

ABSTRACT

Title of Dissertation: THE PSYCHOBIOLOGIC, SOCIOMORAL AND LEGAL
DEVELOPMENT OF JUVENILES ON DEATH ROW

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In spite of substantial research completed on the subject of the death penalty, its imposition on offenders whose crimes were committed as juveniles continues to remain a subject of great debate. The recent Supreme Court decisions in Thompson v. Oklahoma, 108 S. Ct. 2687 (1988) and Stanford v. Kentucky, 109 S. Ct. 2969 (1989) theoretically established the age limit at 16-years-old. In reality, the imposition of sentences remains open to much judicial discretion in process and application. The crux of the problem is the great divide that continues to exist between the legal definition of juvenile and the biopsychosocial research. This paper argues that the legal definition fails to consider the biophysical and socioscientific evidence which is clearly supportive of a bright constitutional line being drawn at 18 years of age.

There are currently a confirmed 71 subjects on death rows throughout the United States for crimes committed as juveniles. A substantive review of the available cases for similar appellate court identified mitigating factors is presented with particular emphasis on the recently argued Supreme Court cases of Thompson v. Oklahoma, Stanford v. Kentucky and Wilkins v. Missouri. Upon analysis of these cases, it appears that the young offenders have more than their age in common. Such factors as emotional and

psychological disturbance, psychiatric diagnoses, troubled family history, documented history of head trauma and subnormal intelligence levels all put these juveniles at risk for so-called dissocial behavior. This risk factor is supported by a wide range of scientific data which is reviewed in this paper.

In our society, disturbing ambiguity exists in the treatment of kids who kill. This is reflected in the diverse state statutes where the death penalty is permitted for juveniles. Although this individualized treatment was originally intended to be in the best interest of the juvenile, the unintended results have been inconsistency and inequity in treatment. A multitude of human factors make it virtually impossible to ensure that nonstatutory and statutory mitigating factors are uniformly applied in similar situations.

THE PSYCHOBIOLOGIC, SOCIOMORAL AND LEGAL DEVELOPMENT
OF JUVENILES ON DEATH ROW

by

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Dedication

To my parents, Gene and Sheila
sister, Mercedes and
brother-in-law, Tom DiMisa

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I: Introduction

A. Background

There is a disturbing degree of ambivalence and conflict reflected in the diverse and sometimes contradictory social policies and criminal laws which are focused on the management of violent juvenile offenders. A critical aspect of this debate is the difference in the legal construction of juvenile and the biopsychosocial research which defines their behavior in terms of physical, emotional, social and cognitive development. Although this may constitute an interesting heuristic debate, its practical application has deadly consequences. A disturbing example is how the narrow legal construction of a juvenile's criminal responsibility is used as justification for imposition of our most severe sanction the death penalty on individuals under 18 years of age.

The purpose of this dissertation is to explore how the legal definition of juvenile fails to comport with the prevailing biophysical and socioscientific evidence. The evidence presented supports an argument for a bright constitutional age limit being drawn at 18 years of age; the established age of majority. Such a change would reduce the arbitrariness that goes into the existing mitigating factor approach in our criminal law. In order to fully and fairly present such an argument, there are a multitude of issues which need to be addressed.

An overview of the history of our juvenile justice system describes the special, albeit different, treatment afforded minors throughout our system. This is just one example of how our society distinguishes the actions of children from the actions of

adults. A host of rights and privileges are vested at the commonly described age of majority. As such, a minor (defined as a person under age 18) cannot vote; sit on a jury; marry in most jurisdictions without permission of a parent or guardian; possess alcohol; purchase cigarettes, patronize bingo parlors or pool halls; cannot pawn property; cannot consent to services by health professionals for most medical care; donate blood without parental permission; join the armed services without parental consent; and may not operate or work at a shooting gallery; and may disaffirm any contract except for "necessaries." Internationally, age 18 is the age chosen by many countries that prohibit the death penalty for juveniles. In the United States, the current death penalty statutes (Appendix A, Chart 1.1) demonstrate the age distribution within the constitutional limits established by the Supreme Court in Thompson v. Oklahoma and Stanford v. Kentucky. Even the demarcation of 16 established by the Supreme Court's decisions on capital punishment has not gone unchallenged. As recently as 1990 Alabama sentenced a 15-year-old to death. An overview of existing case law interpreting state statutes reflects the vast differences and significant discretion in the use of nonstatutory and statutory mitigating factors. This will be demonstrated in an analysis of available cases on the 71 subjects currently on death rows throughout the United States during 1997-1998.

