *IN DEFENSE OF PUBLIC OPINION POLLING* 309-17 (2001) (concluding that public opinion polls are valuable); MICHAEL WHEELER, *LIES, DAMN LIES, AND STATISTICS: THE MANIPULATION OF PUBLIC OPINION IN AMERICA* xiii-xviii (1976) (introducing the debate over public opinion polls); Seymour Martin Lipset, *The Wavering Polls*, PUB. INT., Spring 1976, at 70, 70-72 (discussing the positive and negative aspects of public opinion polls); Howard Schuman & Graham Kalton, *Survey Methods*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 635, 635-38 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985) (identifying the benefits and limitations of survey research).

⁸⁷ See, e.g., WARREN, *supra* note 86, at 133-60 (listing the factors that go into making a “good poll”).

⁸⁸ See Bowers, *supra* note 60; see also Bowers et al., *supra* note 63, at 79; Haney, *supra* note 60, at 320-21 (asserting that public opinion on the death penalty is too complicated for single question surveys); Melissa M. Moon et al., *Putting Kids to Death: Specifying Public Support for Juvenile Capital Punishment*, 17 JUST. Q. 663, 666 (2000) (discussing the inherent weakness of a “single-item, broadly worded question” on such a complex issue);

observes that “[p]ublic attitudes toward most social issues are too complex to be classified in simple pros and cons, or to be measured by a single survey question.”⁸⁹ Also, as with other methods that rely on self-reports, people tend to offer responses to survey questions that are socially desirable and that may not reflect their true sentiments.⁹⁰ They may not be knowledgeable about the issues and, if they were, their responses might be different.⁹¹ On sensitive matters of community conscience, such as the acceptability of capital punishment for juvenile offenders, it may be difficult to obtain sound responses using simple or traditional survey methods.⁹²

Several scholars have argued that the Supreme Court has misconstrued public opinion polls about the death penalty. Professor William Bowers argues that “the public’s expressed support for capital punishment is not a genuine but a spurious function of peoples’ desires for harsh but meaningful punishment for convicted murderers.”⁹³ When individuals are given alternatives to the death penalty that they deem appropriately severe, their support for the death penalty drops. For instance, a January 2003 ABC News/Washington Post poll indicated that sixty-four percent of Americans favor the death penalty for defendants convicted of murder when no other alternative is provided.⁹⁴ However, if respondents are provided with the option of life in prison, their support for capital punishment decreases: forty-nine percent select the death

Marla Sandys & Edmund F. McGarrell, *Attitudes Toward Capital Punishment Among Indiana Legislators: Diminished Support in Light of Alternative Sentencing Options*, 11 JUST. Q. 651, 655 (1994) (recognizing the narrow focus of previous death penalty surveys).

⁸⁹ JOEL BEST, DAMNED LIES AND STATISTICS: UNTANGLING NUMBERS FROM THE MEDIA, POLITICIANS, AND ACTIVISTS 45-46 (2001) (emphasis omitted).

⁹⁰ See Neil Vidmar & Phoebe Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1263, 1266 (1974) (reporting that people sometimes answer death penalty questions based on politicians’ influence or in ways they do not actually want to see carried out).

⁹¹ Supreme Court Justice Thurgood Marshall made this point in criticizing reliance on public opinion about the death penalty. See *Furman v. Georgia*, 408 U.S. 238, 361-62 (1972) (Marshall, J., concurring) (explaining that the test for cruel and unusual punishment depends not on general opinions, but on opinions of an informed public); see also Vidmar & Ellsworth, *supra* note 90, at 1262-66 (concluding that lack of knowledge affects the accuracy of public opinion polls on the death penalty). But see Austin Sarat & Neil Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171, 179-80 (qualifying Justice Marshall’s argument by adding that citizens who follow a retribution rationale would not change their answers even with more information).

⁹² See Haney, *supra* note 60, at 320-21 (advocating a more advanced survey method for death penalty research).

⁹³ Bowers, *supra* note 60, at 159.

⁹⁴ ABC News/Wash. Post, *Majority Opposes Clearing Death Row*, Jan. 20, 2003, available at <http://abcnews.go.com/images/pdf/909a5DeathPenalty.pdf> (last accessed May 10, 2004) (reporting poll results).

penalty while forty-five percent prefer life in prison.⁹⁵ This is only the most recent demonstration of a well-documented phenomenon.⁹⁶

Public opinion polls also routinely show that greater proportions of the public endorse the death penalty for adults than for juveniles.⁹⁷ In fact, very recent polls indicate that only a minority of today's population supports the death penalty for juveniles. For example, a 2002 Gallup poll found that just twenty-six percent of Americans favored capital punishment for juveniles, while sixty-nine percent opposed it and five percent were unsure.⁹⁸ In a 2003 poll of Oklahoma residents released just prior to the execution of a juvenile offender, sixty-three percent supported banning the death penalty for juvenile offenders if the alternative sentencing option of life without parole was a possibility.⁹⁹ Close to half of the Oklahoma respondents agreed that children under the age of eighteen should be treated differently than adults who commit the same crimes.¹⁰⁰ An Indiana survey found that residents of that state also were more reluctant to sentence a juvenile to death.¹⁰¹ In the Indiana study,

⁹⁵ See *id.* (providing poll results); Death Penalty Information Center, *Summaries of Recent Poll Findings*, at <http://deathpenaltyinfo.org/articl.php?scid=23&did=210> (last accessed Mar. 8, 2004) [hereinafter Death Penalty Information Center, *Recent Polls*] (summarizing the recent ABC News/Washington Post death penalty polls).

⁹⁶ See Bowers, *supra* note 60, at 162-65 (arguing that people abandon their support for the death penalty when presented with alternative harsh punishments); Haney, *supra* note 60, at 321 (reporting that half of survey respondents who were "strongly" in favor of the death penalty later chose life in prison without parole as a better alternative); McGarrell & Sandys, *supra* note 88, at 302 (summarizing studies reporting a decline in death penalty preference in favor of harsh alternatives such as a life sentence with no possibility of parole); Moon et. al, *supra* note 88, at 666-67 (summarizing polls concluding that death penalty support declines with the presence of alternative harsh sentences); David Niven, *Bolstering an Illusory Majority: The Effects of the Media's Portrayal of Death Penalty Support*, 83 SOC. SCI. Q. 671, 671-73 (2002) (explaining that only a minority of Americans prefer the death penalty over alternative sentences).

⁹⁷ See, e.g., Death Penalty Information Center, *Recent Polls*, *supra* note 95 (reporting that there is less public support for juvenile capital punishment than for capital punishment in general).

⁹⁸ See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 146 tbl.2.51 (2002), available at <http://www.albany.edu/sourcebook/1995/pdf/t251.pdf> (last accessed May 10, 2004) (displaying the results of telephone surveys on the death penalty).

⁹⁹ See Death Penalty Information Center, *Recent Developments in the Juvenile Death Penalty*, at <http://www.deathpenaltyinfo.org/article.php?scid=27&did=206#recentdevelop> (last accessed Mar. 3, 2004) (summarizing an April 2003 poll from *The Oklahoman*); Oklahoma Coalition to Abolish the Death Penalty, *OU Poll Results 2003*, at http://www.ocadp.org/education/OU_poll_results_2003.html (last accessed Mar. 3, 2004) (reporting that 62.8% of respondents would ban the juvenile death penalty in favor of life in prison without parole).

¹⁰⁰ *Id.* (reporting that 45.5% of respondents strongly agreed or somewhat agreed with treating juveniles differently).

¹⁰¹ See Marla Sandys & Edmund F. McGarrell, *Attitudes Toward Capital Punishment:*

fifty-one percent agreed that “[t]he death penalty should not be imposed on a person who was younger than 18 at the time of the crime,” while forty-one percent disagreed.¹⁰²

Even when polls show majorities who support the juvenile death penalty, as some polls in the 1980s and 1990s did, endorsement of capital punishment for adults still runs higher.¹⁰³ For instance, in a 1999 Tennessee mail survey, fifty-four percent of the respondents favored the death penalty for juveniles, while eighty-one percent of the sample endorsed the death penalty for adults.¹⁰⁴ A majority also felt that the juvenile death penalty should be used either “not at all” or “in only a few cases.”¹⁰⁵ As in the Oklahoma study, almost two-thirds of the Tennessee residents expressed a preference for sentencing juvenile murderers to a life sentence with no possibility of parole.¹⁰⁶

D. *Juries*

Jurors are the people who exercise the community conscience in practice, who express the public’s sentiments by their actions.¹⁰⁷ Justice Stevens wrote that the death penalty “is ultimately . . . an expression of the community’s outrage—its sense that an individual has lost his moral entitlement to live.”¹⁰⁸ He noted “the critical contribution only [the jury] can make toward linking the administration of capital punishment to community values.”¹⁰⁹ Accordingly, learning how juries arrive at their sentencing decisions may yield unique insight into the community’s conscience on a particular punishment.

Jury researchers have typically used mock jury experiments to analyze jury decisionmaking processes.¹¹⁰ Participants in these jury simulation studies

Preferences for the Penalty or Mere Acceptance?, 32 J. RES. CRIME & DELINQ. 191, 197, 203 (1995) (reporting that 51% of respondents disfavored the death penalty for juveniles even though 76% favored the death penalty for adults).

¹⁰² *Id.* at 198 tbl.1 (displaying survey results).

¹⁰³ See Francis T. Cullen et al., *Public Opinion about Punishment and Corrections*, 27 CRIME & JUST. 1, 23 (2000) (stating that Americans are less supportive of the death penalty for juveniles than for adults, even though a majority may support the death penalty in both categories).

¹⁰⁴ See Moon et al., *supra* note 88, at 674 tbl.2 (listing mail survey results); see also Cullen et al., *supra* note 103, at 23-24 (summarizing the Tennessee survey results).

¹⁰⁵ See Moon et al., *supra* note 88, at 674 (reporting that 62.6% of all respondents chose “not at all” or “in only a few cases” in the context of the juvenile death penalty).

¹⁰⁶ See *id.* at 677 (reporting that approximately 64% of respondents favored life in prison without parole over the death penalty for juveniles).

¹⁰⁷ *Spaziano v. Florida*, 468 U.S. 447, 469-70 (1983) (Stevens, J., concurring in part and dissenting in part) (arguing that the death penalty is a decision for a juror and not a judge because the penalty reflects a community’s moral outrage).

¹⁰⁸ *Id.* at 469.

¹⁰⁹ *Id.* at 490.

¹¹⁰ See generally Valerie P. Hans & Neil Vidmar, *Jurors and Juries*, in BLACKWELL COMPANION TO LAW AND SOCIETY (Austin Sarat ed., 2004).

assume the role of jurors, hear evidence in a case, and reach a decision.¹¹¹ A particular variable, such as the offender's age, is randomly assigned so that some mock juries hear a case with a juvenile defendant while others hear the same evidence against an adult defendant. The impact of the offender's age is assessed by comparing the judgments of the two sets of mock juries. This method allows the researcher to draw strong inferences about the causal impact of the selected variable.

Norman Finkel and his associates have undertaken experimental studies using the mock juror approach specifically to assess how an offender's age affects decisions about the appropriateness of capital punishment.¹¹² In two such studies, Finkel and his collaborators presented different case summaries to participants, experimentally varying the putative age of the offender.¹¹³ In the first experiment, they used three cases respectively mirroring the crimes in *Thompson*,¹¹⁴ *Stanford*,¹¹⁵ and a third juvenile death penalty case, *Wilkins*.¹¹⁶ These cases varied substantially in the heinousness of the crimes. The

¹¹¹ For illustrations of the mock jury approach to capital jury decisionmaking, see B.M. Butler & Gary Moran, *The Role of Death Qualification in Venirepersons: Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 LAW & HUM. BEHAV. 175, 177-80 (2002); Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors: Predisposition to Convict and on the Quality of Deliberation*, 8 LAW. & HUM. BEHAV. 53, 56-67 (1984); Craig Haney & Mona Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments*, 21 LAW & HUM. BEHAV. 575, 577-79, 583-84 (1997); William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95, 100-03, 106 (1984).

¹¹² See Norman J. Finkel et al., *Killing Kids: The Juvenile Death Penalty and Community Sentiment*, 12 BEHAV. SCI. & L. 5, 9-17 (1994) [hereinafter Finkel et al., *Killing Kids*] (presenting two experiments testing the effects of defendants' age on mock jury verdicts); see also NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW 209-18 (1995) [hereinafter FINKEL, COMMONSENSE JUSTICE] (summarizing mock juror experiments).

¹¹³ See Finkel et al., *Killing Kids*, *supra* note 112, at 8-9 (providing a general overview of the experiments). The case summaries varied substantially in the heinousness of the crimes. See *id.* at 8 (hypothesizing that degree of heinousness might affect jury decisions on the death penalty). The researchers also questioned the study participants to determine which ones would be death qualified. See *id.* at 9-13. "Death qualification is the process of screening out jurors whose extreme attitudes for or against the death penalty legally disqualify them from service on a capital jury." Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1448 n.8 (1997).

¹¹⁴ See Finkel et al., *Killing Kids*, *supra* note 112, at 10 (reciting the facts of *Thompson v. Oklahoma*, 487 U.S. 815, 819 (1987)).

¹¹⁵ See *id.* (reciting the facts of *Stanford v. Kentucky*, 492 U.S. 361, 365 (1988)).

¹¹⁶ See *id.* (summarizing *Wilkins v. Missouri*, 492 U.S. 937 (1988)). *Wilkins* was a Missouri case originally appealed to the U.S. Supreme Court as a companion case to *Stanford v. Kentucky*. 492 U.S. at 366. Sixteen-year-old Wilkins took part in the brutal stabbing murder of a convenience store clerk.

investigators also questioned the study participants to determine which ones would be “death qualified.” They found that age at offense was a strong determinant of the sentence imposed; fifteen- and sixteen-year-olds were less likely than older defendants to be convicted and sentenced to death on the same evidence.¹¹⁷

In a second mock juror study, Finkel varied the defendant’s age and role in the crime in a case modeled on the heinous *Wilkins* crime.¹¹⁸ The specific ages used in the study were thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, and twenty-five.¹¹⁹ Again, the researchers found age-linked effects on the probability that respondents would convict and impose the death sentence:

In an extremely heinous case, where we expected the age effect to be most muted and where approximately 60 percent of subjects gave the death penalty to a twenty-five-year-old, approximately 25 percent gave it if the defendant was thirteen, fourteen, or fifteen, and approximately 35 percent gave it if the defendant was sixteen, seventeen, or eighteen.¹²⁰

Finkel and associates also found that the defendant’s youth was the reason experimental subjects most often gave for their decision to choose a life instead of a death sentence.¹²¹

¹¹⁷ See Finkel et al., *Killing Kids*, *supra* note 112, at 12, 15, 18-19 (concluding that, as age of defendant decreases, the chance of conviction and a death sentence also decreases); see also FINKEL, *COMMONSENSE JUSTICE*, *supra* note 112, at 209-11 (summarizing the effect of defendant’s age on mock jurors’ death penalty decisions).

¹¹⁸ The researchers described the defendant as either the principal murderer who allegedly stabbed the victim, an accessory who was said to have held the victim down while someone else stabbed her to death, or a get-away driver. See Finkel et al., *Killing Kids*, *supra* note 112, at 8 (summarizing the variables in the second experiment). Not surprisingly, the role that the defendant played in the killing had a significant effect on the frequency with which mock jurors convicted and sentenced the hypothetical defendant to death. See *id.* at 15-18. The principal and accessory were much more likely than the get-away driver to be convicted and sentenced to death. *Id.*

¹¹⁹ See *id.* at 8 (explaining the age variables in the second experiment).

¹²⁰ See FINKEL, *COMMONSENSE JUSTICE*, *supra* note 112, at 217 (reporting that a majority of death-qualified jurors refused to give the death penalty to juveniles even under the *Wilkins* facts). Finkel also argues that age is but one of many factors jurors take into account, some of which may either increase or decrease the significance of age. *Id.* at 219-20 (describing juror decisionmaking as a complex process involving many related factors). For example, Finkel reports that as the heinousness of the case increased, the effect of age became less pronounced. *Id.* at 210. Notably, the age effects were stronger for participants who were not death qualified; that is, a defendant’s age had more influence on the full sample, including those typically excluded from capital jury service, than it did on the participants who were death qualified. See *id.* at 210-13 (proposing that a true understanding of community standards might call for examining both death-qualified and excludable participants).

¹²¹ *Id.* at 216 (concluding that the age of defendant is the “primary factor in life decisions”); see also Finkel et al., *Killing Kids*, *supra* note 112, at 16-17 (examining the data

E. A Premium on Actual Jurors in Real Cases

The U.S. Supreme Court has complained that opinion surveys and mock jury studies, which depend on abstract questions and artificial situations, lack credibility because they do not involve persons who served on real juries and actually made the life or death sentencing decision. Thus, in *Lockhart v. McCree*,¹²² the Court rejected a Sixth Amendment challenge to the death penalty based on opinion survey and jury simulation research that purported to show that death-qualified juries were conviction prone.¹²³ Justice Rehnquist, writing for the majority, objected that these studies were not done with real jurors; instead, they included people “who were not actual jurors sworn under oath to apply the law to the facts of an actual case involving the fate of an actual capital defendant.”¹²⁴ He argued that the findings of such research were seriously flawed and could not be generalized to real juries.¹²⁵ Social scientists have taken issue, however, with the majority’s reasoning in evaluating the studies and their relevance to actual jury decisionmaking.¹²⁶

A year later in *McCleskey v. Kemp*,¹²⁷ the Supreme Court returned to the need to understand real jurors in real cases. In *McCleskey*, the Court rejected the use of a statistical analysis of sentencing outcomes (the “Baldus study”) as the basis of Equal Protection Clause and Eighth Amendment challenges to the death penalty.¹²⁸ The Baldus study examined the frequency or likelihood of a death sentence under various conditions and in particular types of cases,¹²⁹ but it did not look at the jury sentencing process or the way in which individual jurors made their life or death decisions.¹³⁰ The majority in *McCleskey*

on juror reasons for choosing life).

¹²² 476 U.S. 162 (1985).

¹²³ *Id.* at 171 (questioning whether studies that do not use real jurors can accurately predict actual juror behavior).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See, e.g., Phoebe C. Ellsworth, *Unpleasant Facts: The Supreme Court’s Response to Empirical Research on Capital Punishment*, in CHALLENGING CAPITAL PUNISHMENT LEGAL AND SOCIAL SCIENCE APPROACHES 177-211 (Kenneth C. Haas & James A. Inciardi eds., 1988). Ellsworth quotes lower court judges who, faced with the research findings on the impact of death qualification, recognized that hypotheses would have to be tested indirectly. See *id.* at 203. For example, Judge Lay wrote, “[I]t is the courts who have often stood in the way of surveys involving real jurors and we should not now reject a study because of this deficiency.” *Id.* (quoting *Grigsby v. Mabry*, 758 F.2d 226, 237 (8th Cir. 1985)).

¹²⁷ 481 U.S. 279 (1986).

¹²⁸ *Id.* at 313 (concluding that the Baldus study showed neither purposeful discrimination nor a disproportionate penalty).

¹²⁹ The Court followed the same methodology in rejecting the death penalty in the case of rape, see *Coker v. Georgia*, 433 U.S. 584, 597 (1977), and in the case of murder where the defendant did not kill, intend to kill, or foresee killing the victim, see *Emmund v. Florida*, 458 U.S. 782, 797 (1982).

¹³⁰ *McCleskey*, 481 U.S. at 286-87 (describing the research design and variables used in

affirmed its belief in the integrity of jurors' capital sentencing decisions absent evidence to the contrary on the decisionmaking of juries and individual jurors.¹³¹

In the context of the juvenile death penalty a year later in *Thompson*,¹³² Justice O'Connor argued similarly that simple sentencing outcome or verdict data do not adequately demonstrate how the youthfulness of the defendant at the time of the crime figured into the thinking of jurors and the decisionmaking of the jury. She stated that it does not "allow [the Court] reliably to infer that juries are or would be significantly more reluctant to impose the death penalty on 15-year-olds than on similarly situated older defendants."¹³³

The implication of these statements is that researchers would need to interview actual jurors who served on capital cases with juvenile defendants, inquiring systematically about the decisionmaking process, and in particular, about how the youthfulness of the defendant figured into their decisionmaking. To be sure, although it may be unrivaled in its potential for revealing how jurors think about the juvenile death penalty, an examination of the decisionmaking of real jurors in real juvenile death penalty cases can be expected to give a conservative picture of community sentiments; that is to underrepresent the true level of community opposition to the juvenile death penalty. For one thing, capital jurors are death qualified, a procedure that produces a slice of the community that is more punitive and death-prone than the community at large.¹³⁴ Death penalty support is associated with conviction-proneness and a crime-control orientation, which shape evidence perceptions, verdict preferences, and evaluation of aggravating and mitigating circumstances.¹³⁵ Indeed, Finkel's research found that experimentally death qualified subjects were especially likely to choose the death penalty in juvenile

the Baldus study).