Chapters 2 and 3 will provide the theoretical foundations for this dissertation. The biopsychosocial, moral and cognitive research provide crucial evidence of how a juvenile is developmentally defined. A juvenile's development is influenced by many different factors. As such, examination of several theories will be categorized as

follows: psychobiologic issues will include a discussion of family history along with the cycle of violence and other forms of child maltreatment, neglect, parental discord, maladaptive attachment process; problematic personality traits including emotional vulnerabilities, psychiatric decompensation; pathologic interpersonal behavior; gene-environment correlations and interactions; interaction of family, environment and conscience including a review of neurophysiologic, psychophysiologic and neuropsychologic studies. Sociomoral issues will be defined in terms of Lawrence Kohlberg's theory of sociocognitive moral development. The importance of age as it relates to moral development and the qualitative difference in a child's perception of reality are important concepts in Kohlberg's theory as well as in this document. This discussion will evolve around Kohlberg's cognitive-developmental structuralism in the context of his stage theory of moral development.

Chapter 4 and 5 will provide an analysis of available cases currently on death rows or sentenced to death rows throughout the United States for crimes committed as juveniles during 1997-1998. A descriptive cohort design along with a substantive case review of statutorily identified mitigating factors is presented with particular emphasis on the recently argued Supreme Court cases of Thompson v. Oklahoma, Stanford v. Kentucky and Wilkins v. Missouri. An offender profile¹ will become apparent with characteristics such as troubled family history, emotional and psychological disturbance, psychiatric diagnoses, documented history of head trauma and subnormal intelligence levels. In spite of similarities in offender profile, great dissimilarities become apparent regarding the relative weight and consideration which are attributed to the mitigators at

sentencing. As such, there appears to be no consensus concerning what specific mitigators would be sufficient to bar the death penalty. In fact, different state statutes stipulate different requirements and some are not stipulated statutorily but are simply figured into the 'legal equation' before sentencing. Moreover, similar cases with similar mitigators within the same jurisdiction may be given different weight. Equally disturbing, four jurisdictions (Alabama, Delaware, Florida and Indiana) have a judicial override system which allows the judge to override a jury's decision at sentencing.

Chapter 6 reviews and updates the constitutional issues regarding the execution of juveniles. This includes a discussion of relevant case law and the corresponding justification (or lack of justification) regarding the penological goals of retribution and deterrence. The three major international agreements to which the United States is a signatory, condemning execution of persons under 18, are reviewed along with the abolitionist nations.

Although of the death penalty has been hotly debated for years with some degree of resolution for adults; there is no such resolution for juveniles. Our criminal justice system has recognized the necessity of considering age when dealing with juvenile offenders and allows for individualized treatment using the 'mitigating factor' approach in death sentencing. Unfortunately, individualized treatment has not provided a fair and equitable legal process for the youthful super-predator. This paper will address these inconsistencies to provide further evidence of the need for a procedural and substantive change in the form of a ban on the use of capital punishment for those under 18 years of age. This age is well-established as the age of majority in our society and supported as

such by the scientific data.

B. Juvenile Justice

The child is singled out by law for special attention as a consequence of the traditional distinction made between adults and children in physical, psychological and societal terms (Goldstein, Freud and Solnit, 1973). Children are presumed to be incomplete beings who are not competent to determine and safeguard their interests (*Id.* at 9). Each child's development unfolds in response to environmental influences so that emotional, intellectual and moral capacities prosper within the context of family relationships which determine his/her social reactions. Without knowledge of the family influences, neither the child's developmental successes and failures nor his/her social adjustments can become apparent.

Children are not adults but beings per se; different in their mental nature, in their functional status and in their comprehension of events (*Id.* at 13). They are governed in much of their functioning by the irrational parts of their minds (impulses and wishes). Accordingly, they respond to any threat to their emotional security with anxieties, denial, distortion of reality and displacement of feelings reactions which provides little help with the ability to cope. Children experience life events in a highly egocentric manner. The mere move from one house to another can be perceived as a grievous loss imposed on them; the birth of a sibling as an act of parental hostility; the death of a parent as intentional abandonment (Goldstein, Freud and Solnit, 1973). They consider themselves and their own feelings as special and unique which becomes a conviction of his/her immortality (Bender, 1959). It is the juvenile's egocentrism which results in

his/her general impairment of judgment.