¹³¹ See *id.* at 311 (quoting HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 498 (1966)).

¹³² *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

¹³³ *Id.* at 853 (O'Connor, J., concurring).

¹³⁴ See Haney, *supra* note 113, at 1448-49 (explaining that death qualification excludes jurors on either extreme of the death penalty debate from service on a capital jury). Even though both extreme opponents and supporters are excluded, as required by *Morgan v. Illinois*, 504 U.S. 719 (1992), and *Wainwright v. Witt*, 469 U.S. 412 (1985), death qualified individuals as a group are more punitive than excludables. Craig Haney et al., "Modern" *Death Qualification: New Data on Its Biasing Effects*, 18 *LAW & HUM. BEHAV.* 619, 629 tbl.3 (1994) (showing significant differences in attitudes of excludable and death qualified persons, using the *Witt* and *Morgan* standards to distinguish the groups).

¹³⁵ Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process and Crime Control: Death Qualification and Jury Attitudes*, 8 *LAW & HUM. BEHAV.* 31 (1984) (death-qualified survey respondents more likely to possess attitudes favoring crime control as opposed to due process); Butler & Moran, *supra* note 111 (concluding that death-qualified jurors are more prone to giving the death penalty because they are more likely to endorse aggravating factors, as opposed to mitigating circumstances).

cases.¹³⁶ Additionally, Haney argues that psychological mechanisms of moral disengagement are built into the jury's capital sentencing experience, distancing capital jurors from the moral implications of their sentencing decisions.¹³⁷ Thus, the decisions of death qualified juries in capital cases generally, and perhaps even more so in such cases with juvenile defendants, are more likely to be slanted toward conviction and the delivery of death sentences than a jury truly representative of the community.

The selection of cases to be tried provides yet another reason that real jurors in real juvenile death penalty cases might provide a conservative picture of the community conscience on the juvenile death penalty. To the extent that prosecutors sense that community sentiments include misgivings about the juvenile death penalty, they might be expected to bring only the most egregious juvenile cases to a capital jury trial.

F. *The Convergence Challenge*

Clearly, there is no single, foolproof way of gauging the community conscience about the juvenile death penalty. Each of the barometers of community conscience we have reviewed has advantages and limitations. The truth about the juvenile death penalty's comportment with community conscience is best discovered in the convergence of the various indicators. Least tapped of these indicators is the thinking and decisionmaking of real jurors in real cases. Not surprisingly, the Supreme Court itself has identified jurors as distinctly relevant because they have had the experience of bringing the community conscience directly to bear in the capital sentencing decision.¹³⁸ For a thoroughgoing and balanced assessment of community sentiments concerning the juvenile death penalty, then, there is a premium on research that can reveal how actual jurors in real juvenile capital cases make decisions regarding the defendant's punishment.

Ironically, the evidence jurors can provide is untapped by, if not inaccessible to, the courts. The jury's sanctity is a tenet of our justice process that can be breached only under extreme circumstances. This leaves a critical blind spot in the eyes of courts responsible for monitoring compliance with the law. In particular, courts cannot monitor compliance of capital juries with the myriad Supreme Court rulings about how the capital sentencing decision is to be made. The paradox is that, while capital jurors are explicitly acknowledged in *Lockhart* (and by implication in *McCleskey* and *Thompson*) as an unrivaled resource on critical constitutional questions, their contribution is unavailable through institutional channels.

Independent researchers can, however, investigate what jurors in juvenile capital cases think about the defendants, their crimes, and death as punishment,

¹³⁶ See *supra* notes 112-121 and accompanying text.

¹³⁷ See Haney, *supra* note 113.

¹³⁸ See *McCleskey v. Kemp*, 481 U.S. 279, 311 (1986) (discussing the important role jurors play in capital sentencing decisions).

and how their thinking differs from jurors who have served on cases with adult defendants. Mindful that such an investigation is apt to give a conservative picture of the broader community conscience that tends to underestimate community opposition to the juvenile death penalty, this is precisely what we do in the remainder of the article.

II. THE CAPITAL JURY PROJECT

To determine how community standards come to bear in the capital sentencing of juvenile defendants, we turn to the thinking and experiences of those who have actually served as jurors in such cases and have been called upon to make the momentous capital sentencing decision. We draw upon empirical data from the Capital Jury Project (“CJP”),¹³⁹ a national program of research on the decision-making of capital jurors conducted by a consortium of university-based researchers with the support of the National Science Foundation.¹⁴⁰ The findings of the CJP are based on in-depth interviews with persons who have actually served as jurors in capital trials. The interviews chronicle the jurors’ experiences and decision-making over the course of the trial, identify points at which various influences come into play, and reveal the ways in which jurors reach their final sentencing decisions.¹⁴¹

The CJP interviews with capital jurors have been conducted in fourteen

¹³⁹ For further details of the sampling design and data collection procedures, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 *IND. L.J.* 1043, 1080 nn.198-204 (1995). The juror interviews obtained data on a core set of some 700 variables through structured questions used in all states. *See id.* at 1082 n.206 (further information on the interview questions and methods used).

¹⁴⁰ The CJP was undertaken by university-based investigators specializing in the analysis of data collected in their respective states and collaborating to address the following objectives of the Project: (1) to examine and systematically describe jurors’ exercise of capital sentencing discretion; (2) to identify the sources and assess the extent of arbitrariness in jurors’ exercise of capital discretion; and (3) to assess the efficacy of the principal forms of capital statutes in controlling arbitrariness in capital sentencing.

¹⁴¹ The research is based on a common core of data collected in the participating states. The investigators cooperatively developed a core juror interview instrument and enhanced the usefulness of this instrument in their respective states by adding to the information gathered in the core interviews, conducting additional interviews in selected cases of special interest, and incorporating additional case-specific data from other sources. The juror interviews obtained data on some 700 variables through structured questions used in all states, and also included open-ended questions that called for detailed narrative accounts of the respondents’ experiences as capital jurors. Advanced law and social science students working under the supervision of the various faculty investigators carried out much of the interviewing and other data collection in the respective states. All jurors selected for interviews were guaranteed confidentiality. The preparation of the interview data for state-level and project-wide statistical analyses was carried out at the College of Criminal Justice, Northeastern University under the direction of William J. Bowers, Principal Investigator of the CJP. *See Bowers, supra* note 139, at 1082 n.206 (providing further information on the interview questions and methods used).

states. The states were chosen to reflect the principal variations in guided discretion capital statutes.¹⁴² Within each state, twenty to thirty capital trials were picked to represent both life and death sentencing outcomes.¹⁴³ From each trial, a target sample of four jurors was systematically selected for in-depth individual interviews.¹⁴⁴ Interviewing began in the summer of 1991. The present CJP working sample includes 1198 jurors from 353 capital trials in 14 states.¹⁴⁵ These 14 states are responsible for 76% of the 3503 persons on death row as of January 1, 2004 and for 78% of the 909 persons who were executed between 1977 and April 26, 2004.¹⁴⁶ Since 1993, more than thirty articles presenting and discussing the findings of the CJP have been published in scholarly journals.¹⁴⁷

¹⁴² The sample was designed to include (1) states with “threshold,” “balancing,” and “directed” statutory guidelines for the exercise of sentencing discretion, (2) states with “traditional” and “narrowing” statutory definitions of capital murder, and (3) states that make the jury sentencing decision binding and those that permit the judge to override the jury’s decision. *See id.* at 1077-79 (supplying further details about sampling states).

¹⁴³ The sample of trials was restricted to those in which the defendant was charged with a murder punishable by death, convicted of that murder in the guilt phase of the trial, and sentenced to life or death by a jury in the sentencing phase of the trial. The sampling plan for each state called for an equal representation of trials that ended in life and death sentencing decisions to maximize the potential for comparing and contrasting jurors in “life” and “death” cases within each state. Hence, trials were not sampled to be strictly representative within states or within the nation as a whole, but to facilitate analytic comparisons. *See id.* at 1079, 1080 nn.200-03 (providing details about sampling trials within states).

¹⁴⁴ Investigators had discretion to conduct additional interviews in cases where the initial interviews raised questions that further interviews might help to resolve. In two states (Kentucky and Virginia), samples of more than four jurors were drawn from cases where the minimum sample of trials with life or death outcomes could not be met within the initial time frame for data collection. The target sample of four jurors per case was not always met due to difficulties in applying the sampling and replacement protocol, locating jurors whose addresses and phone numbers had changed or were not initially correct or sufficiently detailed, and the unwillingness of some jurors to be interviewed despite the twenty-dollar incentive payment. Of the 353 trials in the sample, 39 trials are represented by a single juror, 45 by two, 71 by three, 152 by four, 31 by five, 13 by six, and 1 each by seven and eight jurors.

¹⁴⁵ The number of jurors interviewed and the number of trials from which they were drawn in each state are as follows: Alabama, 59 jurors, 20 trials; California, 152 jurors, 36 trials; Florida, 117 jurors, 30 trials; Georgia, 77 jurors, 25 trials; Indiana, 102 jurors, 32 trials; Kentucky, 113 jurors, 31 trials; Louisiana, 30 jurors, 10 trials; Missouri, 61 jurors, 19 trials; North Carolina, 83 jurors, 26 trials; Pennsylvania, 74 jurors, 28 trials; South Carolina, 114 jurors, 31 trials; Tennessee, 49 jurors, 15 trials; Texas, 120 jurors, 38 trials; and Virginia, 47 jurors, 12 trials.

¹⁴⁶ *See* NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., DEATH ROW, U.S.A., at <http://www.deathpenaltyinfo.org/DRUSA20040101-03.pdf> (last accessed May 3, 2004).

¹⁴⁷ *See The Capital Jury Project*, at <http://www.cjp.neu.edu> (last accessed May 10, 2004).

III. THE EVIDENCE FROM JURORS' RESPONSES TO STRUCTURED QUESTIONS

A. *The Juvenile Cases*

The defendant was a juvenile, less than 18 years of age at the time of the offense, in 12 of the 353 capital trials in which the CJP interviewed jurors. This represents 2.9% of all cases in the sample; 48 of the 1198 juror interviews were conducted in these 12 cases. Quite obviously, the death penalty is seldom sought in cases where the defendant is a minor. And, as the evidence will show, the capital jury rarely chooses the death penalty in such cases.¹⁴⁸

To identify juvenile cases, we first relied upon jurors' responses to two questions in the interviews and then sought to confirm the juvenile status of the defendant with information from official records in the states where these crimes occurred. Early in the interview, jurors were asked to provide details about the crime and selected demographic characteristics of the defendant and victim, including race, gender, marital status, and most critically, age. The question did not refer specifically to the defendant's age at the time of the offense, but this reference was implied by the context of the question, preceded as it was by the details of the crime. Much later in the interview, when the questioning turned to the juror's punishment decision, one question asked about "factors that might be true or present in a murder case." One of the factors referred to the defendant's age at the time of the offense; it read, "The defendant was under 18 at the time of the crime." This question invites affirmative responses from jurors who believed that the defendant was a minor at the time of the offense but might have been unsure about his exact age in years.¹⁴⁹

The responses of the several jurors sampled from each case to these two questions identified twelve cases in which the defendant's crime was committed when he was under eighteen years of age. In ten of these cases, this determination was confirmed by reference to official records and in two cases

(providing an updated listing of CJP-related articles, commentaries, and doctoral dissertations).

¹⁴⁸ Nationally, juvenile offenders comprise only 2% of death row inmates and 2.4% of those who have been executed in the contemporary period. See STREIB, *supra* note 13, at 4, 11.

¹⁴⁹ Forty-one jurors reported that the defendant was under eighteen years of age in response to both questions. Six jurors reported that the defendant was seventeen or less but did not say that being under eighteen at the time of the crime was a factor in the case. They appear to be indicating that, even though they believed the defendant was under eighteen, this was not a subject of discussion or deliberations on punishment. Sixteen jurors said that being under eighteen at the time of the crime was a factor but did not report that the defendant was seventeen or less. Some of these jurors may not have known the defendant's exact chronological age and were reluctant to hazard a guess, and others may have been reporting that the defendant's juvenile status became a factor in jury deliberations though they themselves did not believe the defendant was less than eighteen at the time of the crime.

through press reports.¹⁵⁰ For the twelve cases we have identified as having a juvenile defendant, Table 1 shows the responses of the several jurors from each case to the two questions about the defendant's age. The cases in this table are ordered by the mean age estimates of the jurors in the respective cases, beginning with the lowest estimates.

As Table 1 shows, the jurors largely agreed on the defendant's juvenile status and chronological age in these cases; there are only minor variations in their estimates. In the first four cases (numbers 1-4), which represent the youngest defendants, all jurors said that the defendant was under eighteen at the time of the crime. All estimates in each case are no more than a year apart. The mean estimates in these four cases do not exceed 16.5 years of age.

In the next four cases (numbers 5-8), all jurors in each case again said that the defendant was under eighteen at the time of the crime. Most but not all of the jurors in these four cases gave age estimates of seventeen years or less; in two cases, one of the jurors estimated that the defendant was eighteen.¹⁵¹ The mean estimates in these four cases do not exceed 17.0 years of age.

In the last four cases (numbers 9-12) there was less agreement on the juvenile status of the defendant. In three of these cases, at least one juror said that the defendant was under eighteen at the time of the crime.¹⁵² Moreover, in each of these cases one or more jurors listed the defendant's age as at least eighteen. Notably, the highest age estimates of nineteen and twenty-three years occur in the *Wright* and *Blount* cases (numbers 11 and 12), respectively, the two cases in which the jury imposed death sentences.

¹⁵⁰ *Knotts v. State*, 686 So. 2d 431, 441 n.1 (Ala. Crim. App. 1995) (defendant was seventeen-years-old); *Flowers v. State*, 586 So. 2d 978, 979 (Ala. Crim. App. 1991) (fifteen-years-old); *Simmons v. State*, 522 S.E.2d 451, 453 (Ga. 1999) (sixteen-years-old); *Patton v. State*, 588 N.E.2d 494, 495 (Ind. 1992) (seventeen-years-old); *Houchin v. State*, 581 N.E.2d 1228, 1229 (Ind. 1991) (sixteen-years-old); *Commonwealth v. Blount*, 647 A.2d 199, 202 n.6 (Pa. 1994) (seventeen-years-old); *Proctor v. State*, 871 S.W.2d 225, 234 (Tex. Ct. App. 1993) (sixteen-years-old); *Villegas v. State*, 791 S.W.2d 226, 235 (Tex. Ct. App. 1990) (seventeen-years-old); *Wright v. Commonwealth*, 427 S.E.2d 379, 383 (Va. 1993) (seventeen-years-old); *Rea v. Commonwealth*, 421 S.E.2d 464, 466 (Va. Ct. App. 1992) (stating only that defendant was a juvenile); Bill Dedman, *School Shooters: Secret Service Findings*, CHI. SUN-TIMES, Oct. 12, 2000, at 14 (reporting that defendant Scott Pennington was of school age); see also John Voskuhl, *Scott Pennington: A New Kid, A Loner*, COURIER J., Jan. 20, 1993 (reporting that defendant Scott Pennington was seventeen-years-old); *Court to Decide 17-year-old's Status*, COURIER J., Jan. 24, 1989 (reporting that defendant Kenneth Robinson was seventeen-years-old).

¹⁵¹ These might be instances in which jurors estimated the defendant's age at the time of the trial rather than at the time of the offense.

¹⁵² In the *Proctor* case (#9), there is virtually no correspondence between responses to the "age estimate" question and the "under 18 was a factor" question. It would appear that the jurors had little indication of the defendant's age and that its relevance to them was insufficient to produce consistent responses to the two age questions.

Table 1: Twelve Juvenile Capital Cases with Jurors' Responses to Two Questions about the Defendant's Age

1. DEFENDANT: Flowers		STATE: Alabama				
JURY SENTENCE: Life		AGE ¹⁵³ : Official Record 15				
Juror	1	2	3	4	5	
Under 18 at crime:	yes	yes	yes	yes	yes	PCT = 100%
Reported age:	16	15	16	15	15	MEAN = 15.4
2. DEFENDANT: Rea		STATE: Virginia				
JURY SENTENCE: Life		AGE: Official Record (unavailable)				
Juror	1	2	3			
Under 18 at crime:	yes	yes	yes			PCT = 100%
Reported age:	16	15	16			MEAN = 15.7
3. DEFENDANT: Houchin		STATE: Indiana				
JURY SENTENCE: Life		AGE: Official Record 16				
Juror	1	2				
Under 18 at crime:	yes	yes				PCT = 100%
Reported age:	17	16				MEAN = 16.5
4. DEFENDANT: Knotts		STATE: Alabama				
JURY SENTENCE: Life		AGE: Official Record 17				
Juror	1	2	3	4		
Under 18 at crime:	yes	yes	yes	yes	PCT = 100%	
Reported age:	17	17	16	16	MEAN = 16.5	
5. DEFENDANT: Villegas		STATE Texas				
JURY SENTENCE: Life		AGE: Official Record 17				
Juror	1	2	3	4		
Under 18 at crime:	yes	yes	yes	yes	PCT = 100%	
Reported age:	16	17	16	18	MEAN = 16.8	
6. DEFENDANT: Pennington		STATE: Kentucky				
JURY SENTENCE: Life		AGE: Unofficial Record 17				
Juror	1	2	3	4	5	
Under 18 at crime:	yes	yes	yes	yes	yes	PCT = 100%
Reported age:	17	17	17	17	17	MEAN = 17.0
7. DEFENDANT: Patton		STATE: Indiana				
JURY SENTENCE: Life		AGE: Official Record 17				
Juror	1	2	3	4	5	

¹⁵³ "AGE" indicates age at offense as determined from official records. *See supra* note 150.

Under 18 at crime:	yes	yes	yes	yes	yes		PCT = 100%
Reported age:	17	17	17	17	— ¹⁵⁴		MEAN = 17.0
8. DEFENDANT: Simmons							
JURY SENTENCE: Life				STATE: Georgia			
Juror				AGE: Official Record 16			
	1	2	3	4			
Under 18 at crime:	yes	yes	yes	yes			PCT = 100%
Reported age:	17	16	18	17			MEAN = 17.0
9. DEFENDANT: Proctor							
JURY SENTENCE: Life				STATE: Texas			
Juror				AGE: Official Record 16			
	1	2	3				
Under 18 at crime:	no	yes	—				PCT = 33%
Reported age:	17	18	16				MEAN = 17.0
10. DEFENDANT: Robinson							
JURY SENTENCE: Life				STATE: Kentucky			
Juror				AGE: Unofficial Record 17			
	1	2	3				
Under 18 at crime:	yes	yes	yes				PCT = 100%
Reported age:	18	17	17				MEAN = 17.3
11. DEFENDANT: Wright							
JURY SENTENCE: Death				STATE: Virginia			
Juror				AGE: Official Record 17			
	1	2	3	4	5	6	
Under 18 at crime:	no	yes	no	yes	yes	yes	PCT = 67%
Reported age:	19	17	18	16	17	17	MEAN = 17.3
12. DEFENDANT: Blount							
JURY SENTENCE: Death				STATE: Pennsylvania			
Juror				AGE: Official Record 17			
	1	2	3	4	5		
Under 18 at crime:	no	yes	no	no	yes		PCT = 40%
Reported age:	18	17	18	23	17		MEAN = 18.6

Observe that jurors imposed the death sentence in only two of these twelve cases; that is, 16.7% of these cases ended with a death sentence. If cases with juvenile and adult defendants were treated no differently by jurors, we would

¹⁵⁴ “—” indicates missing data (i.e., the juror did not know or gave no answer).

expect at least half of these defendants to receive death sentences since our sampling plan called for equal numbers of life and death cases in the participating states.¹⁵⁵ Quite obviously, the jurors in our sample were far less willing to impose a death sentence when the defendant was a juvenile. This is consistent with the national data indicating that juveniles account for only a tiny fraction of those who are on death row or have been executed.¹⁵⁶

Note further that the two death cases, *Wright* and *Blount*, possess the highest mean age estimates¹⁵⁷ and are the only cases where more than one juror did not say that the defendant was under 18 at the time of the crime. In other words, of these twelve cases, the two in which juries imposed death sentences are the ones in which jurors were least sure about the defendant's juvenile status. The obvious implication is that this uncertainty may have contributed to juries' decisions to impose death sentences in these cases.¹⁵⁸ It appears that jurors think differently about juvenile and adult defendants; they are far less likely to impose a death sentence upon a juvenile defendant, and this is especially so when none of the jurors are mistaken about the defendant's juvenile status.