The manner in which children are seen, their role in the family, in the workplace and in society are reflective of historical and cultural perspectives (Schetky and Benedek, 1985). The perception of children has varied significantly across time and societies. They have been seen as chattel and cheap labor as well as a protected class of citizens. In our history, children worked long hours in mines, in factories and on farms as they were "hired out" for economic gain by their parents. Today children are described as a precious "commodity" and are protected by an array of social values, special laws and economic benefits. Recent innovations reflective of the changing role of children include public education, child labor laws, public health laws and child protection legislation. The root of concern for children is the idea that they are particularly helpless and vulnerable, less capable and less responsible and so deserve special protection from a variety of dangers including themselves, their parents and exploitive social and economic interests. The belief is that immediate intervention will result in amelioration of later difficulties.

Throughout American history, children and adolescents accused in capital crimes could be and were tried, convicted and sentenced. Although there was a tendency to overturn or commute the sentences of young children at least two minors aged 12 and under were put to death between 1806 and 1820 (Streib, 1983). In the 1820's a fundamental change in the treatment of young offenders began to develop in the United States and the seeds of a juvenile justice system known today were planted (Stapleton, Aday and Ito, 1982). During the creation of juvenile courts, emphasis was

placed on the rehabilitative ideal (White, 1987). Theoretically, "[t]he 'rehabilitative ideal' presupposed that crime was a symptom of 'pathology' and that criminals should be treated like irresponsible patients" (Platt, 1969, p. 45).

The basis for an elaborate juvenile justice system, is not solely due to concern for children. Rather, it derives from the *parens patriae* doctrine which articulates the state owes a special duty to those who are not fully able to protect themselves (Maynes, 1983). The insane, the mentally impaired and juveniles were recognized as possessing diminished capacity under the law. As such, they receive protection not only because they deserve it but because an implied contract exists that stipulates it is the right and duty of the states to protect them under this doctrine. This doctrine regards children within an empathetic context (Braithwaite and Shore, 1981; Parker, 1976).

Prior to the 1967 Supreme Court decision under In re Gault, 387 U.S. 1 (1967), a juvenile court adjudication hearing (juvenile court trial) was quite informal. The Supreme Court imposed requirements of constitutional due process upon the juvenile court's adjudication hearing. Such constitutional guarantees included the right to counsel for the juvenile, the right to notice of the charges and hearings, the right to confront and cross-examine, and the right against self-incrimination. In re Winship, 397 U.S. 358 (1970) provided even more procedural safeguards with the Supreme Court decision that delinquency cases must be proved beyond a reasonable doubt; the same level of proof required by adult criminal cases. The justification for intervening in the lives of young offenders, retribution, deterrence, incapacitation and rehabilitation, suggest contradictory social policies. Critical to the decision-making process regarding

what becomes of a child who is delivered from the arms of his/her parents to the arms of the law is the child's moral development.

Although younger children may understand the difference between right and wrong, it is not until they become able to process the information that they become capable of abstract thought and (as the legal theory goes) criminally liable. To say that persons are "legally responsible" for their actions is to say that they are liable for the normal legal consequences of them. To say that they are morally "responsible" is to say that they may be legitimately blamed. In other words, an assumption of moral responsibility for the harmful outcome of one's own or another's conduct implies moral blameworthiness or moral obligation to make amends insofar as one could have maintained control or some degree of control over one's actions (*Id.* at 41).

Philosophers, psychologists, developmental and legal experts argue and defend a different chronological age as the magical mark² for criminal culpability. Even different time periods can provide a different definition of liability as pertains to age. In fact, the problem of line-drawing among minors is a dilemma all its own. A dilemma which the Supreme Court has been faced with on several occasions. In numerous factual contexts this Court has concluded that children simply by virtue of their status as minors can be deprived of the rights and privileges of adults. As noted in Thompson v. Oklahoma, No. 86-6169 (1986), "This Court's decisions sanctioning legal disabilities for minors treat juveniles as a coherent class, and establish the age of majority as the demarcation between the period of childhood and the period of adulthood" (p. 18).