The obvious question is what inhibits jurors' use of the death penalty in juvenile cases? Are the factual and other circumstances of the killings or trials different in identifiable ways? Do jurors think differently about them in ways that reflect community conscience and evolving standards of decency about the acceptability of death as punishment for juveniles? And if so, how strictly are such differences associated with chronological age? Is it possible, for example, that jurors perceive in eighteen-year-olds the same dependency and immaturity that many people assume is inherent among those of juvenile status?

To address these questions, we have undertaken a two-fold analysis. In the remainder of Part III, we draw upon jurors' responses to the structured questions in the CJP interviews to learn how the cases of juvenile defendants differ from those of adult defendants, both objectively and in the minds of jurors. In Part IV, we turn to jurors' narrative accounts of their decision-making in juvenile cases for confirmation, refinement, and elaboration of the perspective on jurors' thinking about juvenile defendants developed here in

¹⁵⁵ In fact, death sentences were imposed in 60.1% percent of the adult cases in our sample. The greater overall representation of death than of life cases in our sample reflects the fact that information on death cases including jury lists was more readily available on death than on life cases since death sentences are automatically appealed.

¹⁵⁶ See STREIB, *supra* note 13, at 11 (providing comparison of death sentences imposed on juveniles and adults).

¹⁵⁷ The *Wright* case (#11) actually shares second place in mean age estimate with the *Richards* case (#10); the two are tied at 17.3 years.

¹⁵⁸ It should be noted that race may have also played a role. The defendants were African Americans in four of the twelve juvenile cases, and both *Wright* and *Blount* were African Americans. The probability that both death sentences would be imposed on black defendants by chance is .091 according to Fisher's Exact Test in a sample of eight whites and four blacks in which two were sentenced to death.

Part III. In Part V, we return to the interview questions with structured response options to consider where the death eligible age line might best be drawn and how juvenile status compares with mental retardation as a bar to imposing the death penalty.

The twelve juvenile cases in the CJP sample are diversified by region; they come from seven different states (two each from Alabama, Indiana, Kentucky Texas, and Virginia and one each from Georgia and Pennsylvania). They are roughly comparable to death row in the percentage of African Americans (33% in the CJP sample and 41% on death row).¹⁵⁹ They were younger at offense than the juveniles on death row (33% in the CJP sample and 19% on death row),¹⁶⁰ suggesting that the younger the defendant, the less likely jurors were to impose a death sentence.

For purposes of statistical analysis, it would be advantageous to have a larger sample of jurors from juvenile cases and one in which jurors were drawn from a larger number of such cases because smaller differences between jurors in juvenile and adults cases would be statistically reliable indications of true differences between jurors in such cases. We will need to rely on more sizable differences to establish statistically reliable findings, and for our test of significance, we must take the sampling of more than one juror per trial into account.¹⁶¹

B. *Jurors' Impressions of the Crime*

Are the capital crimes for which juveniles are tried less serious or aggravated than those of adults? If so, this might account in some measure for the evidently greater reluctance of jurors to impose the death penalty in juvenile cases.¹⁶² To address this question, we examine differences between

¹⁵⁹ See STREIB, *supra* note 13, at 12.

¹⁶⁰ *Id.*

¹⁶¹ The tables in Part III present all statistically significant response differences between jurors in juvenile and adult cases to the CJP questions under consideration. The <.10, <.05, and <.01 levels of statistical significance are indicated for each comparison in Tables 2-7. Differences of $p < .10$ but not $p < .05$ are considered marginally significant. A fully significant difference at $p < .05$ would be expected to occur by chance in less than 5 out of 100 samples of comparable size. Since the sampling of jurors was clustered by trial, an alternative to the traditional Chi Square test of statistical independence is preferred. For this purpose we have employed the STATA 8.0 software package that allows us to calculate an F statistic with an adjustment for the clustering of jurors by trial. The p-value associated with this F statistic can be interpreted in the same way as the p-value for the Chi Square statistic. See STATA STATISTICAL SOFTWARE: RELEASE 8.0, COLLEGE STATION, TX: STATA CORPORATION, STATA SURVEY DATA: REFERENCE MANUAL RELEASE 8.0 at 73 (2003).

¹⁶² This reluctance can be seen in death row figures, *see supra* notes 13-15 and accompanying text, in the death sentencing rate of juvenile cases in the CJP sample, *see supra* Table 1 (observing that juries imposed the death penalty on juveniles in 16.7% of the sample juvenile cases and 60.1% of the sample adult cases), and in the association between defendant age estimates of jurors and the percent imposing death sentences, *see infra* Table

juvenile and adult cases through objective indicators of the nature and seriousness of the crime (Table 2) and through jurors' subjective perceptions or feelings about the crime (Table 3).¹⁶³

1. Objective Crime Characteristics

The CJP interviews asked jurors about the crime; in particular, about the number of persons killed and injured, the number of perpetrators, and the relationship between defendant and victim. The individual juror reports are proxies for these features of the cases. Table 2 shows jurors' responses in juvenile and adult cases.

The juvenile and adult cases do not differ significantly in three objective indicators of crime seriousness (as shown in Table 2, Panel A). The difference is less than five percentage points in the number of persons injured but not killed and in the number of persons responsible for the killing. The difference is larger (nine percentage points) but still not statistically significant in multiple victim killings; according to jurors' reports, more than one person was killed in 34.1% of juvenile and in 25.0% of adult cases.¹⁶⁴

Nor was the defendant-victim relationship significantly different in most respects (as shown in Table 2, Panel B). Although none of the juvenile-adult differences exceed ten percentage points, the victims of juvenile offenders were less often strangers (by 9.8 points) and more often family, friends, and neighbors (though by less than five points in each case).¹⁶⁵ Not surprisingly, the juvenile cases were less likely to involve lovers (2.4% compared to 12.4%). This is the only difference that reaches even marginal statistical significance in Table 2.

*Table 2: Percent of Jurors Reporting (A) Number of Victims and Perpetrators and (B) Defendant-Victim Relationships in Juvenile and Adult Cases*¹⁶⁶

8.

¹⁶³ The accompanying tables present all response differences between jurors in juvenile and adult cases that are significant beyond the .10 probability level ($p < .10$) for the CJP questions under consideration. *See supra* note 161. Because our purpose in Tables 2 and 3 is to evaluate and document the similarity of the crimes in juvenile and adult cases, we do not restrict the comparisons to variables that show statistically significant differences in these two tables. Instead, we present all variables on which comparisons were made between jurors in juvenile and adult cases, regardless of statistical significance. Though not shown in Tables 4-7, differences that may be of interpretive relevance but do not reach the .10 probability level will occasionally be mentioned in footnotes. For all comparisons in Tables 2-7 the variables are dichotomized at the point that maximizes the percentage difference between jurors in juvenile and adult cases. This standardizes the comparisons of variables and economizes in the presentation of the statistical data.

¹⁶⁴ *See supra* Table 2, Panel A.

¹⁶⁵ *See supra* Table 2, Panel B.

¹⁶⁶ Percentages are based on 41-47 jurors in juvenile cases and 1081-1146 jurors in adult

	Response Category	Juvenile Cases	Adult Cases	p ¹⁶⁷
Panel A: Numbers Killed, Injured, and Responsible for the Killing				
Respondents were asked for the number of persons . . .				
Killed	2 or more	34.1	25.0	
Injured but not killed	1 or more	20.9	21.2	
Responsible for crime	2 or more	26.2	30.5	
Panel B: Offender-Victim Relationships				
“Were the defendant(s) and victim(s) related in any of the following ways?”				
Lovers	Yes	2.4	12.4	*
Family Relations	Yes	14.0	10.0	
Neighbors	Yes	14.6	10.6	
Friends	Yes	26.8	22.9	
Acquaintances	Yes	39.0	41.7	
Strangers	Yes	29.3	39.1	

The overall similarity of juvenile and adult crimes in defendant-victim relationships, as well as the slightly greater incidence of multiple victim killings in juvenile cases, argues against the possibility that death sentences are imposed less frequently in juvenile cases because their crimes are different, at least in these respects.

2. Jurors' Characterizations of the Killing

In addition to the relatively objective information about defendant-victim numbers and relationships, jurors were asked for their own views of the killing. They were presented with some eleven words or phrases and asked: “In your mind, how well do the following words [or phrases] describe the killing?” They could answer “very well,” “fairly well,” “not so well,” or “not at all.” The responses of jurors in juvenile and adult cases appear in Table 3.

Again, the differences between jurors in juvenile and adult cases are not large; none reach fifteen percentage points, and only two qualify as different at the .10 level of statistical significance. In the juvenile cases, jurors were more likely (by at least ten percentage points) to say the crime was “bloody,” that it was “gory,” and that it made them “sick to think about it.” On the other hand, they were less likely to say it was “calculated,”¹⁶⁸ or that “the victim was made
Table 3: Percent of Jurors Giving Various Crime Characterizations in Juvenile

cases.

¹⁶⁷ Probability levels * $p < .10$, ** $p < .05$, *** $p < .01$, computed with adjustment for clustering of jurors by trial. *See supra* note 161.

¹⁶⁸ Strictly speaking, jurors in juvenile cases more often said that the killing was “not at all” calculated (by 13.2 percentage points); hence, they also said less often that it was calculated, at least to some extent.

and Adult Cases¹⁶⁹

“In your mind, how well do the following words describe the killing?”

	Response Category	Juvenile Cases	Adult Cases	p ¹⁷⁰
Calculated	Not at All	22.9	9.7	**
Bloody	Very Well	68.8	54.9	*
Gory	Very Well	60.4	48.2	
Made You Sick	Very Well	62.5	51.0	
Victim Made to Suffer	Very Well	34.0	42.9	
Depraved	Very Well	51.1	44.5	
Vicious	Very Well	72.9	72.3	
Cold Blooded	Very Well	76.6	79.0	
Senseless	Very Well	87.5	88.1	
Repulsive	Very Well	68.8	71.9	
Work of a Mad Man	Very Well	20.8	27.2	

to suffer.” There was virtually no difference (less than five points) in jurors’ responses to the descriptions “depraved,” “vicious,” “cold-blooded,” “senseless,” and “repulsive.”

The prevailing picture here is one of mostly minor offsetting differences. The jurors in juvenile cases appear to be a bit more horrified by visceral elements of the crime such as blood and gore, but they are less likely to see it as calculated or sadistic and no more or less likely to see the crime as a result of vile traits such as viciousness or depravation. Although the offsetting “calculated” and “bloody” differences are statistically or marginally significant, none of the differences between juvenile and adult cases reaches fifteen percentage points. In short, the jurors’ subjective views of the killing do not explain why defendants in juvenile cases are given the death penalty far less often than those in adult cases.

C. *Characterization of the Defendant*

Do jurors think differently about juvenile and adult defendants in ways that have implications for the acceptability of capital punishment? Early in the interview, jurors were asked for their perceptions of the defendant. The most extensive question began with a list of some twenty-three statements that jurors were asked to evaluate in terms of how well they describe the defendant. The

Table 4: Percent of Jurors Characterizing the Defendant in Terms of (A) Family Background, (B) Social Adjustment, and (C) Age Graded Factors in Juvenile

¹⁶⁹ Percentages are based on 47-48 jurors in juvenile cases and 1116-1142 jurors in all adult cases.

¹⁷⁰ Probability levels * p < .10, ** p < .05, *** p < .01, computed with adjustment for clustering of jurors by trial. See *supra* note 161.

and Adult Cases¹⁷¹

“In your mind, how well do the following words describe the defendant?”

	Response Category	Juvenile Cases	Adult Cases	p ¹⁷²
Panel A: Family Background Factors				
Raised in a Warm Loving Home	Not at All	72.7	34.5	***
From Poor or Deprived Background	Very Well	54.2	35.8	**
Has Gotten a Raw Deal in Life	Very/Fairly Well	43.7	25.7	**
Panel B: Social Adaptation Factors				
Doesn't Know Place in Society	Very Well	58.7	31.7	***
Lacks Basic Human Instincts	Very/Fairly Well	62.6	46.5	**
Panel C: Age Graded Factors				
Alcoholic	Not at All	70.7	36.8	***

jurors could answer “very well,” “fairly well,” “not too well,” or “not at all.” Although many of these statements are general and impressionistic characterizations, to the extent that they differentiate between juvenile and adult defendants, they may hold a key to what is distinctive in jurors’ thinking about the appropriate punishment for juvenile defendants. The six statements that distinguish significantly between juvenile and adult cases appear in Table 4. These statements have been grouped by substantive reference: family background factors (Panel A), social adjustment factors (Panel B), and age-graded factors (Panel C).

In contrast to the similarities in jurors’ characterizations of the crimes committed by juveniles and adults, there are marked differences in jurors’ characterizations of the juvenile and adult defendants. The two greatest differences appear to represent complementary ways in which juvenile defendants are at odds with the communities from which they come. One pertains to the defendant’s relationship with his family or family background and the other characterizes his role or orientation to others in society. Together, they cast a picture of the juvenile defendant at odds with both family and society.

1. Family Background

The statement “raised in a warm loving home” distinguishes between juvenile and adult defendants more than any of the other defendant characterizations.¹⁷³ Jurors in juvenile cases were far more likely than those in

¹⁷¹ Percentages are based on 39-48 jurors in juvenile cases and 954-1120 jurors in adult cases.

¹⁷² Probability levels * $p < .10$, ** $p < .05$, *** $p < .01$, computed with adjustment for clustering of jurors by trial. See *supra* note 161.

¹⁷³ See *supra* Table 4, Panel A.

adult cases to say it was “not at all” true that the defendant was raised in a “warm loving home.” The percentage difference reaches almost forty points (72.7% compared to 34.5%), more than a two-to-one ratio. This decisive absence of a warm loving home among juvenile defendants is accompanied by other apparently family-related differences such as being from “a poor or deprived background,” and having “gotten a raw deal in life.”¹⁷⁴ In these latter two respects, juvenile defendants are nearly twenty percentage points more disadvantaged than adult defendants in the minds of the jurors.¹⁷⁵ Together, these characterizations cast the juvenile defendant as someone relatively deprived of a family context that provides necessary socialization for emotional well being and social adjustment.

2. Social Adjustment

The difference in social adjustment is reflected foremost in the statement “doesn’t know his place in society.” Many more jurors in the juvenile cases say this characterizes the defendant “very well.” The difference between jurors’ characterization of juvenile and adult defendants here is 27.0 percentage points (58.7% compared to 31.7%), again, an almost two-to-one ratio.¹⁷⁶ Also more common in juvenile cases (by 16.1 points) is the perception that the defendant “lacks basic human instincts.”¹⁷⁷ This is a stark foreboding of social maladjustment and certainly one reason for a juror to believe the defendant “doesn’t know his place in society.”¹⁷⁸

3. Age-Graded Differences

One age-related factor—namely, “the defendant was an alcoholic”—distinguished substantially and significantly between juvenile and adult defendants.¹⁷⁹ Jurors in juvenile cases were much more likely to say that this alcohol-related characterization was “not at all” true of the defendants (by a difference of 33.8 points). Nor is it surprising that this age-graded attribution distinguishes juvenile and adult defendants. Becoming an alcoholic requires access to alcohol and time to become addicted; state laws bar the sale of

¹⁷⁴ *See id.*

¹⁷⁵ Though not statistically significant, there was also a difference of 17.7 percentage points in the characterization “seriously abused as a child” between jurors in juvenile and adult cases. Specifically, 27.9% in juvenile cases (as compared to 45.6% in adult cases) said the characterization “seriously abused as a child” was “not at all true.”

¹⁷⁶ *See supra* Table 4, Panel B.

¹⁷⁷ *See id.*

¹⁷⁸ There are two other characterizations that may reflect shortfalls in social adjustment, though the differences do not reach statistical significance. More jurors in juvenile than in adult cases say that the defendant “doesn’t know right from wrong” (41.3% compared to 28.7%) and say the defendant is “a good person who got off on the wrong foot” (50.0% compared to 36.0%).

¹⁷⁹ *See supra* Table 4, Panel C.

alcohol to minors, and the time it takes to have a confirmed alcohol addiction makes this relatively uncommon among juveniles.¹⁸⁰ Notably, this alcohol-related factor is arguably mitigating and may, therefore, work more to the advantage of adult than of juvenile defendants.

Apart from the differences shown in Table 4 and mentioned in footnotes, the characterizations of the defendants in juvenile cases did not differ appreciably from those in adult cases in many other respects. For example, they were separated by less than ten points in the percent of jurors who said that the defendant was a “loner without many friends,” “vicious like a mad animal,” “mentally defective or retarded,” “emotionally unstable or disturbed,” “a drug addict,” an “occasional drug abuser,” “dangerous to other people,” “went crazy when s/he committed the crime,” and “sorry for what s/he did.”

Our interpretations of the statements in Table 4 as indicators of jurors’ thinking about juvenile cases are necessarily speculative. The characterizations are brief and imprecise. They beg for elaboration and refinement. In the next tables and accompanying text, we attempt to clarify this picture by adding further details from jurors’ reports about the defendant’s family, his appearance in court at trial, and the punishment decisionmaking in these cases. We examine these issues still further in Part IV with the extensive narrative responses jurors provided to the open-ended questions during tape-recorded interviews.

D. *Jurors’ Feelings about the Defendant and His Family*

The questioning in the CJP interviews moved from jurors’ characterizations of the defendant to their more visceral feelings about the defendant and his family. This shift of focus was intended to discern how jurors’ perceptions and impressions of the defendant may have been anchored in their feelings or emotional reactions toward him and the members of his family. Jurors’ responses to questions about these feelings and reactions appear in Table 5. We first examine jurors’ feelings toward the defendant (in Panel A) and then toward his family (in Panel B).

One question asked, “Did you have any of the following thoughts or feelings about the defendant?” Jurors could respond “yes” or “no” to each of eight descriptions of thoughts or feelings toward the defendant. Only one of these descriptions, which expressed feelings of pity or sympathy for the defendant, distinguished between jurors in juvenile and adult cases. Two-thirds of the

Table 5: Percent of Jurors Expressing Various Feelings about (A) the Defendant

¹⁸⁰ Differences in two other characterizations, though not statistically significant, appear also to be age graded in character. That is, more jurors in juvenile than in adult cases said “not at all” to the characterization “the defendant was an occasional alcohol abuser” (43.6% compared to 24.2%), and to “the defendant had a history of violence and crime” (34.8% compared to 21.0%).

and (B) the Defendant's Family in Juvenile and Adult Cases¹⁸¹

	Response Category	Juvenile Cases	Adult Cases p ¹⁸²
Panel A: Jurors' Feelings about the Defendant			
"Did you have any of the following thoughts or feelings about the defendant?"			
Felt pity or sympathy for defendant	Yes	66.7	51.5 *
Panel B: Jurors' Feelings about the Defendant's Family			
"Whether or not they came to the trial, did you have any of the following thoughts or feelings about the defendant's family?"			
Felt anger or rage toward def's family	Yes	34.0	10.1 ***
Felt contempt or hatred for def's family	Yes	19.6	5.2 ***
They seemed very different from your own family	Yes	80.9	58.5 **
Imagined yourself in their situation	Yes	27.7	47.3 ***

jurors in the juvenile cases (66.7%) said they felt "pity or sympathy for the defendant" as compared to about half of those (51.5%) in adult cases (a difference of 15.2 points).¹⁸³

While the juvenile defendant's more dysfunctional background and social maladjustment may have translated into greater feeling of pity or sympathy for him among his jurors, in other respects, the differences were negligible. Roughly the same percentage of jurors in juvenile and adult cases felt anger or rage toward the defendant, found the defendant frightening to be near, found the defendant likable as a person, was disgusted or repulsed by the defendant, couldn't stand to look at the defendant, imagined being like the defendant, or imagined themselves in the defendant's situation.¹⁸⁴ In none of these respects did the percentage difference reach five points.

It is the juvenile defendant's family, far more than the defendant himself, who provoked distinctive feelings and reactions among jurors in juvenile cases, and these feelings were quite the contrary of pity or sympathy. Like the question about feelings toward the defendant, jurors were asked, "Did you have any of the following thoughts or feelings about the defendant's family?" This question listed seven thoughts or feelings. Jurors' responses manifested much greater feeling of both animosity and remoteness toward the defendant's family in juvenile as compared to adult cases.

Far more jurors in juvenile than those in adult cases said they felt anger or rage toward the defendant's family (a more than three-to-one difference of

¹⁸¹ Percentages are based on 47 jurors in juvenile cases and 1121-1146 jurors in adult cases.

¹⁸² Probability levels * $p < .10$, ** $p < .05$, *** $p < .01$, computed with adjustment for clustering of jurors by trial. *See supra* note 161.

¹⁸³ *See supra* Table 5, Panel A.

¹⁸⁴ These comparisons are not shown in Table 5 since none are statistically significant.