There has been a change in attitude toward the juvenile murderer as reflected by

an upward shift in age of incapacity (Frey, 1970). The United States, during the late eighteenth to mid-nineteenth century, applied the English common law rules concerning the criminal liability of children and older adolescents. Under these rules, there was an irrebuttable presumption that children below the age of seven were incapable of forming criminal intent (Id. at 113). As such, minors were never liable for their felonious acts. This was the result of the common law view that these children were never capable of forming criminal intent. Capability, of course, is a prerequisite to criminal liability. Children between 7 and 14 were presumed to be incapable of entertaining criminal intent. The presumption could be rebutted by showing that the child was able to distinguish between right and wrong and understood the wrongful nature of his or her act [State v. Dixon, 283 So. 2d1 (Fla. 1973); Commonwealth v. Green, 151 A. 23 246 (Pa 1959)]. Children 14 years and older were deemed fully capable of forming criminal intent and therefore always were liable for their criminal offenses (Radzinowicz, 1948). Most statutes, however, fix the maximum jurisdictional age at 18 and the minimum at seven. The age of culpability is defined as the jurisdictional age at which a child is deemed capable of receiving a death penalty. No child below the minimum age of culpability can be held criminally liable and a youth at the maximum age must be tried as an adult (Appendix A, Chart 1.2).

All juveniles must endure the burdens of the state or as Justice Rehnquist put it, a critical legal difference between minors and adults is that "...[freedom] [is] qualified by the recognition that juveniles, unlike adults, are always in some form of custody" [Schall v. Martin, 104 S. Ct. 2403, 81 L.Ed. 2d 207(1984)]. A problem of due process

and equal protection exist as a result of the restraints imposed on juveniles while at the same time being subjected to an adult penalty. Some legal analysts have even argued that the restrictions the states impose amount to a constructive form of discrimination against juveniles as a class (White, 1983). The necessity for parental consent, the denial of the right to drink or buy liquor, vote and compulsory school attendance laws are all justified on the basis of being in the best interest of the child [Parham v. J.R., 442 U.S. 584 (1979)]. The execution of a minor, however, can in no way be justified on the basis of being in the child's best interest. In fact, the inequity of the death penalty for minors is best captured by the mother of a condemned 15-year-old who was asked by prison officials for parental consent to emergency treatment for her son. The mother responded: "Now isn't that ironic ... He's old enough to be put to death but he's not old enough to get an aspirin without our consent" (Streib, 1996).

Prohibition of the death penalty for juveniles would be consistent with the actions of state governments around the country in the protection of juvenile welfare and promotion of juvenile guidance. Our society recognizes that minors are less mature, less experienced, less able to exercise good judgment, self-restraint, and more susceptible to environmental influences. As a result, juveniles are less responsible and less culpable in a moral sense than adults. Minors are neither privy to all the rights and privileges of adulthood nor are they given the full obligation of adulthood until they reach their eighteenth birthdays (U.S. Constitution amend. XXVI 1). As stated in Eddings v. Oklahoma, 455 U.S. at 116 n.12 [quoting May v. Anderson, 345 U.S. 528 (1953), "children have a very special place in life which law should reflect"]. "During

the formative years of childhood adolescence, minors often lack the experience, perspective and judgement to recognize and avoid choices that could be detrimental to them" [Bellotti v. Baird, 443 U.S. at 635 (1979); H.L. v. Matheson, 450 U.S. 398, 409-11 (1981)]. As Justice Stewart stated in Ginsberg v. New York, 390 U.S. 629, 649-50(1968), "a child is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." In Parham v. J.R., 442 U.S. 584 (1979), the court even rejected a claim that an involuntary civil commitment statute unconstitutionally discriminated against persons on the basis of their youthfulness. Parham v. J.R. observed that "most children, even in adolescence, simply are not able to make social judgments concerning many decisions" (Id. at 603).

Special treatment of juvenile offenders is a reflection of the fundamental belief that the young must have time and opportunity to grow and to escape from the disadvantages, deprivations and abuse that may account for their behavior [Thompson v. Oklahoma, 56 LW 4892 (1988)]. This special treatment derives from a prevalent compassionate and decent sense that government must be restrained from adding undue punishment to whatever pain and handicaps have been inflicted by fate and circumstance. Again, this sense of restraint parallels the "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse" [California v. Brown, 107 S. Ct. 837, 841 (1987)]. As Herbert Humphrey once said, "The moral test of government is how it treats those who are in the dawn of life, the children; those who are in the shadows of

life, the sick, the needy, and the handicapped" (Krisberg and Schwartz, 1983).