23.9 points).¹⁸⁵ More jurors in juvenile cases also said they had feelings of “contempt or hatred” for the defendant’s family (by 14.4 points).¹⁸⁶ Notably, the greater pity or sympathy jurors felt toward the juvenile defendant himself is absent, if not reversed, when it comes to his family: 72.3% of jurors in the juvenile cases as compared to 80.4% of those in the adult cases had pity or sympathy for the defendant’s family.¹⁸⁷

In accord with their greater anger, rage, contempt, or hatred toward his family, jurors in juvenile cases also tended to distance themselves psychologically from his family. Jurors in these cases were more likely to see the juvenile’s family as “very different from their own family,” and they were less able to “imagine [themselves] in [the defendant’s] family’s situation,” (differences of 22.4 and 19.6 points, respectively).¹⁸⁸ Note that the difference in psychological distancing is specific to the defendant’s family; it does not extend to the defendant as well. As reported above, jurors are no less likely to imagine being like the defendant or to imagine themselves in the defendant’s situation in a juvenile case than an adult case.¹⁸⁹

The absence of a loving family, which was so prominent in jurors’ characterizations of juvenile defendants in Table 4, is echoed most emphatically in jurors’ feelings of anger or rage toward that family. Evidently, the family’s failure to provide the defendant with a minimum of love or nurturing when he was growing up provokes jurors’ anger or rage. They appear to hold his family responsible in some measure for his crime. Indeed, this may be why more jurors feel pity toward the juvenile than toward the adult defendant. In other words, the dysfunctional home life of juvenile defendants may explain both the anger jurors feel toward the defendant’s family and the pity they feel for the defendant. In turn, the stronger feelings of antipathy toward the juvenile defendant’s family may be reinforced by jurors’ recognition that his family is very different from their own and by their inability to imagine themselves in his family’s situation.

E. *The Defendant’s Appearance in Court*

The impressions jurors have of the defendant will be a product of the evidence adduced in court, including his testimony if he takes the stand. Beyond that, however, their impressions will be influenced by his appearance, manner, and demeanor in the courtroom, and by how others related to him. Both the verbal and nonverbal cues that jurors observe can be potent indicators

Table 6: Percent of Jurors Describing the (A) Defendant’s Appearance in Court

¹⁸⁵ See *supra* Table 5, Panel B.

¹⁸⁶ See *id.*

¹⁸⁷ This comparison is not shown in Table 5 because the difference is not statistically significant.

¹⁸⁸ See *supra* Table 5, Panel B.

¹⁸⁹ See text accompanying *supra* note 184..

*and (B) Other Demeanor Related Factors in Juvenile and Adult Cases*¹⁹⁰

	Response Category	Juvenile Cases	Adult Cases p ¹⁹¹
Panel A: Defendant's Appearance in Court			
"How did the defendant appear to you during the trial?"			
Spruced up to make a good appearance	Yes	26.1	60.9 ***
Self-confident	Yes	30.4	49.0 **
Bored (i.e., indifferent, remote)	Yes	66.0	51.0 *
Panel B: Other Demeanor Related Factors			
What did def. usually wear in court?	casual clothes	72.9	47.5 **
How did the defense attorney(s) treat the defendant?	close relationship	27.9	46.0 **
Did the defendant's mood or attitude change after the guilty verdict and the focus of the trial shifted to what the punishment should be?	Yes	10.4	29.3 ***
Did the defendant testify or make a statement at the punishment stage of the trial?	Yes	6.4	29.5 ***

to them of who the defendant is, especially the degree to which he is an immature individual who has yet to know his place in society. Jurors' responses to questions about the defendant's appearance in court and about other aspects of his demeanor appear in Table 6.

A question designed to determine how the defendant came across in court asked, "How did the defendant appear to you during the trial?" The juror could respond "yes" or "no" to eight descriptions. Jurors in the juvenile as compared to the adult cases saw the defendant as failing to be "spruced up to make a good appearance," as lacking in self-confidence, and as bored (i.e., indifferent, remote). The failure to take special steps to make a good appearance when on trial for one's life is responsible for a thirty-four-point difference between juvenile and adult defendants (26.1% compared to 60.9%).¹⁹² The juvenile-adult differences in appearing self-confident and bored are 18.6 and 15.0 percentage points, respectively.¹⁹³ These differences appear to signal a juvenile defendant's immaturity in terms of a failure to understand the seriousness of his situation or to appreciate the impression he is making on other people—most particularly, his jurors. Other aspects of

¹⁹⁰ Percentages are based on 43-48 jurors in juvenile cases and 1081-1137 jurors in adult cases.

¹⁹¹ Probability levels * $p < .10$, ** $p < .05$, *** $p < .01$, computed with adjustment for clustering of jurors by trial. *See supra* note 161.

¹⁹² *See supra* Table 6, Panel A.

¹⁹³ *See id.*

courtroom appearance, such as seeming ill at ease, frightening, sorry, sincere (i.e., honest), uncomfortable, or bitter, were not appreciably different between juvenile and adult defendants in jurors' minds.¹⁹⁴

The juvenile defendant's failure to make a good appearance in these ways is symptomatic of other unfavorable aspects of his courtroom demeanor. For instance, jurors reported that juvenile defendants were much more likely than adult defendants to wear casual clothes instead of a suit at the trial (by 25.4 points).¹⁹⁵ Jurors were also less likely to say that "his attorney(s) seemed to have a close working relationship with the defendant as part of the defense team" (by 18.1 points).¹⁹⁶ In effect, the juvenile defendant did not act like or get treated like a mature responsible individual in the courtroom relative to his adult counterpart.

The juvenile defendant's response to his capital murder conviction is another indication of his failure to understand or appreciate his situation. Only a third as many jurors in juvenile as compared to adult cases (10.4% compared to 29.3%) said that "the defendant's mood or attitude changed after the guilty verdict was handed down and the focus of the trial shifted to what the punishment should be."¹⁹⁷ This apparent indifference to being convicted of capital murder may be reinforced by the fact that juvenile defendants were less likely to testify on their own behalf at the sentencing stage of the trial. While they were slightly more likely than adult defendants to testify at the guilt stage (36.2% compared to 30.8%),¹⁹⁸ they were decidedly less likely than their adult counterparts to do so at the penalty stage of the trial (6.4% compared to 29.5%).¹⁹⁹ Perhaps the juvenile defendants' attorneys generally believed that the defendant's appearance on the stand at the penalty stage would make an unfavorable impression on the jury.

While jurors may infer the juvenile defendant's failure to know his place in society or to exhibit basic human instincts²⁰⁰ from what they learn during the trial about his crime and the surrounding circumstances, they will also be directly confronted with the social incapacities and signs of immaturity that juvenile defendants often exhibit during the trial. These are signs that the juvenile defendant is out of touch with adult surroundings in that he fails to understand or appreciate the seriousness of his situation, and that he may be oriented to peer rather than adult realities. His behavior in the courtroom raises doubts about his capacity to participate effectively in his own defense and thus calls his cognitive development and social maturity into question.

¹⁹⁴ These comparisons are not shown in Table 6 because the differences are not statistically significant.

¹⁹⁵ See *supra* Table 6, Panel B.

¹⁹⁶ See *id.*

¹⁹⁷ See *id.*

¹⁹⁸ Not shown in Table 6 because the difference is not statistically significant.

¹⁹⁹ See *supra* Table 6, Panel B.

²⁰⁰ See *supra* Table 4, Panel B.

Such obvious improprieties and signs of immaturity might well make jurors think that the juvenile defendant doesn't know his place in society or lacks basic human instincts.

F. *The Punishment Decision*

How do the concerns of jurors in juvenile cases influence their punishment decision? What considerations are distinctive to their decisionmaking when the defendant is a juvenile? For answers, we look first to jurors as informants about the jury's deliberation (Table 7, Panel A) and turn secondly to the factors most prominent in their own thinking about the punishment (Table 7, Panel B). We conclude this comparison of decisionmaking in juvenile and adult cases with an indication of the impact of this experience on jurors (Table 7, Panel C).

1. Jury Deliberations on Punishment

To learn about juries' punishment deliberations we began by asking jurors to tell us in their own words what the jury did to reach its decision about the defendant's punishment.²⁰¹ We then posed thirty-seven specific issues that might have been discussed during jury deliberations on punishment and asked jurors, "How much did the discussion among the jurors focus on [each topic]?" They could answer "a great deal," "a fair amount," "not much," or "not at all." Jurors' responses were significantly different in juvenile and adult cases on the six topics shown in Table 7, Panel A.

Here again, the defendant's family background most distinguishes juveniles from adult defendants.²⁰² Jurors in the juvenile cases are twice as likely as those in the adult cases to say that the "defendant's family background and upbringing" was discussed "a great deal"; the 24.6 percentage point difference (48.9% compared to 24.3%) well exceeds the juvenile-adult differences in the other five discussion topics.²⁰³ Consistent with this focus on the juvenile defendant's background and upbringing, there was also greater discussion of "jurors' feelings toward the defendant" and their lesser concern with "the role of the victim" than in adult cases (differences of 10.1 and 14.8 points, respectively).²⁰⁴ Clearly, the defendant's family background and upbringing is the overriding concern of jurors in juvenile cases. It is not only what most distinguishes how they characterize the juvenile defendant, but also what most distinguishes the focus of the jurors' discussions during deliberations on punishment.

Table 7: Percent of Jurors Indicating (A) Topics Discussed During Jury

²⁰¹ Their responses to this question figure prominently in the analysis of Part III, where we present further perspective on jurors' decisions in juvenile cases from their narrative accounts of the decisionmaking process.

²⁰² See also *supra* Table 4, Panel A.

²⁰³ See *supra* Table 7, Panel A.

²⁰⁴ See *id.*

*Punishment Deliberations, (B) Topics of Importance in Jurors' Own Decisions, and (C) Emotional Distress of Serving as a Juror in Juvenile and Adult Cases*²⁰⁵

	Response Category	Juvenile Cases	Adult Cases	p ²⁰⁶
Panel A: Topics of Discussion During Sentencing Deliberations				
"How much did the discussion focus on the following topics?"				
Defendant's background or upbringing	Great Deal	48.9	24.3	***
Jurors' attitudes on capital punishment	Great Deal	48.9	32.8	*
Defendant's history of crime or violence	Great/Fair	48.9	65.3	*
The victim(s)' role or responsibility	Great	6.4	21.2	**
What the law requires	Great	66.0	56.5	*
Jurors' feelings toward def.	Great Deal	28.3	18.2	*
Panel B: Topics of Importance in Jurors' Own Decisions				
"How important were the following considerations for you in deciding on what the defendant's punishment should be?"				
The goal of rehabilitation	Very/Fairly	55.3	36.4	***
Desire to avoid a horrible mistake	Very/Fairly	56.3	40.1	**
Keeping other people from killing	Very	41.7	23.6	**
Feelings of compassion or mercy	Very/Fairly	47.9	33.6	**
Belief that def. should have a chance	Not at All	42.6	54.3	*
Punishment wanted by victim's family	Not at All	41.7	55.1	*
Punishment wanted by most members	Not at All	54.2	66.0	*
Desire to see justice done	Very	87.5	75.8	**
The principle of an eye for an eye	Very	6.3	15.9	**
Panel C: Emotional Distress of Serving as a Juror				
"Did you find the experience of serving as a juror on this case emotionally upsetting?"				
	Yes	76.6	60.2	***

Jurors in juvenile cases also talked more about their own attitudes toward capital punishment; half of the jurors in juvenile cases (48.9%), but only a third in adult cases (32.8%), reported that "jurors' own attitudes about capital punishment" were discussed "a great deal."²⁰⁷ Perhaps the greater discussion of their death penalty attitudes in juvenile cases reflects the efforts of jurors to reconcile their feelings that the death penalty was unacceptable in the case at hand with personal assumptions, probably expressed at jury selection, that the death penalty was generally acceptable to them for such crimes (i.e., when the

²⁰⁵ Percentages are based on 45-48 jurors in juvenile cases and 1107-1126 jurors in adult cases.

²⁰⁶ Probability levels * p < .10, ** p < .05, *** p < .01, computed with adjustment for clustering of jurors by trial. See *supra* note 161.

²⁰⁷ See *id.*

defendant was not a juvenile). Though death qualified, jurors may nevertheless feel scruples against death as punishment when confronted with the realities of a juvenile defendant, including his family dysfunction and his social maladjustment. Such misgivings may also be responsible for the greater discussion of “what the law requires” in juvenile cases (by 9.5 points)²⁰⁸ to the extent, for example, that such discussions encompass whether the law permits jurors to treat the defendant’s juvenile status as an exemption from the death penalty.

The remaining topic of discussion during the jury’s punishment deliberations that differed significantly between juvenile and adult cases—“the defendant’s history of crime or violence”—was treated earlier as an “age-graded” difference between juvenile and adult defendants.²⁰⁹ The reduced discussion of this factor when the defendant is a juvenile (by 16.4 points)²¹⁰ might be expected since juvenile defendants will have had less time to develop a history of criminal violence than their adult counterparts.

2. The Juror’s Own Punishment Decision

To learn what jurors regarded as important in their own punishment decisions, the CJP asked about twenty-five punishment-related issues. The question asked, “How important were the following considerations for you in deciding on what the defendant’s punishment should be?” They could answer “very,” “fairly,” “not very,” or “not at all.” In nine instances the differences qualified as statistically significant; three displayed differences in excess of fifteen percentage points and the other six differences fell below this level. The importance jurors in juvenile and adult cases attributed to these nine issues appears in Table 7, Panel B.

The main difference in jurors’ thinking about punishment was in the importance of rehabilitation. More jurors in juvenile cases (55.3%) than in adult cases (36.4%) said that “the goal of rehabilitation” was very or fairly important to them in deciding what the punishment should be.²¹¹ Since rehabilitation and execution are incompatible, the implication is that jurors in juvenile cases are much more concerned than those in adult cases with preserving the defendant’s life. Consistent with such a concern, jurors in juvenile cases also appear to have been moved more than those in adult cases by “feelings of compassion or mercy for the defendant” and by “the belief that the defendant should have a chance to pay for the crime and become a law abiding citizen” (differences of 14.3 and 11.7 percentage points, respectively).²¹²

Another punishment consideration of greater importance to jurors in

²⁰⁸ *See id.*

²⁰⁹ *See supra* note 180 and accompanying text.

²¹⁰ *See supra* Table 7, Panel A.

²¹¹ *See supra* Table 7, Panel B.

²¹² *See id.*

juvenile cases was the “desire to avoid a horrible mistake.” This was very or fairly important to 56.3% of the jurors in juvenile cases as compared to 40.1% of those in adult cases.²¹³ This greater apprehension about a horrible mistake may reflect the fact that jurors more often see the juvenile defendant’s family deprivation and social immaturity as conditions that made him qualitatively less blameworthy, and hence exempt from capital punishment. Two possibly allied differences are the greater importance jurors in juvenile cases attributed to “the desire to see justice done” and the lesser importance of “the principle of an eye for an eye” (differences of 11.7 and 9.6 percentage points, respectively).²¹⁴ In these respects the jurors in juvenile cases appear to be more favorable toward an individualized and less favorable toward a uniform determination of the punishment.

Crime prevention is also a consideration jurors in juvenile cases deem more important than jurors in adult cases. The traditional goal of general deterrence or “keeping other people from killing” shows a juvenile-adult difference of 18.1 percentage points.²¹⁵ The allied goal of incapacitation or “keeping the defendant from ever killing again” also was more common among jurors in juvenile cases, though the juvenile-adult difference was only 12.2 points.²¹⁶ Jurors in juvenile cases may have heightened concern about deterrence because juvenile cases appear to attract greater public attention.²¹⁷ Media coverage of violent crime typically stimulates public fear and the demand for improved crime prevention.²¹⁸ Moreover, jurors’ well-documented underestimates of how long offenders not sentenced to death will spend in prison before returning to society²¹⁹ may make them especially apprehensive about the possible recidivism of the youngest defendants.²²⁰ Such apprehension could

²¹³ *See id.*

²¹⁴ *See id.*

²¹⁵ *See id.*

²¹⁶ This comparison is not shown in Table 7 because the difference is not statistically significant.

²¹⁷ In the CJP interview, one question jurors were asked was: “Did this case attract much attention in your community?” Jurors in juvenile cases were more likely to say “a great deal” by almost twenty percentage points (48.8% compared to 29.0%). For this difference, the p-value, with adjustment for sample clustering is .0547. *See supra* note 161.

²¹⁸ *See* DAVID L. ALTHEIDE, *CREATING FEAR: NEWS AND THE CONSTRUCTION OF CRISIS* 134, 189 (2002) (arguing that news reporting about crime and punishment helps promote fear and this fear leads to constrained behavior, community activism, and an environment constructed from fear).

²¹⁹ *See* William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 *TEX. L. REV.* 605, 648 (1999) (studying jurors’ estimates of prison terms, and concluding that “[j]urors grossly underestimate how long capital murderers not sentenced to death usually stay in prison”).

²²⁰ Jurors’ concern about preventing the juvenile defendant from killing again is tied up with a pervasive underestimation of the death penalty alternative. *See id.* The defendant’s youthfulness, presumed to be a mitigating factor, has been found to make jurors more likely

even be the basis for greater concern about making a horrible mistake in juvenile cases in the minds of some jurors.

Two other community related concerns were of somewhat greater importance to jurors in juvenile than in adult cases—namely, “the punishment wanted by the victim’s family” and “the punishment wanted by most members of the community.” It is uncertain, however, whether these concerns were more important because jurors in juvenile cases anticipated that their punishment decision would be unwelcome in these quarters or because they wished to take such concerns into account in making the punishment decision.

Finally, Table 7, Panel C includes jurors’ responses to a question about the experience of serving as a capital juror. Jurors were asked, “Did you find the experience of serving as a juror on this case emotionally upsetting?” While most jurors did (61.0% overall), this was true of more jurors in juvenile than in adult cases (76.6% compared to 60.2%).²²¹ Since jurors’ impressions of the characteristics of juvenile and adult capital crimes did not differ on the whole, this difference in reported emotional stress suggests that members of the community serving as capital jurors find it an especially troubling experience to countenance death as punishment for juvenile defendants. Perhaps the disproportionate imposition of life sentences in juvenile cases is a product in some measure of the emotionally distressing character of this experience.

G. *Overview of the Statistical Evidence*

In the foregoing discussion of the statistical evidence, we have seen first that the crimes of juvenile and adult capital defendants differ only slightly in defendant-victim relationships, in the numbers of victims and perpetrators, and in jurors’ choice of descriptive terms to characterize the killings. Despite the similarity of their crimes, defendants in juvenile and adult cases differ vastly in how they are described by jurors. The two most distinctive characterizations of the juvenile defendant are his family dysfunction and his social maladjustment.²²² Reflecting his adverse family background, jurors affirmed the absence of a loving family, the presence of poverty, and their belief that he got a raw deal in life.²²³ As indicators of social maladjustment, they identified his inability to know his place in society and lack of basic human instincts.²²⁴

The juvenile defendant’s unloving, impoverished, abusive family appears to evoke feelings of pity or sympathy for the defendant, but inflames even

to vote for death because they grossly underestimate how long the defendant will spend in prison if not given the death penalty. *See id.* at 670, 701 (arguing that youth is a main factor in sentencing young defendants to death when jurors think the defendant might otherwise survive to be paroled).

²²¹ *See supra* Table 7, Panel C.

²²² *See supra* Table 4 (showing differences in the characterization of family background and social maladjustment).

²²³ *See discussion supra* Part III.C.1.

²²⁴ *See id.*

stronger feelings of anger, rage, contempt, and hatred for his family.²²⁵ The jurors distance themselves psychologically from the juvenile defendant's family; they see his family as very different from their own and cannot imagine themselves in his family's situation.²²⁶ This evidence suggests that, at least in part, they blame his family for the crime.

As mentioned above, jurors see the juvenile defendant as not knowing his place in society.²²⁷ This impression comes in part from his demeanor and conduct in court.²²⁸ Inappropriate reactions—such as acting bored, appearing unconfident, not dressing up, staying remote from his attorneys, and having little (if any) reaction to the jury's guilty verdict—suggest that the defendant is not a mature and responsible individual. These reactions could be aspects of a lack of social maturity, such as cognitive incapacity, emotional immaturity, or excessive peer orientation. They appear to signal to the jurors that something is wrong with this individual—that he is not fully responsible or blameworthy for his actions.²²⁹

When the jury sits down to discuss the juvenile defendant's punishment, his family background and upbringing is the topic that most distinguishes his jurors from those in adult cases, just as it did in their characterization of the defendant and in their feelings toward him and his family.²³⁰ This makes it clear that his family background is not merely a subjective characterization but a chief topic of group discussion and consideration. The jurors in juvenile cases also talk more in the group setting than jurors in adult cases about their own attitudes toward capital punishment, perhaps attempting to examine whether their general support of capital punishment, as death-qualified jurors, extends to juvenile offenders.²³¹

When jurors try to decide in their own minds what the punishment should be, the goal of rehabilitation followed by concern about making a horrible mistake were distinctive to juvenile cases.²³² Both of these concerns imply grave reservations about death as punishment. Rehabilitation precludes execution, which could be “a horrible mistake.” At the same time, the jurors in juvenile cases also were more concerned about deterring such crime.²³³ In view of this heightened premium on deterrence, the relatively few death

²²⁵ See *supra* Table 5, Panel B and accompanying discussion (concerning jurors' feelings toward the defendant's family).

²²⁶ See discussion *supra* Part III.C.1.

²²⁷ See discussion *supra* Part III.C.2.

²²⁸ See *id.*

²²⁹ See *supra* Table 6 and accompanying discussion (addressing how jurors perceive the defendant during trial).

²³⁰ See *supra* Table 7 and accompanying discussion (displaying statistics related to the importance of certain criteria in punishment deliberations).

²³¹ See discussion *supra* Part III.F.1.

²³² See discussion *supra* Part III.F.2.

²³³ See *id.* (concerning the prevention of future crimes by others and by the same person).

sentences imposed in these cases²³⁴ speaks to the deep-seated reticence in jurors' minds about death as a punishment for convicted juvenile defendants. Little wonder that jurors in juvenile capital cases were more likely than those in adult cases to find their jury experience emotionally disturbing.

To further enrich and refine this perspective about how jurors regard the death penalty for juvenile defendants, in Part IV we turn to a different kind of evidence—that is, to jurors' narrative accounts of how they made their punishment decisions in juvenile cases. We draw upon the interviews with jurors in the juvenile defendant cases identified in Table 1. This will give us a more nuanced perspective on jurors' thinking about the appropriateness of the death penalty for adolescent defendants.

IV. EVIDENCE FROM JURORS' NARRATIVE ACCOUNTS

Our purpose in this Part is to discern the essence of jurors' thinking about the death penalty in juvenile cases by examining juror's narrative accounts of their reasoning in deciding on the appropriate punishment. We draw upon the extensive narrative accounts many jurors' provided in response to open-ended questions and at other points when jurors felt moved to elaborate upon their responses to structured questions with limited response options. The CJP interviews were tape recorded with jurors' permission²³⁵ and have been transcribed for analysis.²³⁶ The evidence presented here draws upon the transcribed interviews with jurors from the twelve juvenile cases in the CJP sample.

We present this evidence in three steps. First, we examine jurors' accounts in the majority of cases where the jury voted for a life sentence and the trial judge imposed that sentence. This will serve to explicate the themes common to jurors' thinking in these cases where jurors rejected the death penalty and to convey these themes in the language jurors used to express their thinking and feelings. Second, we examine the two cases in which juries imposed the death penalty. In that section, we will ask under what conditions jurors make exceptions to the prevailing pattern. Are these exceptions that prove the rule? Third, we examine the two cases in which the jury's sentencing verdict was

²³⁴ See *supra* note 155 and accompanying text (stating that only two of the twelve juvenile offenders in the study received death sentences).

²³⁵ See William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 244-57 (2001) (providing narrative accounts from juror interviews).

²³⁶ The original research design did not provide for recording and transcribing the interviews, but during the pre-testing of the interviewing protocol, the investigators encountered jurors who often volunteered extensive and detailed narrative accounts that contained valuable qualitative information as explanation or support for their thinking and actions. In recognition of the likely value of this qualitative data in understanding the juror's decisionmaking, the CJP investigators decided to tape record and transcribe the interviews with jurors.

life but the trial judge imposed a death sentence. These are cases that enable us to see what judges and jurors disagree about and whether the perspectives of judges are a genuine challenge to the evidence that jurors' decisions reflect the conscience of the community. These last four juvenile cases serve as specimens of special value in understanding the distinctive nature of jurors' thinking and decisionmaking in juvenile cases. At each step, we have selected one case for in-depth examination.

A. *When Juries Reject the Death Penalty*

We now turn to jurors' verbatim accounts of why they refused to sentence a juvenile offender to death. While these interviews dealt with different defendants and crimes, nearly all of these jurors describe the juvenile defendant's overwhelmingly dysfunctional home life and immaturity as a reason for sparing him the death penalty. In particular, jurors from these cases describe the defendant as lacking positive role models and never being taught social norms of proper behavior. Observing that the juvenile offender is in many ways himself a victim, they often describe the defendant as lacking the fundamental social capital to be a law-abiding citizen. They see the death penalty as unacceptable in such cases because juvenile defendants cannot be held fully responsible for their crimes. In this section, we turn first to an intensive examination of jurors' accounts in the Dwight Simmons case²³⁷ and then to illustrative excerpts from other cases in which the jury voted for life and the judge imposed that sentence.²³⁸

1. *State v. Simmons*²³⁹

The first *Simmons* juror believed the defendant's age and upbringing required a life sentence, even in the absence of personal feelings of sympathy or compassion. The juror first described the details of the crime:

J: Okay the defendant was a young black man, age 19, and he was 17 when he committed double murders. . . . He had been accused of felony murder of his great-aunt and great-uncle, who were both very aged. . . . And that had occurred about two years before the actual trial. . . . He had, um, gone over there to get money from them. And . . . when they refused to give it to him or tell him where it was he, uhh, became angry and, uhh,

²³⁷ *State v. Simmons*, No. S90A0144, slip op. (Ga. Dist. Ct. Oct 18, 1999).

²³⁸ In our presentation of the excerpts from the transcribed interviews, we use "J:" to indicate that what follows are the words of the juror, "Q:" when reproducing the written question as read to the juror by the interviewer, and "I:" to identify the interviewer's reactions or probes in the dialogue with the juror. To preserve the confidentiality of these interviews, jurors are not identified by name. Instead, they are referred to by a code designating the state of the case and a number unique to that juror. Transcripts of the interviews are on file with the authors. In four instances factual details were altered to protect juror confidentiality; the changes appear in brackets.

²³⁹ No. S90A0144, slip op. (Ga. Dist. Ct. Oct. 18, 1999).

got the rifle that was on top of the fireplace, as I recall, that they used to kill chicken hawks with, and then he shot them. . . . See Dwight had lived with them briefly prior to the murder at one time and I think he had stolen from them or been disruptive in some way, so they put him out, or told him to leave.²⁴⁰

When the questioning turned from the crime to the defendant, this juror referred to Simmons as a child who had received no structuring or nurturing at all. Indeed, she described this factor as the one that most differentiated juvenile and adult defendants, a statement that is confirmed in Table 4.²⁴¹ That is, when asked how well the phrase “raised in a warm loving home” described the defendant, she responded “not at all” and added, “I don’t think this child had any structuring or nurturing at all.”²⁴²

Her response to another descriptive phrase, “a good person who got off on the wrong foot,” gives further perspective on her view of the defendant.

J: No, I wouldn’t say that, Miss. I think this kid just never had a chance, was never taught, I don’t think he was ever a good person, period. . . . I don’t think he was ever taught what is good, what is bad. He was never taught that by anyone in authority.²⁴³

After responding to suggested words that might describe the defendant, jurors were invited to add further observations about the defendant. At this point, she said:

J: He was like . . . a little ball. They go from place to place, they just bounce around. But they don’t belong anywhere or any place. This person has him for a while, that person has him for a while, they go to a foster home for a while. I believe that was what he endured most as a child—severe neglect.²⁴⁴

This juror was not moved by overt sympathy or compassion for Simmons or for those who pleaded for his life.²⁴⁵ She saw the defendant as dangerous, was aware that he had been in trouble before, mistrusted his testimony in court, and indeed was offended by the tearful pleas to spare his life by members of his family.²⁴⁶ She responded to the description “had a history of violence and crime” saying, “Yes he did. He had been in trouble with school and fights and arson, that sort of thing.”²⁴⁷

Concerning his testimony at the guilt stage of the trial, the juror commented:

²⁴⁰ Interview with Juror GA-0384.

²⁴¹ *See supra* Table 4.

²⁴² Interview with Juror GA-0384.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* (stating that the death penalty is proper for those that engage in heinous crimes).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

J: Um, I didn't believe him. I thought they were crocodile tears, and I thought he . . . he was just making it all up. And I think he . . . just went up there and said, 'I didn't do it, I'm innocent, I didn't kill my great aunt and uncle,' those were his words, and then he cried, and I studied him intensely for his body language and his mannerisms, and I didn't believe him. I thought he was lying.²⁴⁸

When asked about the defense witnesses at the punishment stage of the trial she said:

J: There were three or four of them at the end of the trial that spoke on his behalf. I think they were cousins or nieces or distant relatives, yeah. Ya know, they were the ones putting on a great show of tears and which I felt very uncomfortable with.²⁴⁹

This juror also mentioned how the defendant's mental incapacities as well as his age impacted her decision regarding punishment.

Q: After the jury found defendant guilty of capital murder, but before you heard any evidence or testimony about what the punishment should be, did you then think defendant should be given death? When did you first think so?

J: Um, I was undecided but for me what did it was his youth and the fact that he was, if not mentally retarded, but leaning in that direction. . . . He had been in and out of school. He had been a school dropout. He had a lot of problems in school. . . . I don't think that I could of given him the death penalty [in view of] his youth and the fact that he was not fully mentally equipped. . . . I think for myself, if I was on a jury and the person up there had committed atrocious crimes on the, on the scales of, say, Hitler. Say he had cut or mutilated some innocent little girl and he knew what he was doing and he was not considered insane, I could easily give him the death penalty. I'm saying that for myself. But in his case it was different because we felt he was so young and then he was not as mentally equipped as you and I.²⁵⁰

When asked what the jury did to reach its decision about the defendant's punishment, this juror made a point of saying she was not against the death penalty, that her opposition was based on his age:

J: I said, "no way, I'm not [inaud.] out for this kid to die. No way, he's just a kid." . . . Had he been, older, I think . . . I don't know what my decision would have been. I couldn't tell you now. But right then, that's what I thought.

A second juror in the *Simmons* case stressed that, in addition to his age, the defendant's immaturity, his lack of emotion, and the fact that he was brought

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

up “like an animal” were reasons she could not vote for death.²⁵¹ This reasoning is reflected in her answers to a series of questions where she described the defendant and her feelings towards the defendant’s family.

Q: How did [the defendant] appear to you during the trial?

J: Well, uh, he seemed like a child, ya know, he was very immature. He just, he was not extremely intelligent.

Q: Did you have any [other] thoughts or feelings about [the defendant]?

J: Well yeah, I just, I tried to put myself in his position, and what he did was horrible. It was just the fact that he [inaud.]. I don’t think Dwight was ever taught right and wrong.

Q: What thoughts or feelings did you have about [the defendant’s] family?

J: The way they raised him. I mean, they raised him like an animal. He had no love.²⁵²

This juror reiterated the fact that he had no one to take care of him at several points in the interview:

J: He had, ya know, no home He had never been taken care of. He just—he was just trying to survive. . . .

. . . .

J: [H]e had lived with his mother for a little while then she sent him to Georgia and to live with his aunt and uncle, and then he ended up living with—ya know, he was pretty much on his own. [Inaud.] He had no—he had nobody taking care of him. He was a child. So he was trying to survive the best way he knew how and he needed the money. . . .

. . . .

J: I don’t think he was capable of [juror sighs] ya know, [inaud.]. No, didn’t think he was sorry—no emotions.²⁵³

When asked what the jury did to reach its decision about defendant’s punishment, this juror answered:

J: [We] did not want to give him the death penalty—basically because of, ya know, his environment, the way he’d been raised, his lifestyle, he was very . . . ya know, he was, he was just, he was very, very immature for his age. He—he was just not very intelligent. What he did was horrible and he—he should never be on the street again. . . . I had, you know, I—I’ve been raised in a, in a good environment, I know right from wrong. Dwight’s—Dwight’s been raised like an animal, you know, basically he

²⁵¹ Interview with Juror GA-0382.

²⁵² *Id.*

²⁵³ *Id.*

was raised like an animal. He was out for survival and he had, you know, he just—I don't know. It's sad.

Q: Can you think of anything more we haven't talked about yet that was important in understanding the jury's punishment decision?

J: The age. We haven't really said anything about his age. I mean, he was so young, ya know, ya g- [juror sighs] even, yeah, that had an effect, ya know, he was a very young boy. [Inaud.] That had a lot to do with it.²⁵⁴

At two points during a series of questions about factors that made jurors more or less likely to vote for a death sentence, this juror emphasized the critical role of age and family dysfunction by actually saying that she would have been more likely to sentence this defendant to death if he had been an adult or had come from a loving family:

J: [I]f he had been a 30-year-old man that came from a good home that had been raised like a human, ya know, I'd been much more likely to give him the death penalty, but [inaud.] like a child should, you know, he had just never been taken care of as a child—he didn't—so, you know—[I: Less likely to vote for death?] Yeah, just—just because, ya know, he [inaud.] more like an animal than a human, ya know. Just he's—he's very unintelligent and he's never had a chance to be human, I guess you'd say.

J: If he had had a loving family, I would have been much more likely to have voted for death. [I: Slightly more or much more?] Much more likely.²⁵⁵

Ultimately, it was the defendant's youth and family upbringing that impacted her sentencing decisions. She stated, “[i]t was basically just the fact that he . . . was . . . ya know, so young and had been mistreated for so long. I mean, it was both those factors together that made me decide against the death penalty.”²⁵⁶

The third *Simmons* juror's responses reveal that she thought categorically of the defendant as a juvenile, as different from an adult, as someone who thinks and acts differently, and, by implication, as someone who must be judged and treated differently. When asked to describe the defendant, she remarked, “he was seventeen years old. So how does a seventeen year old think or do? Certainly not like a forty year old.”²⁵⁷

On the matter of a loving or caring family, the juror drew a sharp contrast between the defendant's family and her own family.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Interview with Juror GA-0383.

J: I can't—I don't think so, okay? If it was a loving family—if it was a loving family, uh . . . or a caring family. L-let's say caring family, if I put myself on that caring and loving [juror laughs], he would of never left the house until he was eighteen years old.

I: So you're saying he wouldn't be like he was?

J: No, I mean it—I - I would—before I would leave him I would of called the police and told them, “hey, this child's not eighteen, and he's leaving home.” . . . I have a [child who] still loves and kisses me and [my husband]. We have a very loving family, . . . so it's really different to say what, ya know. But of course if [he] weren't home at 3:30, 3:45, I walked o- went to school and made sure, hey I want to know where my kids are. So, uh, I was maybe a little too loud or too fast on some of the things, but then again I was scared something happened to my children. So, ya see, uh, then I would have to go back, ya know, when it says how do you feel, personal feelings. I would have definitely turned him in if he didn't show up the first night or the next morning. Oh yes, ya know, I gave him to 12 o'clock that night and that would have been it. . . . I feel as a juror, when it comes to like he was seventeen . . . He—to me at my age he's a child, okay? Uh, I—that's why I said I have to be sure. I got to sleep.²⁵⁸

For the fourth *Simmons* juror, the factors that made her feel that life should be the punishment were, again, the defendant's age and the possibility of rehabilitation. The tape recorder malfunctioned early in this jurors' interview so we are limited to the responses that the interviewer was able to transcribe by hand during the interview.

In response to the very first question that asked the jurors to tell the interviewer about the crime, she said, “it was bad, sad, he was a kid.”²⁵⁹ The interviewer next asked the juror if she had any thoughts or feelings about the defendant. She replied “just seeing him sitting there was sad, to think of someone being that young and involved in something so bad. At the same token, I wanted to do the right thing because he wouldn't be safe to someone on the street.”²⁶⁰ The juror also felt that the defendant had been let down by his parents, and that the defendant's age was a significant factor in her decision not to vote for a death sentence.²⁶¹

Q: Whether or not they came to the trial, did you have [other] thoughts or feelings about defendant's family?

J: [I] felt [the] defendant had been let down by parents.

²⁵⁸ *Id.*

²⁵⁹ Interview with Juror GA-0381.

²⁶⁰ *Id.*

²⁶¹ *Id.*

Q: What defense evidence or witness at the punishment stage of the trial was most important or influential, in your mind, and why?

J: [His] schoolteacher—thought [the] defendant had never had family to help him.

Q: In making your punishment decision, did you find a specific feature or aspect of the case that made you feel you knew whether life or death should be the punishment? What factor or aspect of the case made you feel that way?

J: Age of the defendant. . . . Age and rehabilitation.

2. *Villegas v. State*²⁶²

The remaining cases in this section briefly elaborate upon the themes evident in the statistical analysis of Part III and in the words of the *Simmons* jurors. The juvenile defendant's immaturity, naiveté, and inappropriate behavior figured prominently in the Texas case involving Rene Villegas. One juror talked about Villegas's cognitive and emotional immaturity. She described his inability to understand the full implications of his actions:

J: [He was] too young and too naïve. I don't think he took it serious, he didn't know the seriousness of what was happening, that's how I saw it. Yes he knew he was gonna go to jail, but I don't think he knew, he couldn't see in such a futuristic way, I don't think he was able to see that.²⁶³

She further described his inappropriate behavior at trial and his naiveté in the broader community:

J: I think he still was a kid, he was immature. To what I would see, the way he would respond during the courtroom, especially when his friends were up there on trial, he couldn't hold himself from laughing like he was still a kid. Still a kid in himself, he hadn't grown up. . . .

J: [W]e felt like he was still so naïve because being that he was so dumb, I hate to use that word but he was so dumb, to go out there and tell his friends. "I killed my aunt," like a real murderer wouldn't have done that. That's the way we felt. And we also felt that he was so naïve because he went out to his girlfriend's house with his bloody socks and he could have gotten rid of those things, those evidence and nobody would have known about it. So we felt that he was still so naïve.²⁶⁴

A second juror saw Villegas's conduct as inappropriate because he was remorseless; he displayed "no remorse whatsoever, he never had any

²⁶² 791 S.W.2d 226 (Tex. Ct. App. 1990).

²⁶³ Interview with Juror TX-5008.

²⁶⁴ *Id.*

expressions on his face.”²⁶⁵

Villegas’s dysfunctional family life was also a major theme in the jury’s sentencing decision. Like the *Simmons* juror who characterized the defendant as a “little ball” that “bounced around,”²⁶⁶ another *Villegas* juror used much the same imagery to describe how the jury thought about his upbringing in reaching its punishment decision.

J: We discussed [a lot about] his home life. We talked about how he had been from one home to another because of his parent’s problems, for a time he’d be with his mother, for another time he’d be with the grandmother and the aunt, for another time he’d be with the father. So he was just, he really didn’t have a home, he was just rolling from one place to another. . . . [W]e talked about how his aunts and uncles tried to help him out, but there was no stability so . . . [he] didn’t have anyone that he was attached to, he was just like roaming from friends to homes, different homes, and didn’t have a place in mind. That’s what it seemed to be, he didn’t belong with mom, he didn’t belong with the grandmother. He just didn’t fit anywhere.²⁶⁷

The *Villegas* jurors agreed that the defendant’s age, with the accompanying family dysfunction and immaturity, were the primary reasons for their decision to give him a life sentence. When asked what the strongest factors were against the death penalty, the third *Villegas* juror responded, “one of the major factors was his age for one and as far as I knew, this was the first time that he had ever done anything [t]hat brought him to court.”²⁶⁸

When asked, “among the topics you did discuss, what was the single most important factor in the jury’s decision about what defendant’s punishment should be?,” the first *Villegas* juror answered, “his age, his home life, about how life had been unfair to him.”²⁶⁹

3. *State v. Pennington*²⁷⁰

The defendant’s dysfunctional family life consistently arose during jurors’ deliberations about how to punish the juvenile defendant. Specifically, in the Kentucky case involving Scott Pennington, the first juror blamed the defendant’s family to the point of wishing they could be on trial as well for the crime. This juror alluded to the defendant’s impoverished upbringing and observes that his parents were physically and emotionally abusive.

²⁶⁵ Interview with Juror TX-5016.

²⁶⁶ Interview with Juror GA-0384.

²⁶⁷ Interview with Juror TX-5009.

²⁶⁸ *Id.*

²⁶⁹ Interview with Juror TX-5008.

²⁷⁰ *State v. Pennington*, slip op. (Ky. Dist. Ct. 1993); see also Voskoir, *supra* note 150 (providing some factual background on Pennington, including the fact that he was seventeen when he committed the murders at issue in this case).

J: I just couldn't see why they couldn't prosecute the family along with Scott.

I: What was brought out by the family?

J: From what I could understand, he was ignored and he was treated like a non-person. He was[n't] allowed to have any friends come over to the house because they were poor and didn't have running water, and they didn't have this and didn't have that. In my book, that was no excuse. They just didn't want him around. His mom was kind of a psychopath herself and dad was a drug user and an alcoholic and he abused [the defendant] and beat him and stuff. I just didn't think people ought to be treating their children like that.²⁷¹

This juror blamed the defendant's abusive and addicted parents for his conduct and wished the legal system could hold parents partially responsible for their children's criminal behavior. Remarking on the defendant's dysfunctional home life and school experience, the juror described feeling a deep sympathy for the defendant:

J: They were all kinds of thoughts and feelings about him throughout the trial. My mind changed back and forth several times. I just felt sorry for him. They talked about his home life and his stuttering and kids making fun of him at school. They talked about his mom and dad not caring for him. I just felt like he was a poor lost puppy. I just wanted to bring him home and take care of him, because I figured he just needed a little loving like all kids do.²⁷²

4. *Rea v. Virginia*²⁷³

In the *Rea* case, a juror described both the juvenile defendant's emotional reaction to his sister's testimony and additional testimony detailing what she perceived as the defendant's dysfunctional family life.