The amici argue that the law and policies regarding juveniles reflect an almost universal judgment that adolescents ought to be treated differently than adults. That juveniles as a class have yet to reach a level of maturation and responsibility that is presumed in adults and considered desirable for full participation in the rights and duties of our life experiences. As stated in Thompson v. Oklahoma, "the reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explains why their irresponsible conduct is not as morally reprehensible as that of an adult." There is consistent evidence,³ that minors "are more vulnerable, more impulsive and less self-disciplined than adults," and are without the same "capacity to control their conduct and to think in long-range terms." As such, they are prone to "experiment, risk-taking and bravado," and lack "experience, perspective, and judgment" [Bellotti v. Baird, 443 U.S. 622, 635 (1979)].

Our criminal justice system is based on concepts of individual responsibility. The differences between minors and adults in their capacities to assume such responsibility has been reflected in our response to crimes committed by minors. The clearest indication of society's commitment to this concept of separate treatment is the development of the juvenile justice system [Brief of Amicus Curiae, American Bar Association, Thompson v. Oklahoma, No. 86-6169 (1986)].

There have been approximately 350 offenders executed in the past 30 years including over 90 between 15 and 17 years of age sentenced to death in the United States since the death penalty was reinstated in 1970's (Amnesty International, 1991).

Several of the 90 had their sentences reversed on appeal. Although they represent only a small portion of the approximately 3,316 males and 49 females under sentence of death (Justice Department, personal communication, June, 1998) in the United States; there are more juvenile offenders on death row in the United States than in any other country [Brief of Amicus Curiae, Office of the Capital Collateral Representative for the State of Florida, Stanford v. Kentucky, No. 87-5765 (1989)].

The United States is one of only eight countries worldwide known to have executed juvenile offenders in the last decade. Confirmed juvenile executions in the seven other countries are as follows: Bangladesh (1 in 1986), Iran (unknown number in the early 1980's), Iraq (13 in 1987), Nigeria (1 in 1997), Pakistan (3 since 1985), Saudi Arabia (1 in 1992), and Yemen (1 in 1993) (Amnesty International, 1998). Barbados abolished the juvenile death penalty in 1989. The majority of United Nations member states report no death sentences imposed on juveniles. In fact, International standards prohibiting the execution of juveniles were developed in recognition of the fact that the death penalty, uniquely cruel and irreversible in character, is a wholly inappropriate penalty for individuals who have not attained full physical or emotional maturity at the time of their actions.

Despite such standards, 24 of the 38 U.S. states (as of 1998) with the death penalty have statutes allowing for the imposition of death sentences on juveniles (Appendix A, Chart 1.3). In other words only 13 jurisdictions have no death penalty: Alaska, District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin (NAACP

Legal Defense Fund, 1998). That means, of course, only 13 states prohibit imposition of the death penalty on juvenile offenders. This is an irony in a country which places such emphasis on human rights. Seventeen states have established a minimum age for execution ranging from 12 to 17 years (at the time of the crime) 7 other states have no minimum age (Amnesty International, 1998). The Supreme Court ruled in 1989 that the execution of someone as young as 15 years of age constituted "cruel and unusual punishment," in direct violation of the Constitution.

As mentioned, there exists a presumption in law that as juveniles grow older, they become more culpable. For atrocious crimes, the juvenile's intent is presumed despite the lack of support for the hypothesis that all older juveniles have achieved judgmental maturity (Maynes, 1983). As such, intent substitutes for immaturity. This provided the rationale which allowed New Jersey to hang a boy of 12 for murder in 1828 [State v. Guild, 10 NJL 163 (1828)] and which set precedent for Alabama to hang an 11- year-old in 1858 [Godfrey v. State, 31 Ala. 323 (1858)]. In 1944 such a premise justified South Carolina's electrocution of a seventh grader named George Stinney.

Although this may constitute the basis for a logical legal argument, a child's capacity to control aggressive impulses must be established (along with a consensus of opinion) before a convincing sociomoral argument can be sustained. In other words, the age of demarcation should correlate to the level of criminal responsibility. In order for criminal responsibility (culpability) to be proven, one must establish the existence of moral responsibility. The ability to assume moral responsibility is linked to a multitude of psychosocial and biophysical variables.

The following chapters will provide a review of the literature on genetic correlates, family-environmental effects, emotional effects and the ethological correlation in the development of dissocial behavior in the juvenile's progression to adult criminality. Such a discussion will provide a better understanding of the extent of capability (culpability) of the juvenile. The issue of capability is a critical element in proof of the existence of mens rea as a justification for the use of capital punishment. In order to establish culpability one must be able to fully appreciate the wrongfulness of the behavior. As revealed in the literature and data collected on juveniles, there appears to be uncertainty regarding this issue.

II: Psychobiologic Variables

A. Family History

Juvenile crime is widespread, growing and more times than not violent. It has been documented that since 1960 arrests of those under 18 years of age have risen 254 percent for murder, rape, robbery and aggravated assault. According to the FBI's Uniform Crime Reports, the number of young people under 18 who were arrested for murder jumped 128 percent from 1983 to 1992. In 1994, the national juvenile violent crime rate increased steadily starting in the late 1980's, with 514 violent crime arrests per 100,000 juveniles between the ages of 10 and 17 as compared to 317 per 100,000 juveniles in 1988 (U.S. Department of Justice, 1998). While the overall crime rate has leveled off, the number of juveniles arrested for violent crimes rose over 47 percent from 1988 to the present. The annual number of juvenile homicides nationwide has tripled to 3,100 since 1984, with 125,000 youths charged each year with a serious violent crime, according to the Criminal Justice Center at the National Center for Policy Analysis. In fact, persons under 18 years of age account for nearly half of all serious crimes, although they constitute only 30 percent of the nation's population (*Id.* at 1). One out of every five people arrested for a violent crime is 17 years of age or younger. Although serious violent juvenile offenders represent only a small portion of the juvenile population it accounts for a disproportionate amount of violent crime.

The wave of criminal horror cases by children has baffled officials. Many of the crimes committed by minors are gruesome beyond description. It is precisely the viciousness of these crimes that indicates the extent of disturbance among such young

people. From across the country, headlines in newspapers have read:

"Teenage boy in Colorado waits patiently while two young friends hack and hammer his mother to death"

"Florida police try to determine if 5-year-old knew consequences when he threw 3-year-old off fifth floor stairwell"

"Kansas City police are baffled by jealous 12-year-old who kills younger sister, mother over birthday party plans"

"Eleven year-old from affluent St. Louis neighborhood orders 10-year-old out of her yard; when he doesn't leave she shoots him with parents gun. Playmate dies after surgery"

"Girl, 4, kills twin baby brothers by throwing them to the floor after one of the 3 week-old infants accidentally scratches her during play"

"San Francisco police don't know what to do about 18 month-old who kills playmate with toy truck" (Magid and McKelvey, 1987).

Equally as horrifying are the offenses listed in the Brief of Amici Curiae, American Society for Adolescent Psychiatry and American Orthopsychiatric Association, Thompson v. Oklahoma, No. 86-6169 (1986) from a sample of 14 of the juveniles currently on death row: ⁴

1. "Raped and murdered young woman.
2. Shot and killed subjects attorney's sister, then attempted to rape her.
3. In the company of a 14-year-old accomplice, shot and killed man in the course of burglary.
4. In course of a robbery of a convenience store, shot and killed female clerk.
5. During a robbery with one other person, shot and killed clerk.
6. Raped, stabbed and strangled 76-year-old nun.
7. During a spree of six robberies in one week, shot and killed male grocery store customer.
8. In the company of others, bludgeoned male victim with the tire jack while stealing car.
9. Shot and killed female convenience store clerk in the course of a robbery.
10. Abducted, raped, then shot and killed female convenience store clerk.

11. Stabbed female victim 60 times, bit her breast and pushed his hand in her vagina.
12. Participated with a gang in the robbery and murder of a business man.
13. In the company of others shot and killed relative.
14. Shot and killed mother and stepfather."

As reported by the Children's Defense Fund, the reality is that homicide is currently the country's third leading cause of death for elementary and middle-school children. Marian Wright Edelman, president of the Children's Defense Fund, explains that between 1979 and 1991 nearly 50,000 children were killed by guns which is equivalent to the number of Americans killed in the Vietnam War. She adds, "The crisis of children having children has been eclipsed by the greater crisis of children killing children" (Shulins, 1986).