J: When they brought [the defendant's] sister in, it was the first time you could sense there was some compassion in him. The introduction of testimony about his family life—that his father was homosexual and bisexual. This was important because it showed what a bad home life the kid had and that there was some reason.²⁷⁴

Perhaps ironically, all three of the jurors interviewed from the *Rea* case described a juvenile probation officer who testified for the prosecution as persuading them that the defendant's awful family life may have led the defendant to commit the crime. Describing how this witness backfired for the prosecution, a second juror from the *Rea* case observes:

²⁷¹ Interview with Juror KY-0720.

²⁷² *Id.*

²⁷³ 421 S.E.2d 464 (Va. Ct. App. 1992).

²⁷⁴ Interview with Juror VA-1652.

J: The juvenile probation officer testified that because of [the defendant's] family, she had tried to take him out of the home and could not get him out. He had a very minor juvenile record. She was trying to get him out of his home environment. . . . She said that if she had gotten him out of the home, he probably would have turned out a lot different.²⁷⁵

5. *Houchin v. State*²⁷⁶

A juror from the *Houchin* case describes the defendant's family life and his parents' appearance in court as confirming that life was the only acceptable punishment:

J: You cannot be hang[ing someone] when you see the circumstances that he came in and if you saw his parents, how they walked in on the witness stand—I don't like to say this, but she came in a yellow miniskirt, like she came from a whorehouse. . . . His father walks in nonchalantly with that modern style hairdo, no feelings whatsoever. If that was my kid, my God, I would fall apart, to pieces. That was another reason. There were so many reasons I was against capital punishment.²⁷⁷

The accounts in this section help to explain, in the words of jurors themselves, why they refuse to support the death sentence in cases involving defendants who are younger than eighteen years of age at the time of their crimes. Jurors blame the defendant's family and the lack of parental care or supervision as reasons for refusing to impose the death sentence. Describing the defendant's parents as unloving, uncaring, absent, abusive—picturing them as drug addicts, as inappropriate themselves in court—many jurors think of the juvenile defendant's upbringing as profoundly lacking in social control and support. Others even see the parents' failure to provide counseling as “proof” of why a young defendant committed the crime, thus ascribing guilt to them as well as the defendant. Jurors also see the defendant's immaturity as a bar to the death penalty. While an adult defendant's inappropriate behavior in court and failure to show remorse may undermine jurors' receptivity to mitigation, such conduct may have the opposite effect when the defendant is a juvenile. By laughing or showing a lack of respect or seriousness, for example, a juvenile defendant may be seen by jurors as “still a kid.” In effect, such inappropriate or immature behavior confirms jurors' suspicions that the juvenile defendant is not fully responsible for his crime and hence that death is not appropriate as punishment.

B. *When Juries Vote for Death*

Although jurors are far more likely to spare the lives of juvenile defendants than of adult defendants, jurors did impose death sentences upon two of the

²⁷⁵ Interview with Juror VA-1653.

²⁷⁶ 581 N.E.2d 1228 (Ind. 1991).

²⁷⁷ Interview with Juror IN-0461.

twelve juvenile defendants in CJP cases: Dwayne Wright and John Blount. The obvious question to ask is what led jurors in these two cases to depart from the prevailing tendency to spare the lives of juvenile defendants and instead impose a death sentence. What is different about these cases, about these defendants? Did jurors not see family dysfunction or immaturity and dependency in these death cases? The interviews with jurors in these two cases provide some answers. We draw primarily on the responses of the *Wright* jurors since more jurors were interviewed in that case and they generally provided more extensive accounts.

1. *Wright v. Commonwealth*²⁷⁸

The *Wright* jurors were not substantially different in their thinking and concerns about his background and upbringing from those who voted for life in other juvenile cases. As did the jurors in life cases, these jurors considered and discussed Wright's dysfunctional home life and disruptive upbringing at length during their sentencing deliberations, and they observed what they regarded as his inappropriate courtroom behavior.

Consider the following excerpts from the interviews with Wright's jurors about his home environment and upbringing. A *Wright* juror commented:

J: I guess it was maybe the circumstances of defendant's upbringing and his whole life it seemed it was very unfortunate and had he been in a different environment he might not have been the person he was: And that was what gave me a hard time making the decision²⁷⁹

A second juror observed:

J: The big swaying points were that—in his favor—perhaps his lousy upbringing the fact that he was in the juvenile detention centers and nobody cared that was brought up. Some jurors thought that should make his sentence lighter and that he should get a break because his mother didn't care about him.²⁸⁰

Wright's own mother appeared in court and testified on his behalf.²⁸¹

²⁷⁸ 427 S.E.2d 379 (Va. 1993).

²⁷⁹ Interview with Juror VA-1700.

²⁸⁰ Interview with Juror VA-1695.

²⁸¹ Dwayne Wright's clemency petition, filed when his execution date was set, recounted details of Susan Wright's mothering, which the jurors presumably had heard at trial.

Mrs. Wright did not really want another child. She drank through her pregnancy, saturating Dwayne's development with alcohol. She suffered from severe depression and schizoid symptoms. . . . The [Children's Hospital] staff urged Susan Wright to take Dwayne to see a psychiatrist. She did not. [Wright's] teachers at Kingsman Elementary School knew Dwayne had serious problems. Dwayne was academically far behind the other children his age. The "only obstacle" in placing Dwayne in special education was his mother. In spite of repeated urging of the school, Susan failed to consent to the testing requiring for the placement. The school gave up. No consent—no testing—no special ed.

Responding to the question whether any defense evidence or witnesses were influential during the punishment stage of the trial, a juror commented:

J: I guess it would have to be his mother's testimony [S]he also made you sympathetic towards him, just because her demeanor—she was just a total wreck and she told us all these things You know she is talking about, “Oh he was a good boy, he took out the garbage” I guess you could see with a mother like his how he could . . . no, I don't . . . she didn't really help his case at all. It's more a feeling than anything²⁸²

Other jurors had similar reactions towards the mother.

J: The defense's testimony of the mother trying to come on and seem like she was a loving mother when the prosecution made it pretty obvious that she didn't give a damn, really. Uh, that her son finished school at night, where he was, what he was doing, if he had a job, much of anything. So yeah I had a tough time believing when she said “oh-I love my boy” and she cried. Which I'm sure she does—but the way the prosecution tryin' to show it—not at all. It was also the only time the defendant had any emotion at all, because he cried when his mother cried. That was kinda tough.

This juror commented further about the mother's testimony:

J: I remember I almost laughed, a couple of the jurors started to laugh. [Inaud.] she . . . her own attorney caught her lying on, when she got on the stand prior, or in the first phase. He had asked a question and then asked it again and she gave the opposite answer. He repeated the questions like 6 or 7 times to her, almost telling her to say “No,” “[t]he answer is no And remember, he didn't wanna do this, did he.” She was like oh yeah he did. She just, she really looked like she needed a fix before she got there. . . . [T]hat's probably when people felt the worst for him²⁸³

The jurors also recognized that there was an absence of positive role models in his life, indeed, that he was chiefly influenced by and dependent upon his adolescent peers.

J: There was no preacher, no clergy man that came forward to say this is a fine young man he comes to church often. There was no school teacher that came to testify that he was a . . . because he had dropped out of school. So, he had nobody other than . . . the only people that could have done anything for him would all be his own buddies and everything and they were just like him.²⁸⁴

Clemency Petition for Dwayne Allen Wright at 5, *Wright* (No. 920810, 920811).

²⁸² Interview with Juror VA-1700.

²⁸³ *Id.*

²⁸⁴ Interview with Juror VA-1699.

Another factor the defense brought out during trial was the death of Wright's older brother and the impact this had on him.²⁸⁵

J: When the attorney told the story of his older brother being shot out in front of their house and Dwayne as a small child running out and seeing his brother dead—and I guess his brother was quite the role model in his life . . . that got to me because I remember Dwayne wiping tears away at that point. So I guess there was a little more affect than I first thought of.²⁸⁶

Jurors in Wright's case commented on what they seem to have regarded as his inappropriate demeanor or behavior in court. They reported an utter lack of emotion on his part.

J: He sat there—I don't even know if I saw him blink an eye. He had absolutely no expression on his face—his hands the whole time were clenched, like this—his feet were stretched out and they were on the other side of the table because he was big and just sat there like this—staring straight ahead. He wasn't staring into space like he was somewhere else, he was very intent as to what was going on—but he had absolutely no emotion whatsoever.²⁸⁷

Another juror agreed that Wright was emotionless during the trial:

J: Let me tell you how he looked in the entire time of the trial. We are talking about a kid that showed absolutely no emotion for four long days. He just sat there with his feet out underneath the table, hand in front of him, looking down at them for four long days.

Still another juror commented on his lack of emotion. When asked whether Wright looked uncomfortable, bored, or indifferent, the juror responded, “[i]ndifferent, yeah as in nothing. No emotion whatsoever. Indifferent.”²⁸⁸

Despite their recognition that Wright grew up in a dysfunctional family, was grossly neglected during childhood, was deprived of nurturing role models,

²⁸⁵ The clemency petition provides more details that the defense presumably communicated to the jury about the effect his brother's death had on Wright.

[Wright's brother] Daniel did his best to try to fill the void left in Dwayne's life by an absent father and absent mother. . . . [Daniel] helped Dwayne decipher a world that Dwayne was clearly unable to navigate alone. . . . He was the only person to get through to Dwayne. . . . Daniel served as a link through whom the world could be explained to Dwayne and through whom Dwayne could try to articulate his “inner” dialogue with himself. Doctors described this dialogue as an “essential human function.” Daniel played a vital role in compensating for Dwayne's diminished ability to perform this function. . . . One day, around when Dwayne was 11 years old, his brother was fatally shot. Dwayne clung to his brother as he bled to death on the floor. Shortly, after Daniel's death Dwayne began getting into trouble with the law.

Clemency Petition for Dwayne Allen Wright at 5-6, *Wright* (No. 920810, 920811).

²⁸⁶ Interview with Juror VA-1697.

²⁸⁷ Interview with Juror VA-1696.

²⁸⁸ Interview with Juror VA-1695.

was left largely to the influence of unsavory peers, was devastated by the murder of his own brother, and appeared inappropriately emotionless during the trial, the jurors still imposed the death penalty. Why in his case did these adversities, together with Wright's juvenile status at the time of the crime, not yield a life sentence? Why in this case did his jurors discount these considerations?

The simplest answer appears to be that jurors did not think of him as a juvenile. Instead they saw him as an adult—indeed, a frightening adult. Wright was nearing twenty-one years of age by the time of his trial.²⁸⁹ He was physically imposing. At eleven years old he was over six feet tall.²⁹⁰ Perhaps his racial identity as an African-American also played a role. When asked to describe the defendant, one juror responded that he was “a very large black man.”²⁹¹ Another juror identified Wright with someone he knew in a way that made race explicit and emphasized his physical size.²⁹² The juror explained this likeness, saying, “[o]nly because this guy was a tall, pretty muscular black guy with, this is just gonna be what it is, with big feet. And big feet meaning, because he was a big boy”²⁹³

Could jurors' reactions to Wright's physical size, race, and age at trial—the fact that they saw him as “large” and “black” and a “man”—have numbed them to the reality that he was a juvenile at the time of the crime? Were they less ready to see him as a “youth,” and less likely to think of him as similar to juveniles they know personally? Did his size, race, and age at trial make them less receptive to arguments that Dwayne's poor upbringing was responsible in some measure for his crime and more inclined to interpret his courtroom conduct as sullen, surly, and frightening rather than immature or out of touch with the courtroom context?²⁹⁴ Several jurors described him as utterly emotionless despite other jurors' reports of Wright's tears at the mention of his murdered brother and during his mother's appearance on the stand.²⁹⁵ Did his tears fail to register sympathetically because his appearance and demeanor in court fit their image of an adult black predator?

Wright's death sentence also appears to have been the product of two

²⁸⁹ His trial was held in June 1992; his twenty-first birthday was in October of that year. See *Wright v. Commonwealth*, 427 S.E.2d 379, 383 (Va. 1993), *vacated by Wright v. Virginia*, 512 U.S. 1217 (1994).

²⁹⁰ Indeed, his size concerned his elementary school teachers, who thought he was getting too big for elementary school and sought unsuccessfully to convince his mother to place him in a special education program. See Dwayne Allen Wright's Clemency Petition at 5, *Wright* (No. 920810, 920811).

²⁹¹ Interview with Juror VA-1695.

²⁹² Interview with Juror VA-1696.

²⁹³ *Id.*

²⁹⁴ See Bowers et al., *supra* note 235, at 205-26 (providing extensive comparisons of the difference between the perceptions of white and black jurors in the same cases when exposed to the same evidence).

²⁹⁵ See *supra* notes 282-286 and accompanying text.

mistakes the jury made in understanding and following their instructions, one at the guilt stage and one at the penalty stage of the trial. In deciding guilt, the jury apparently disagreed on the essential matter of Wright's premeditation but voted him guilty of capital murder so that the door would not be closed to a death sentence.²⁹⁶ In considering Wright's guilt, it is apparent that the jurors struggled with the issue of premeditation. This is reflected in one juror's response when asked to identify the issues over which the jury disagreed:

J: Disagreed on premeditated murder.

I: The definition of it, or saying is this it, or . . . ?

J: Well saying was this it or not was a matter of interpretation, so I'd have to say yeah the definition. Was he . . . mentally responsible, I just can't think of another way to put it, for what he did. And again I guess to break that down even more, a lot of the jurors felt he had a much, much, worse upbringing then how I felt and that played a role, and with that being the case, how responsible was he? For what its worth, this was about 99% of the voting issue.²⁹⁷

Evidently deadlocked on premeditation and, hence, whether the defendant was guilty of death-eligible capital murder, the jury decided to find the defendant guilty of capital murder in order to keep its punishment options open.²⁹⁸ In response to a further question, this juror revealed how punishment concerns trumped guilt considerations.

I: What do you think was the strongest evidence of the defendant's guilt?

J: Are you asking what was #1 reason we went for capital murder?

I: Yeah.

J: Because that left us the option. For me, and this is what I tried, right or wrong, to mainstream our discussions—the table discussion over deliberation—is if we find for other than capital murder he can get a jail sentence. Capital murder doesn't mean we have to give him a sentence of death. We can't even talk about death because we aren't at that stage. So the main thing was that . . . having a capital murder charge left an open door to charge or to sentence anyway we felt necessary . . .²⁹⁹

It appears that the jurors reached a unanimous capital murder verdict not because they agreed that the killing was premeditated, but because they agreed that they should keep the door open for the death penalty as a punishment option.

A further misunderstanding sealed Wright's fate. Despite the U.S. Supreme

²⁹⁶ Interview with Juror VA-1696.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

Court's holding in *Woodson v. North Carolina* that a conviction of a capital murder charge does not mandate a death sentence,³⁰⁰ some of the jurors became convinced that the law or the judge's instructions required them to impose a death sentence in this case.³⁰¹ One juror was asked,

Q: What was the most influential factor impacting the jury's punishment decision?

J: The rules the judge hands down to a jury—he gives you a blow by blow of what is a capital crime and what constitutes a capital punishment. More than anything it was the judge's charge to the jury. There's no two ways about it.³⁰²

The force of this misconception is revealed in the experience another juror who had difficulty finding the defendant guilty of capital murder.

Q: After the jury found defendant guilty of capital murder, but before you heard any evidence or testimony about what the punishment should be, did you then think defendant should be given death? When did you first think so?

J: I remember thinking well I don't think the death penalty is in order here.

I: How strongly did you think so?

J: I guess very strongly.

I: When did you first think so? Was it any time during the guilt phase or was it later than that?

J: Well, let's see, after hearing all the evidence, after we had decided that he was guilty of capital murder³⁰³

When asked why she was reluctant to go along with the death penalty, this juror replied, "I guess [doubts about] premeditation was one and [the] other was . . . [this] moral or is this right" She was then asked,

Q: What do you remember about the judge's instructions to the jury for deciding what the punishment should be?

³⁰⁰ 428 U.S. 280, 305 (1976) (striking down North Carolina's mandatory death sentence statute).

³⁰¹ See Interview with Juror VA-1695; Interview with Juror VA-1700; see also William J. Bowers et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT* (James R. Acker et al. eds., 2d ed. 2003); William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 *CRIM. L. BULL.* 51, 72-74 (2003) (explaining that jurors still believe that the death penalty is mandatory for capital cases).

³⁰² Interview with Juror VA-1695.

³⁰³ Interview with Juror VA-1700.

J: There was one deciding factor. I'm not sure [what it was] but there was something in the instructions that said if this is the case you have no choice, but to decide on death as punishment. And because we couldn't say that it was not other than that factor, we had to decide on death as the punishment. . . .

I: Did you believe that these guidelines led to the right or wrong punishment?

J: I don't know because of . . . personally, I have a hard time in with what I did but I felt like I did the right thing based on what instructions I was given. . . .

I: So without those instructions in front of you

J: [mumbling] I probably wouldn't have voted that way.³⁰⁴

Governor James Gilmore III denied clemency to Dwayne Wright; Wright was executed on October 14, 1998.³⁰⁵

2. *Commonwealth v. Blount*³⁰⁶

John Blount is the other juvenile defendant who was sentenced to death. His trial was held when he was eighteen years of age, roughly a year after his crime.³⁰⁷ He was the only juvenile defendant for whom more of the CJP jurors believed he was "18 or older" rather than "17 or younger" at the time of the crime.³⁰⁸ He, too, is an African-American, but there are no references to his race or size in the jurors' accounts.

Blount's jurors indicated that he had a dysfunctional family and disadvantaged upbringing and that he was inappropriately hostile or menacing in court. One juror felt pity or sympathy for Blount because of "the way he was raised."³⁰⁹ This juror noted that she "tried to figure out what made him do what he did—his environment, his upbringing. His mother lived in that house and was also involved in drugs—if the mother was involved [he might] think its okay."³¹⁰ Another juror commented on the defendant's family, stating that "their standards were psychopathic in a sense—in a different culture, not ambitious, mother [was] probably indifferent."³¹¹

³⁰⁴ *Id.* These accounts do not, of course, represent the thinking of all Wright's jurors, but when the jury imposes death, the misunderstanding of a single juror who believes the punishment should be life is a fatal mistake.

³⁰⁵ Frank Green, *Juvenile Offender Wright Executed*, RICH. TIMES DISPATCH, Oct. 15, 1998, at A1 (reporting the details of Wright's execution and denial of clemency).

³⁰⁶ 647 A.2d 199 (Pa. 1994).

³⁰⁷ *Id.* at 201-02 (discussing the defendant's background).

³⁰⁸ *See supra* Table 1.

³⁰⁹ Interview with Juror PA-0921.

³¹⁰ *Id.*

³¹¹ Interview with Juror PA-0923.

Blount's courtroom demeanor seemed to have alienated his jurors, most of whom did not think of him as a juvenile who was younger than eighteen-years-old at the time of the crime, as noted above.³¹² The first juror mentioned that she and the other jurors felt disconnected from Blount. She observed that "when you're a juror [they] say that [the] jury is a group of your peers—[we] were not his peers . . . raised in this atmosphere, no one could really walk in his shoes [or] know that lifestyle."³¹³ His jurors also commented on what they saw as Blount's inappropriate demeanor in the courtroom. One juror observed that Blount appeared "angry [and] spent time glaring at the jury, non-reactive."³¹⁴ The same juror described Blount as "an unsympathetic character . . . no feelings of remorse; he did not seem to be 'helpable.'"³¹⁵

Like the *Wright* jurors, some of the *Blount* jurors also felt required by the law to impose a death sentence. Responding to a question about what most influenced her punishment decision, one juror said, "[the] judge's instructions."³¹⁶ This juror added that she felt "uncomfortable with it, [but] knew [they] had to follow the letter of the law."³¹⁷ An interviewer's note on another juror's completed interview instrument read, "this respondent . . . described being 'caught' because of feeling that she had sworn to uphold and follow the law."³¹⁸

John Blount's death sentence was subsequently reversed by the Pennsylvania Supreme Court³¹⁹ because the court found that the trial judge's sentencing instructions could have misled jurors in a manner that caused them to discount his youthfulness in their punishment decision.³²⁰ If properly instructed, the court concluded, "[t]here exists a reasonable probability that the jury's weighing process may have yielded a different result. . . ."³²¹ Any one

³¹² See *supra* Table 1.

³¹³ Interview with Juror PA-0921.

³¹⁴ Interview with Juror PA-0923.

³¹⁵ *Id.*

³¹⁶ Interview with Juror PA-0921.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Blount v. Pennsylvania*, 647 A.2d 199 (Pa. 1994).

³²⁰ The Pennsylvania Supreme Court observed:

[W]hen the trial court instructed the jury that they *must* consider the lack of unanimity regarding findings of mitigating circumstances when determining whether the mitigating circumstances were outweighed by the aggravating circumstances, the trial court interfered with the province of the jury. In making this statement, the trial court, in contravention of the Statute, invaded the exclusive function of the jury to assess what weight each factor deserved within the particular case before them. This instruction had the unavoidable effect of telling the jury that the weight to be accorded to mitigating circumstances was governed by the number of jurors that had found them to exist—i.e., how weighty or serious can the evidence in mitigation be if only a few members of the jury found it.

Id. at 209.

³²¹ *Id.* at 210.

of the jurors that found the mitigating circumstance of age to exist could have compelled a sentence of life imprisonment. It appears that the last quoted Blount juror who felt the law compelled a death sentence fell victim to this misunderstanding.

C. *When the Jury Wants Life and the Judge Imposes Death*

In two of the twelve CJP juvenile cases, *Knotts v. State*³²² and *Flowers v. State*,³²³ the trial judge imposed a death sentence despite a jury vote for life. These were both Alabama cases, where the trial judge has the statutory authority to override the jury sentencing decision.³²⁴ Did the trial judge see something the jury missed in these cases, or did the jury give greater weight to things the judge took less seriously? If the jurors gave decisive weight to factors the judges discounted or ignored, are these things at the core of community conscience about the juvenile death penalty? Are they precisely what jurors emphasize as reasons not to impose the death penalty in other juvenile cases?

The tape recording of the Alabama cases was less complete than in other states. For *Knotts*, the interviews were tape recorded only for the open ended questions, not throughout the entire interview. In the *Flowers* case, the interviews were not tape recorded, so only the interviewers' on site transcriptions of the jurors' responses are available. Since the verbatim responses of jurors in the *Knotts* case are available, we will make it the chief focus of this inquiry.

1. *Knotts v. State*³²⁵

As in the other juvenile cases we have examined, the defendant's dysfunctional family life and disruptive upbringing were predominant in juror's accounts. Indeed, one juror began her account of the crime with a description of the defendant's background; it served as a preamble to her story of the crime.³²⁶

J: William Knotts was, definitely had a very troubled childhood. Growing up with an abusive father who was an alcoholic. He had run away from home several times to try and get away from the situation. They found him I think in a church or at city hall or a court room or something like that crying when he was about 11, 12, or 13 and he asked not to be put back in the home. So they placed him in a whole series of

³²² 686 So. 2d 431 (Ala. Crim. App. 1995).

³²³ 586 So. 2d 978 (Ala. 1991).

³²⁴ ALA. CODE § 13A-5-47(e) (2003) (placing ultimate determination of whether to impose the death penalty with the trial judge, although the jury must give a non-binding recommendation).

³²⁵ 686 So. 2d 431.

³²⁶ Interview with Juror AL-1833.

concilliary [sic] care, foster care type situations. I really think the H.R. blew it, they moved him around an awful lot. Obviously that [sic] the child had a lot of problems. He was probably, attention deficit disorder, had some emotional problems, hyperactive, like that type of situation. He was being passed around. Several things, finally he had um, he was at one care facility and they had a long list of what they called infractions, but most of them were things like what I would called kids stuff, like talking to other kids after curfew, and things like that. Well, anyway, he got into one situation uh, he threw some chairs or something in the rec. room because he got mad so they transferred him over to Mount Meigs.³²⁷

This juror was haunted by the failure of authorities to provide much needed care and treatment for young Knotts as indicated in her response to the following question.

Q: Is there anything about this case that sticks in your mind, or that you keep thinking about?

J: I really think that this is a case where society was culpable in this crime. To me that really stuck in my mind. That the, that the authorities really botched it, it should have never happened. One, the child should have gotten good counseling, should have been put in a permanent facility, so there was some permanence in his life. You know what I mean, they were trying to get him in King's Ranch. But he should have been placed in one place and kept in one place and they worked on him in one place, rather than when he did something, just some minor little cut up, that didn't go by their rules, they transferred him. Uh, to me that was the thing that stuck in my mind. . . . The authorities that are taking of thirteen year olds should be more professional. And that stuck in my mind, that the witnesses that they had for the people that were in charge with him while he was a juvenile. I was not impressed with them.³²⁸

Another juror was especially troubled by Knotts' dysfunctional family and his parents' failure to care for him, to the point where they did not appear at the trial for his life. When asked what stuck in her mind, this juror responded:

J: His mother and father were not, I know that children can do a lot of wrong things, but what in the world could make his momma and daddy not be there for him, you know I cannot imagine that. I have children and I cannot imagine not being there for my children and I don't know what they said that though the mother felt she did what the husband wanted her to do. He controlled everything. They showed them in counseling sessions and he'd try to be a good guy but it was very evident that she was . . . afraid of him according to the testimony he abused her. The

³²⁷ *Id.*

³²⁸ *Id.*

husband abused the mother. I just can't imagine them not being there.³²⁹

This juror reported further that the father also abused Knotts and his sister. From the interviewer's written transcription of comments at the end of a question about the respondent's thoughts or feelings about the defendant, the juror noted that the jury "[h]eard a lot after his lawyer brought out evidence about his home life. Abused by father. Sister sexually abused."³³⁰

This juror's comments also reveal that the jurors watched the defendant closely during the trial in an effort to understand his thinking and motivation. She said that the discussion during guilt deliberations focused a great deal on the defendant's reactions during the trial.³³¹

J: He would, they would be talking, asking questions and its like we were all trying to look at his face to see if there were any emotions. He would never make eye contact, never would he, looked down for the biggest part of the time he, we watched how he reacted when different people [testified] we talked about that a great deal.³³²

When the questioning moved to the jury's punishment decision, the first juror began her account with a telling contrast between William Knott's appearance during the trial and his appearance a year and a half earlier on his video-taped confession.

J: [He spent] maybe a year and a half, maybe two years in jail before the trial. It was quite a period of time because he was, I really can't remember, I just know that he was much older from when he had actually committed the crime, cause he changed, his appearance. He'd become a man, he was a boy before, when we saw then, when we saw the videotape of his confession, he was like a little boy who had, messed up. But I did . . . a totally different human being than that was at the trial. It was really like, they had put him on some kind of drug.³³³

This juror then turned to the jury's discussions and their role in their punishment decision.

J: We talked about humane. We talked about being pre-meditated, we went back over a lot of the evidence and read more things about him, about his behavior and his childhood. The records that they produced from the other facility that he had been to played a large part, a tremendous part in our verdict for life without parole.³³⁴

Another juror recounted:

J: We looked at, spent a long time looking at a document that was not

³²⁹ Interview with Juror AL-1832.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

entered, that was introduced as evidence but was not really brought out much in court. That was his medical history which was surprising. I don't know, but it looked like it was more than four or five hundred pages. One of the jurors was involved with special ed, so she picked up real quick from looking at the medical record why she thought that, why she thought, why he was doing what he was doing, when he was, you know, a lot younger, and it really looked like that, he wasn't getting the kind of treatment he was supposed to be getting.³³⁵

This juror was then asked whether there was anything more about the jury that would help explain why it reached its decision. She responded:

I really believe that his [b]ackground played a big part in it especially see there were, there were two, three school teachers on this jury who dealt with children similar to him everyday. They said a lot of things that influenced us, so that I think the child's, the boy's background had a lot to do with our decision.³³⁶

In spite of the jurors' belief that Knotts' age, immaturity, dysfunctional family, and disruptive upbringing warranted a life sentence, the trial judge nonetheless imposed the death penalty and the Alabama Court of Criminal Appeals upheld the judge's sentence.³³⁷ The appellate court explained: "[T]he trial court found the existence of two aggravating circumstances and five mitigating circumstances. It . . . weighed the aggravating circumstances against the mitigating circumstances, and finding that the aggravating circumstances outweighed the mitigating circumstances, sentenced the appellant to death."³³⁸

The trial judge appears not to have disagreed with the jurors about the mitigation. As mitigating factors, the judge found two statutory factors. First, "that the appellant has no significant history of prior criminal activity, and [second,] that the appellant was 17 years and 11 months old at the time of the commission of the crimes."³³⁹ He also found three non-statutory factors present:

[First] that the appellant comes from a dysfunctional family with an alcoholic, abusive father and that this background had a severe effect on him; [second] that he is impulsive and immature for his age, and he never learned to adequately control his emotions; and [third] that his entry into the state juvenile system began as a runaway from a dysfunctional home and not because of delinquent acts.³⁴⁰

³³⁵ Interview with Juror AL-1833.

³³⁶ Interview with Juror AL-1832.

³³⁷ *Knotts v. State*, 686 So. 2d 431, 484 (Ala. Crim. App. 1995).

³³⁸ *Id.* at 483.

³³⁹ *Id.*

³⁴⁰ *Id.* Trial judges should consider a defendant's character and upbringing in addition to the factors explicitly enumerated in the statute. ALA. CODE § 13A-5-52 (2003).

The substance of Knotts' mitigation was not in dispute. Indeed, this summary reflects much of what the jurors said about the defendant, his background, and his upbringing. So what tipped the balance for death in the trial judge's mind? According to the appellate decision, the trial judge believed "(1) that the capital [offense was] committed while the defendant was engaged in the commission of or attempted commission of a burglary and a robbery, and (2) that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses."³⁴¹

The obvious question to ask is why these two aggravators outweighed the five mitigating factors in both the trial judge's and appellate court's judgment. Was the robbery or burglary so outlandish or remunerative to the defendant as to be exceptionally weighty as aggravation? With respect to this aggravator, the appeals court simply comments that it is present in many other cases that get death sentences in Alabama while ignoring the pivotal question of whether these other cases had comparable mitigation.³⁴²

The appellate court paid more attention to the "heinous, atrocious or cruel" aggravator, though the court again made no effort to assess its weight relative to the mitigating factors in this case.³⁴³ It sought chiefly to address the defendant's challenge that this factor was not in fact an aggravator in this case.³⁴⁴ It concluded, "we find no merit in the appellant's contention that the evidence was insufficient to find the existence of this aggravating circumstance."³⁴⁵

Our interviews indicate that the jury considered at length the question of the heinous, atrocious, and cruel character of Knott's crime. They considered the fact that he did not harm the victim's two-year-old child and that the victim's death was relatively quick and not purposely protracted.³⁴⁶ They compared this crime to others they regarded as heinous and concluded this one was not.³⁴⁷ When asked to describe what the jury did to reach its punishment

³⁴¹ *Knotts*, 686 So. 2d at 483.

³⁴² *Id.* at 484 (observing that "[w]e take judicial notice that similar crimes are being punished capitally throughout this state").

³⁴³ *See id.* at 483 (accepting without an independent evaluation the trial judge's decision that the aggravating factor had more weight than the mitigating factors).

³⁴⁴ To justify his determination that the crime was heinous, atrocious, or cruel, the trial judge pointed to the premeditation of the murder, the time that Knotts spent planning and waiting to conduct the crime, the pain suffered by the victim, the fact that the victim's child witnessed the murder, and the fact that the victim did not die until approximately one minute after the final gunshot. *Id.* at 447.

³⁴⁵ *Id.* In affirming the presence of this aggravator, the court purported to "adhere to the standard announced in *Ex parte Kyzer*: the particular offense must be one of those 'conscienceless or pitiless homicides which are unnecessarily torturous to the victim.'" *Id.* at 446 (quoting *Ex parte Kyzer*, 339 So. 2d 330, 334 (Ala. 1981)).

³⁴⁶ Interview with Juror AL-1833.

³⁴⁷ *Id.* (describing other criminal acts which the juror would consider as heinous, atrocious, and cruel).

decision, one juror recounted these considerations:

J: There was also some discussion about whether the [defendant] actually shot at the child. The jury didn't believe . . . the prosecution's contention that he did. There was also a long discussion again about the physical evidence, and about how quick death occurred and whether it was, you know, and there was also some discussion about what was heinous, atrocious, and cruel. And there was some discussion about, for us being, you know, from the kind of part of society that would be on the jury, any murder is heinous, atrocious and cruel. But it's not, to me, it, it's a discretion, it's not like a Charlie Manson. You know, it wasn't like that other case where the guy goes and kills the people and carves his initials in their heads and chops their heads off. . . . So to us, even though there was a murder, a senseless murder, it was not like he held the woman and kidnapped her, and, you know for hours or something like that in the house, or even if he just tied her up. It wasn't like that, she walked in the house and boom he shot her kind of thing.³⁴⁸

It seems clear that the death sentence imposed by the trial judge, contrary to the jury's recommendation, was not owing to the absence of mitigation in this case.³⁴⁹ Indeed, in his sentencing opinion, the judge affirmed the essence of the juror's sentiments as to mitigating factors as expressed in their interviews. In that sense, the judge's opinion, even if not his ultimate decision, confirms their judgments. The differing outcome is a result of the weight the judge and the jury assigned to the aggravation and mitigation or the meaning they attributed to this evidence. For the judge, the mitigation carried relatively little weight; for the jury it was decisive. The jurors were explicitly conscious of the seventeen-year-old defendant as conveyed in his video-taped confession. Their interviews make it clear that his family experience, his treatment in juvenile facilities, and his immaturity, impulsivity, and other psychological attributes made the death penalty not just less acceptable but unacceptable to the jurors as members of the community whose conscience the punishment is supposed to mirror.

2. *Flowers v. State*³⁵⁰

Clayton Flowers was the other juvenile defendant sentenced to death by the trial judge after his jury voted for a life sentence.³⁵¹ Flowers, who was fifteen-years-old at the time of the crime, was convicted of killing a female victim during the course of sodomy.³⁵² In *Flowers*, five jurors were interviewed, but

³⁴⁸ *Id.*

³⁴⁹ See *Knotts*, 686 So. 2d at 483 (observing that the trial court found five mitigating factors).

³⁵⁰ 586 So. 2d 978 (Ala. Crim. App. 1991).

³⁵¹ *Id.* at 979.

³⁵² *Id.*

the interviewer did not use a tape recorder, so only the interviewer's usually brief synopses of jurors' responses as contemporaneously transcribed in the course of the interview are available. This restricts our ability to convey the jurors' thought process in their own words, but it does provide us with a picture of how the jurors thought about the crime and the defendant, and how they reached their sentencing decision.

The jurors reported that no witnesses were called at the penalty stage of the trial. One juror commented that "no evidence was given on punishment. The attorneys both spoke to the jury and then the judge gave instructions."³⁵³ The jury then retired to deliberate and jury deliberations lasted about fifteen to twenty minutes. The jury then voted eleven to one for a life sentence. When asked what the most important factor in the jury's decision was, one juror succinctly responded, "He was too young for the death penalty."³⁵⁴ In fact, the prospect of a death sentence for someone who was fifteen-years-old at the time of his crime provoked some jurors to consider not finding Flowers guilty of capital murder. A juror indicated that "[a] couple of jurors did not want to find him guilty because they were hesitant to either give him the death penalty or life without parole because of his age."³⁵⁵ Another juror put it differently: "Some of the jurors knew that he was guilty but were trying to find a loophole to find him not guilty because of his age."³⁵⁶

Like the judge in *Knotts*, the judge in the *Flowers* case had no way of knowing the critical role the defendant's age and adverse life experiences would play in the jurors' decisionmaking. Clearly, the judge's sentencing decision was not only out of touch with the community conscience as reflected in the thinking of Flowers' jurors, but also as articulated by the U. S. Supreme Court three years earlier when it banned the death penalty for fifteen-year-olds in *Thompson v. Oklahoma*.³⁵⁷ Relying on *Thompson*, the Alabama Court of Criminal Appeals vacated Flowers's death sentence.³⁵⁸

Knotts and *Flowers* tend to confirm the observation that juries are unrivaled by judges as markers of community conscience—of what constitutes cruel and unusual punishment for juvenile defendants in murder cases. Judges concerned with the law and matters of legal refinement may find aggravation where jurors do not. In these override cases, however, these judges appear to have weighed less heavily a juvenile defendant's failure to achieve maturity in society and to be less than fully responsible and blameworthy—the factors that make the death penalty unacceptable to jurors in such cases.

³⁵³ Interview with Juror AL-1858.

³⁵⁴ Interview with Juror AL-1857.

³⁵⁵ Interview with Juror AL-1856.

³⁵⁶ Interview with Juror AL-1860.

³⁵⁷ *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion) (vacating the juvenile defendant's death sentence because he was under the age of sixteen at the time he committed the offense).

³⁵⁸ *Flowers v. State*, 586 So. 2d 978, 979 (Ala. Crim. App. 1991).

These judges seem less concerned with inadequate childhood socialization caused by family dysfunction and a disruptive childhood, with vulnerability to peer pressure, and with the defendant's immaturity and impulsivity. These concerns, however, are shared by community members called upon to serve as jurors in capital cases. Acting alone, perhaps the judge is deprived of community soundings on matters of conscience that jurors discuss in the jury room, soundings that bring the decision out of the domain of a legal exercise and into the realm where the community's moral conscience comes to bear.³⁵⁹

Beyond the statistical patterns shown in Part III, the accounts examined here in Part IV add further perspective on jurors' thinking and decisionmaking when the defendant is a juvenile. Not only do these narratives confirm the influence of family dysfunction and lack of maturity on the juries' deliberation, but they also reveal that jurors interpret these circumstances as indications that the juvenile is not fully responsible for his crime. The jurors implicate his family as partly responsible, saying they deprived the defendant of an upbringing essential to be a mature and fully responsible citizen and that this is evident in his immature and inappropriate behavior. Some even wish that his family could be on trial as co-defendants.³⁶⁰ The jurors speak of the defendant as "just a kid"³⁶¹ and "too young for the death penalty."³⁶² It is clear that the jurors see the juvenile defendant in a qualitatively different light than the adult defendant, one which casts the death penalty as a fundamentally unacceptable punishment for a juvenile.

The two exceptions in which jurors voted for death in juvenile cases are consistent with this interpretation. As with the jurors who voted for life, the jurors in these two cases saw the defendant as seriously deprived of a functional family environment. Yet, the pro-life influence of this circumstance was trumped by the defendant's intimidating adult appearance in court,³⁶³ by the jury's uncertainty about his youthfulness at the time of the crime,³⁶⁴ and by the jury's false impression that the law "required" them to impose death in these cases.³⁶⁵

The two anomalies where judges did not sentence in accord with the jury's life recommendation were also cases in which jurors were greatly concerned about the defendant's upbringing. The judges decided to impose death for

³⁵⁹ In their classic study of the American jury, Kalven and Zeisel found that in capital cases judges were more likely to impose a death sentence than juries and that the judges believed this was a result of "values" jurors held. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 436, 495 (1966). The *Knotts* and *Flowers* cases show that this value discrepancy is present in capital cases with juvenile.

³⁶⁰ See, e.g., Interview with Juror KY-0720.

³⁶¹ Interview with Juror GA-0384.

³⁶² Interview with Juror AL-1857.

³⁶³ See *supra* notes 291-293, 314-315 and accompanying text.

³⁶⁴ *Id.*; see *supra* Table 1 and accompanying text.

³⁶⁵ See *supra* notes 302-304, 316-318 and accompanying text.

reasons that seemed important to them, but were out of touch with the jurors' sentiments in these cases and with what appears from the bulk of interviews in juvenile cases to be the community conscience in such cases. One wonders, had the judges known what the jurors thought in these two cases, whether they would have ignored the jury's recommended sentence.

V. DRAWING THE LINE AND CONFIRMING THE EXEMPTION

We turn now to two concerns of direct legal relevance with respect to death as punishment for juvenile defendants. One is the question of where the line should be drawn in terms of age for capital punishment eligibility, the question first addressed by the U.S. Supreme Court in *Thompson* and *Stanford*. The second asks whether the sentencing behavior of jurors in juvenile cases is comparable to that of jurors in cases of the mentally retarded where *Atkins* has established a standard for exemption from the death penalty. We examine here (A) how jurors' punishment decisions in cases with defendants of specific ages compare with their decisions in juvenile cases, and (B) how their punishment decisions in cases with juvenile defendants compare with their decisions in cases of the mentally retarded.

A. Defendant's Age and the Imposition of Death

In the CJP sample, juvenile defendants received death sentences in two of twelve cases. This represents 16.7% of these cases, substantially lower than the 60.0% of the adult cases.³⁶⁶ Might this huge gulf in the likelihood of a death sentence between cases with juvenile and adult defendants actually mask a more progressive or continuous change in the likelihood of a death sentence as defendants get older year by year? Is it realistic to suppose that jurors draw a bright line between seventeen- and eighteen-year-olds? More likely, they consider the defendant a fully competent adult as a matter of growing independence and maturity that is strongly associated with chronological age, but not something present on a defendant's eighteenth birthday and absent the day before.