Clearly, nothing so violated the natural order of things as a child turned killer (Shulins, 1986). Experts from around the country have found evidence that the violent behavior of children and adults which erupts in murder is rooted in dysfunctional family relationships (Lefkowitz, Eron, Walder and Huesmann, 1977; Linn, 1987). The breaks that cause unattachment include domestic violence, divorce, parental mismanagement (including overly harsh and inconsistent discipline), physical, sexual, and psychological abuse and neglect. Arguably, neglectful and abusive parents are the most dramatic precursors of attachment⁵ problems. There are, however, endless theories on the source of violence in childhood ranging from genetic influences to environmental stressors (poverty and social disadvantage) to the child's individual temperament. Although several of these theories will be discussed, none will be presented as the answer to the problem.

Overwhelming evidence indicates that the family is a major probably the major social unit within which the meaning and uses of violence are learned (Gelles and Straus, 1975; Straus, Gelles and Steinmetz, 1980). The family is the most frequent locus of all types of violence ranging from slaps to beatings to torture to murder. From earliest childhood until death a person is more likely to observe, to commit and to be the victim of violence within the family than in any other setting. Unlike violence in other situations, the family provides a model for violence that cuts across age and sex taboos. Gelles and Straus (1975) reported that from 20 percent to 50 percent of murders take place within the family. Research on child abuse suggests that as many as two million children per year in the United States are victims of the form of violence called child abuse. Available evidence supports the theory that child maltreatment (particularly when construed broadly) is associated with juvenile delinquency (when construed narrowly). The links may be causal in both directions as well as being the result of common etiology in disrupted, ineffectual families.

Importantly, intrafamilial violence involves those who are closest to each other in a social-psychological sense. The observation and experience of such violence by a child carries the message that violence between intimates is both possible and legitimate. "Parents are the vehicle for transmission of the cultural constraints," explains Dr. Murray Miron, professor of psychology at Syracuse University. Parents who use physical punishment provide their children with an aggressive model for imitation and teach children patterns of counter-aggression. Ironically, such violence is usually employed for moral training and character development. The family not only

trains its members to accept violence but also to accept particular modes of violence.

Dr. Murray Straus, co-director of the Family Research Laboratory at the University of New Hampshire has done extensive research on family violence. In one study, Gelles and Straus (1975) distinguish between “direct training” and “indirect training” in violence. The indirect training, they argue, is more important than the direct training because it begins before speech, and is learned in such a diffuse and vague manner as to become an unconscious motive. Researchers have found that children learn violence through several mechanisms: identifying with the aggressor; turning passive into active (as with the victim who later becomes the abuser); imitating behavior that is rewarded; and desensitizing inhibitions against violence (Schetky and Benedek, 1985). Experience with violence as a child (as observer, aggressor or victim) is correlated with subsequent approval of violence as an adult, especially when violence is used as a means of control. From these experiences the child learns that violence is the most effective means of dealing with others (Id at 596).

Psychologists and psychiatrists have long known that brutal treatment can breed brutal behavior. It has been repeatedly found that childhood abuse increased the odds of future delinquency. In fact, previously abused or neglected persons were found at higher risk of beginning a life of crime at a younger age with more significant and repeated criminal involvement. The physically abused (as opposed to the neglected or sexually abused) were the most likely to be arrested later for a violent crime (Widom, 1989). These findings should in no way be construed as diminishing the significance of damage done by childhood neglect. In reality, physical abuse isn't the most prevalent

child maltreatment problem. The majority of reported cases involve a primary allegation of neglect or emotional maltreatment. Nationwide, the incidence of neglect is almost three times that of physical abuse (15.9 per 1,000 children in 1986, compared to 5.7 per 1,000 for physical abuse, and 2.5 per 1,000 for sexual abuse) (U.S. Department of Health and Human Services, 1995).

Maltreated children are victims of profound changes in our society including social isolation, economic pressures and lack of traditional support mechanisms readily available to other generations.⁶ Families are increasingly living in a state of social isolation which appears to be a major contributor of child maltreatment. It appears that the migration to the suburbs has resulted in decreasing population, decreasing home ownership and increasing family and community violence. Traditional neighborhood social networks are now being disrupted and isolation is becoming an everyday reality.