In what way is the imposition of a death sentence associated with the defendant's age? Is there a sharp break between juvenile and adult defendants or does reluctance to impose a death sentence become progressively stronger with each step down the age ladder? To answer this question, we look at the death sentencing of defendants of specific ages as reported by the jurors.³⁶⁷

³⁶⁶ See *supra* Table 1.

³⁶⁷ This represents a shift from defendant's age as confirmed by official records, see *supra* Tables 1-7, to defendant's age as perceived and reported by the respective jurors. We employ jurors' estimates although they are imperfect proxies, see *supra* Table 1, since we do not have official data on the ages of most defendants. Note that jurors' estimates of the defendant's age may have an advantage over the defendant's actual chronological age (when the two are not the same) to the extent that jurors' perceptions are what will influence their thinking about the defendant and their decisionmaking in his case.

Table 8: Percent of Jurors Saying the Death Penalty Was Imposed by Their Reports of the Defendant's Age

Reported Age	Percent in Death Cases	Number of Jurors
15	0.0	4
16	7.7	13
17	24.1	29
18	34.3	35
19	55.2	58
20	56.9	130
21	53.6	56
22	56.8	44
23	55.0	40
24	57.1	35
25-29	57.9	271
30-34	65.2	204
35-39	59.3	81
40-70	62.9	167
All Ages	56.9	1171

Table 8 shows the percent of jurors saying a death sentence was imposed by their reports of the defendant's age, year by year for ages fifteen through twenty-four, in five year intervals from twenty-five through thirty-nine, and for all defendants forty years or older.

Death sentencing drops decisively with age eighteen and again at seventeen and younger from an extraordinarily constant level for defendants of more advanced ages. For those nineteen and older, the likelihood of a death sentence is remarkably unrelated to the defendant's age. Indeed, for each of the years nineteen through twenty-four and the interval twenty-five to twenty-nine years, the percent saying a death sentence was imposed falls between 53.6% and 57.9%; the three percentages for defendants thirty years and older are only slightly higher, between 59.3% and 65.2%.³⁶⁸ The dramatic break in this uniformity comes between ages nineteen and eighteen where the death sentencing rate drops 20.9 percentage points and between eighteen and seventeen or younger where the drop is another 16.9 points.³⁶⁹ In other words,

³⁶⁸ The failure of death sentencing to decline gradually down to nineteen years of age may reflect the tendency of jurors to see younger defendants as more likely to be released from prison and to be dangerous in the future, factors that may offset the mitigating effect of youthfulness among adult defendants.

³⁶⁹ The 25.3 percentage-point death sentencing drop of those estimating eighteen-years-old from those who say nineteen or older is statistically significant at $p=.0114$; the 42.2 point drop of those who say seventeen or younger from those saying nineteen or older is

there is a precipitous drop in the likelihood of a death sentence for youthful defendants, but it does not coincide precisely with the difference between eighteen- and seventeen-year-olds, where the line is traditionally drawn between juveniles and adults. It begins instead with defendants who jurors believe to be age eighteen. In effect, eighteen-year-old defendants are midway between the uniformly high death sentencing of 55.2% for defendants presumed to be nineteen and older and the very low level of 17.4% for those perceived to be seventeen and younger.

The pattern in Table 8 suggests, on its face, that the death dip associated with defendants' juvenile status extends to some, if not many, eighteen-year-olds. Jurors may see many defendants who are eighteen-years-old in the same light as younger defendants whom they are very likely to spare.³⁷⁰ That is, these data clearly point to the possibility that eighteen-year-olds, or at least many of them, qualify in jurors' minds for the same exemption from the death penalty that they would give to younger defendants.³⁷¹

B. *Juveniles, the Mentally Retarded, and the Imposition of Death*

In *Atkins v. Virginia*, the U.S. Supreme Court ruled that the mentally retarded could no longer be sentenced to death.³⁷² When the CJP interviews were being conducted, however, it was constitutionally permissible to execute the mentally retarded. Thus, the interview protocol included a question asking jurors whether the defendant in their case was mentally retarded. Based on jurors' responses to this question and to the question that asked whether the defendant was under eighteen at the time of the crime,³⁷³ we are able to determine how likely it was for jurors to impose death on defendants who they

significant at $p=.0008$. The p -values have been estimated with adjustment for a clustering of jurors by trial. See *supra* note 161.

³⁷⁰ See Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES, July 6, 2003, § 6 (Magazine), at 32 (chronicling the story of how an Indiana jury, once poised to impose death upon a juvenile defendant who had committed a "coldhearted" murder, was swayed to spare the youth's life).

³⁷¹ Since drawing a bright line between seventeen and eighteen years of age would seem to exclude many eighteen-year-old defendants who jurors appear to regard as not sufficiently independent or mature for capital punishment, a rebuttable presumption that eighteen-year-old defendants are not mature enough to be executed for their crimes might be appropriate. This could be a presumption that the state would have to rebut beyond a reasonable doubt before a unanimous jury. Only then could the jury make a life or death sentencing decision. For a further elaboration on how such a presumption would operate, see Judge Wolff's concurrence in *Simmons v. Roper*, 112 S.W.3d 397, 416-18 (Mo. 2003) (Wolff, J., concurring). See also Joseph L. Hoffmann, *On the Perils of Line Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229, 271-72 (1989) (arguing that a presumption-based system is superior to the adoption of a bright line rule).

³⁷² 536 U.S. 304, 321 (2002) (holding that the execution of mentally retarded criminals is unconstitutional).

³⁷³ This is shown for juvenile defendants in Table 1.

Table 9: *Percent of Jurors Giving Death Sentences for (A) Defendant Who Was Under 18 at Time of the Killing and (B) Defendant Who Was Mentally Retarded*

	<u>Under 18</u>		<u>Mentally Retarded</u>	
	Percent in Death Cases	Number of Jurors	Percent in Death Cases	Number of Jurors
Yes	17.5	57	38.2	55
No	59.1	1063	58.6	1072
Not Sure	60.0	25	35.0	20

believed to be mentally retarded and defendants who were under eighteen at the time of their crime. This comparison appears in Table 9.

Juvenile status is far more likely than mental retardation to keep capital jurors from sentencing a defendant to death, as the death dip in juvenile cases is more than twice that in cases of the mentally retarded. In particular, the reduced level of death sentencing in cases where jurors say the defendant was less than eighteen years of age at the time of the crime is 17.5% as opposed to 38.2% among jurors who said the defendant was mentally retarded.³⁷⁴

In jurors' eyes, then, juvenile defendants are far less deserving of death than mentally retarded defendants. In other words, the thinking and behavior of citizens who serve as capital jurors tells us that when they are making the life or death decision, juvenile status is a more decisive factor than mental retardation in causing them to reject the death penalty. The community conscience, as embodied in the thinking and sentencing decisions of these capital jurors, rejects the death penalty for juvenile defendants even more decisively than it does for the mentally retarded.

VI. CONCLUDING PERSPECTIVE

A. *The Eighth Amendment Challenge: Exemption versus Mitigation*

Juvenile status is almost universally accepted among nations of the world as an exemption from capital punishment, not merely a mitigating consideration in capital sentencing.³⁷⁵ The United States is the principal exception; the U.S.

³⁷⁴ The death sentencing drop owing to juvenile status is significant at $p=.0001$ as compared to $p=.0154$ for the drop owing to mental retardation with adjustment for sampling clustering by trial. See *supra* note 161. The true difference may be even greater owing to the failure of many jurors to recognize that a mentally retarded defendant is actually retarded, and the tendency to see unrecognized symptoms of retardation as signs of dangerousness. Only about five percent of the jurors in the CJP sample believed the defendant to be mentally retarded. The percent of mentally retarded defendants on death row is estimated to be at least twice that level. *Atkins*, 536 U.S. at 324 (Rehnquist, C.J., dissenting) (stating that, of the 3600 death row inmates in the United States, about ten percent are mentally retarded (citing Raymond Bonner & Sara Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, N.Y. TIMES, Aug. 7, 2000, at A1)).

³⁷⁵ All other nations have abandoned the death penalty for juvenile offenders, with only

Supreme Court has interpreted the Constitution to exempt only persons fifteen or younger at the time of their offense.³⁷⁶ In various states, the defendant's age is sometimes an exemption and sometimes mitigation.³⁷⁷ Aside from the twelve states that do not have capital punishment, sixteen states and two federal jurisdictions (both civilian and military) disallow the death penalty for those younger than eighteen-years-old at offense, five do so for those younger than seventeen, and seventeen jurisdictions are bound only by the constitutional limit, which bars the execution of those younger than sixteen years of age at offense.³⁷⁸ Many states have enacted statutes that make the defendant's age an explicit statutory mitigating consideration apart from having a specific age-level exemption. In nine states, "youth" or "youthfulness" are designated as mitigating considerations and in another seventeen states the less definite term "age" is used to identify considerations that may be mitigating.³⁷⁹

The critical question is when should age be an exemption rather than mitigation—at what age are defendants too young to be executed? According to the Supreme Court, the answer is found in the "conscience of the community." Arguably, this conscience is best reflected in the thinking and decision-making of those members of the community who are called upon to bring that conscience to bear in making the sentencing decision in juvenile cases. If capital jurors are markedly less willing to impose the death penalty upon defendants below a given age, this is a good indication of the age at which defendants should be exempt from execution. If jurors are equally or even less willing to impose death upon defendants of that age than upon defendants who are exempt from execution on other grounds, such as mental retardation, this is further confirmation of the exemption age.

The evidence from capital jurors is clear on these accounts. Jurors are drastically less likely to sentence defendants to death when their crimes were committed at ages seventeen or younger. Death sentences are about one-

the United States continuing this practice. See STREIB, *supra* note 13. Of the last seven juvenile offender executions since 2000, five occurred in the United States. *Id.* The other two officially sanctioned executions took place in Iran and the Democratic Republic of the Congo. AMNESTY INT'L, THE EXCLUSION OF CHILD OFFENDERS FROM THE DEATH PENALTY UNDER GENERAL INTERNATIONAL LAW 5 tbl. (2003).

³⁷⁶ *Thompson v. Oklahoma*, 487 U.S. 815, 838 (2003) (plurality opinion).

³⁷⁷ See *Bowers*, *supra* note 139, at 1046-50 (describing the great variety of death penalty statutes that are used in the different states).

³⁷⁸ See STREIB, *supra* note 13, at 7 (summarizing the minimum ages for capital punishment by jurisdiction as of March 15, 2004).

³⁷⁹ See James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. L. BULL. 299, 331-32 (1994). Additionally, four jurisdictions require a capital felon be under eighteen at the time of the murder in order to invoke the statutory age mitigating circumstances. See LOUIS J. PALMER, JR., *THE DEATH PENALTY: AN AMERICAN CITIZEN'S GUIDE TO UNDERSTANDING FEDERAL AND STATE LAWS* 122 (1998) (listing the types of statutory mitigating circumstances).

quarter as likely for defendants who are seventeen or younger than for the nineteen or older defendants.³⁸⁰ The data show, in fact, that death sentencing drops off with declining age in two steps: eighteen-year-olds fall midway between the younger and older defendants. This two-step pattern suggests that, for many jurors, eighteen years of age is a point of ambiguity between juvenile and adult status. In roughly half of the cases with eighteen-year-old defendants, jurors may associate them with those seventeen or younger and in the other half with those nineteen or older.

Additionally, defendants thought by jurors to be seventeen or younger at the time of their crimes are only half as likely to receive a death sentence as those thought by jurors to be mentally retarded. This makes youngsters seventeen or younger decidedly less likely to receive a death sentence than those now exempt from execution by *Atkins*. Indeed, even jurors who believed the defendant was eighteen-years-old were no more likely to impose the death penalty than were jurors who believed that the defendant was mentally retarded. The greater reluctance of jurors to impose death sentences upon juveniles than upon the mentally retarded may explain why there appear to be only one-fifth as many juveniles as mentally retarded persons on death row. That is, a known two percent of death row inmates were younger than eighteen at the time of their crimes as compared to ten percent thought to be mentally retarded.³⁸¹

B. *The Essence of Community Conscience: Reduced Responsibility*

The statistical comparisons of jurors who served on cases with juvenile and adult defendants show, and the accounts of jurors in the juvenile cases confirm, that the essential factor underlying a life rather than a death sentence is the reduced responsibility jurors attribute to the juvenile defendant. This evidence may be summarized under two broad themes that encompass what we have demonstrated here. One pertains to the defendant's background and one to his foreground. The core of the background theme is family dysfunction and the ways in which jurors come to see the defendant's family as responsible in part for what led to his crime and hence for the crime itself. The core of the foreground theme is the defendant's immaturity, incapacity, and incompetence to be a fully responsible person in society. The implication is that juvenile status is not simply a mitigating consideration, but a factor, similar to mental retardation, that entails reduced responsibility for the crime.

³⁸⁰ Moreover, in the two of twelve juvenile cases where jurors did vote for death, their verdicts appear to have been flawed by the misconception that the death penalty was required by law. See *supra* notes 300-305, 316-321 and accompanying text.

³⁸¹ For the national estimate of mentally retarded on death row, see Raymond Bonner & Sara Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, N.Y. TIMES, Aug. 7, 2000, at A1. This article was cited by Chief Justice Rehnquist in his *Atkins* dissent. *Atkins*, 536 U.S. 304, 353 (2002) (Rehnquist, C.J., dissenting). For the known statistics on death row inmates who were juveniles at the time of their crimes, see STREIB, *supra* 13, at 4.

1. Background: Family Dysfunction

We have a wealth of evidence that many jurors see the juvenile defendant's family background or upbringing as at the root of his crime. Themes that most distinguish between juvenile and adult cases in the statistical data include concern about the absence of a loving family, child abuse, and poverty,³⁸² feelings of anger and rage toward members of the defendant's family,³⁸³ and discussion of family background and upbringing in jury deliberations on punishment.³⁸⁴ The qualitative data are replete with jurors' castigation of defendants' families in juvenile cases for various kinds of abuse and neglect, as reflected in the following comments of jurors in juvenile cases:

"[T]hey raised him like an animal. He had no love."³⁸⁵

"I don't think this child had any structuring or nurturing at all."³⁸⁶

"[W]hat he endured most as a child [was] severe neglect."³⁸⁷

Neglect is often implicated in the failure of the defendant as a youngster to get needed attention for adequate development and adjustment in relationships with others. Jurors in cases with juvenile defendants also implicate the defendant's family in his crime, attributing to them responsibility for his criminal potential that is ultimately and tragically realized in the killing:

"I just couldn't see why they couldn't prosecute the family along with [the defendant]."³⁸⁸

"You cannot be hanging someone when you see the circumstances that he came from."³⁸⁹

2. Foreground: Cognitive, Emotional, and Social Immaturity

From the statistical data, we know that jurors in juvenile cases are far more likely to see the defendant as someone who does not know his place in society and, at the extreme, as someone who lacks basic human instincts.³⁹⁰ Being a misfit or failing to know one's place in society is manifested in a host of improper and immature courtroom behaviors.³⁹¹ Jurors identify several kinds of immaturity in the interviews. One is outright cognitive dysfunction—some jurors observed that the defendant just wasn't right or "he was not as mentally

³⁸² See *supra* Table 5.

³⁸³ See *supra* Table 6.

³⁸⁴ See *supra* Table 7.

³⁸⁵ Interview with Juror GA-0382.

³⁸⁶ Interview with Juror GA-0384.

³⁸⁷ *Id.*

³⁸⁸ Interview with Juror KY-0720.

³⁸⁹ Interview with Juror IN-0461.

³⁹⁰ See *supra* Table 5.

³⁹¹ See *supra* Table 7.

equipped as you and I.”³⁹² Another is emotional or psychological immaturity—when the defendant acts improperly childish or otherwise inappropriately. Jurors offered, for example, the following descriptions: “he seemed like a child, ya know, he was very immature,”³⁹³ “he was too young and too naïve,”³⁹⁴ “he didn’t know the seriousness of what was happening,”³⁹⁵ and “he couldn’t hold himself from laughing like he was still a kid.”³⁹⁶ Inappropriate peer fixation, influence, and dependency also figure in this foreground of immaturity. These aspects of immaturity convince jurors that the defendant cannot be treated as a fully responsible individual for whom the death penalty would be acceptable as punishment.

These findings of family irresponsibility and defendant immaturity speak fundamentally to the “community conscience” criterion of the Eighth Amendment. They reveal the operation of the community conscience in a way that uncovers not just the behavior of jurors in voting for a life or death sentence, but also reveals their sentiments about the defendant, the crime, and the appropriateness of the punishment—the essential ways in which jurors think about the juvenile defendant’s responsibility for what he has done and, hence, what punishment he deserves.

CONCLUSION

As we have argued, no single indicator of evolving standards of decency or of community conscience with respect to the juvenile death penalty, is perfect; each indicator has limitations.³⁹⁷ The actions of legislatures may be faulty as an indicator of community conscience when, for example, the public’s fear of crime overrides more reasoned community sentiments in the enactment of repressive laws. The views of expert professionals and other interest groups may be informed by pertinent scientific evidence, but they are typically unrepresentative of the community whose conscience is at issue. The results of opinion surveys are hypothetical in the sense that respondents are asked for their opinions in the abstract, without grounding in the reality of a particular case or the experience of having made the life or death punishment decision. Mock jury experiments have the advantage of presenting the facts of a particular case and isolating the effects of a given factor such as the defendant’s age, yet they must rely upon simulation as a proxy for the reality of the trial experience. Nor is the voting behavior of real juries necessarily a reflection of jurors’ thinking about the defendant’s juvenile status. Such statistics may be misleading, as in cases where jurors imposed the death

³⁹² Interview with Juror GA-0384.

³⁹³ Interview with Juror GA-0382.

³⁹⁴ Interview with Juror TX-5008.

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ See *supra* Part I (discussing the various indicators that can gauge the evolving standards of decency or the community’s conscience on the death penalty).

penalty because they misunderstood sentencing instruction or failed to appreciate that the defendant was a juvenile at the time of his crime.

While the various indicators are imperfect, when all of the indicators point in the same direction they may form a convincing picture of community standards. The data on the juvenile death penalty from legislative action, experts on adolescence and human development, public opinion surveys, mock jury experiments, and the number of juvenile death sentences are accumulating, and the convergences are compelling. The Missouri Supreme Court found in *Simmons v. Roper* that there was a national consensus against the juvenile death penalty based on a number of factors: the consistent opposition to the death penalty for juveniles in legislative action, the infrequency of the imposition of the death penalty on juvenile defendants, and the opposition to the juvenile death penalty by professional, social, and religious organizations.³⁹⁸ That court explained that “neither retribution nor deterrence provides an effective rationale for the imposition of the juvenile death penalty, and the risk of wrongful execution of juveniles is enhanced for reasons similar to that set out in *Atkins* in regard to the mentally retarded.”³⁹⁹

The stage is now set for a further and perhaps final determination of the juvenile death penalty’s constitutionality. The U.S. Supreme Court is scheduled to review *Simmons v. Roper* in the fall of 2004. For its review, the Supreme Court will now have evidence concerning an additional highly relevant indicator of community conscience to consider as well—namely, the thinking of actual jurors who made the life or death decision in juvenile capital cases. While the decisionmaking of juries is routinely shielded from scrutiny by the veil of jury room secrecy, this study has lifted that veil and revealed that community sentiments reject the juvenile death penalty. Furthermore, the rejection of the juvenile death penalty in the community at large is surely stronger than these capital juror interviews reveal. Former capital jurors are a conservative representation of the broader community with respect to death penalty attitudes since death qualification in jury selection produces juries that are more punitive than the community at large.

By directly examining the thinking of individual jurors who served on juvenile cases, as reflected in their responses to systematic questioning and in their unrestricted accounts and explanations of their thinking and decision-making, we see that they are extremely reluctant or unwilling to impose the death penalty on juvenile defendants. The reasons jurors give for refusing to impose the death penalty reflect a judgment that the defendant lacks full responsibility for his crime. This reduced responsibility derives from his upbringing that has typically deprived him of the ordinary essentials for full participation in society and from his social and emotional immaturity that usually makes him less than fully responsible for his actions. The

³⁹⁸ 112 S.W.3d 397, 409-13 (Mo. 2003) (setting aside the death penalty for a juvenile defendant and re-sentencing him to life imprisonment).

³⁹⁹ *Id.* at 412.

community's conscience on the juvenile death penalty, as reflected in the sentiments of jurors who have served on capital cases with juvenile defendants, may best be summed up by the juror who said, "He was too young for the death penalty."⁴⁰⁰

⁴⁰⁰ See Interview with Juror AL-1857.