Even after controlling for age, race and sex, a relationship between childhood neglect and subsequent violence is evident. Birth complications in combination with early child rejection predispose one to violent crime (Raine, Brennan and Mednick, 1994). Other studies have found a vast array of developmental differences associated with childhood neglect (Kazdin, Siegel and Bass, 1992). The premise that severe physical punishment is significantly correlated with later delinquent behavior⁷ has been supported by research. Case in point, a British longitudinal study of 411 boys initiated when the boys were age 8 years of age reported startling results in support of the link between severe punishment and juvenile violence. Of the group, 27 (7 percent) had been convicted of a nonviolent offense. Parents of 62 percent of the violent boys had

been judged to use harsh discipline and have a harsh attitude toward their children while parents of 33 percent of the nonviolent delinquents and 27 percent of the 286 nondelinquents were identified in this category (supra, p. 12). Similarly, case files of 863 delinquent male adolescents incarcerated in Ohio showed that 26 percent had been physically abused and 85 percent had been abused more than once (Kratcoski, 1982). Evidence of child abuse was found in the medical records of 15 percent of 81 delinquents incarcerated in a Connecticut correctional school (Shanok and Lewis, 1981). A group of 80 incarcerated delinquents in the same correctional school were found to be significantly more violent than a matched group of 77 nonincarcerated delinquents, 50 percent of the former and 27 percent of the latter had been involved in violent acts (Lewis, Shanok and Balla, 1979). Researchers found that 10 percent of the incarcerated (more violent) groups compared to 4 percent of the nonincarcerated (less violent) groups had histories of child abuse documented in their medical records (supra, p. 13).

Overall, statistics of juveniles involved in delinquent acts have consistently found that these juveniles have endured child abuse and neglect at far greater rates than the estimates for the general population. Some researchers have even argued that more common and more damaging than physical beatings are the psychological assaults which violent juveniles in particular have suffered (Granat, 1987). There is no question that poor bonding results in subsequent maladjusted behavior (Raine, Brennan and Mednick, 1994). Families of killers are quite different in their social structure which usually consists of pervasive violence, inconsistency, neglect and abuse with little

likelihood of bonding. In fact, it appears that middle-class kids who commit murder come from even more pathological families. According to Jon Hull (1987), over 90 percent of children who commit parricide have suffered mental abuse.

The "cycle of violence" hypothesis indicates a childhood history of physical abuse predisposes the survivor to violence in later years. An interesting finding from a supporting study ⁸ involved a comparison group of 667 children who were not officially recorded as abused or neglected but matched to the study groups according to sex, age, race and family socioeconomic status. Irrespective of a lack of juvenile or adult criminal record, for most members, being abused or neglected as a child increased the likelihood of arrest as a juvenile by 53 percent, as an adult by 38 percent and for a violent crime by 38 percent (*Id.* at 1). However, findings reported by Widom (1989) in a study completed in the midwest found abused children were no more likely than their nonabused match to continue with a career in crime. These findings suggest that childhood abuse can clearly encourage criminal or violent activity but it does not cause the individual to maintain such a lifestyle.

Substantive research argues the existence of a strong association between an individual's experiences with his/her parents and subsequent capacity to make affectional bonds. The significance of this association will become even more evident in the next chapter which examines mitigators in the backgrounds of those on death row for crimes committed as juveniles. Overall, there appears to be a causal link between inability to form affectional bonds and corresponding behavior (Karen, 1994).

Even the strongest defenders of the powerful influence of parents by no means

allege such influence is decisive. This recognition prevents the assumption that familialistic determination exists. It also allows for recognition of the reality that the so-called cycle of violence is virtually impossible to prove. The most reliable experiment is disallowed due to existing legal as well as ethical standards researchers are expected to maintain. This would involve regularly abusing one group of children and comparing to a group of nonabused children. Although frequently used, retrospective studies present many problems that make results difficult to validate or generalize (Id. at 32).

Regardless of the powerful extra-familial influences, parental conflict has been found to be highly criminogenic, accounting for the relationship between broken homes and crime (Emery, Weintraub and Neale 1982; Loeber and Stouthamer-Loeber, 1986; Call, 1984). One study allowed for an examination of research where low identification with both parents was found to be one of the most potent predictors of aggression irrespective of the subject's sex .⁹

Substantial evidence has been found to support the correlation between parental rejection and inattention with crime (McCord, 1990; Kazdin, Siegel and Bass, 1992; Loeber and Stouthamer-Loeber, 1986; Wells and Rankin, 1988). Dr. Rolf Loeber of the University of Pittsburgh explains how researchers distinguish families with delinquent children from families in which children are not delinquent. The parents of delinquent children often lack involvement with their children, provide poor supervision and administer inadequate or erratic discipline. Some parents of delinquent children are not law-abiding, thus providing examples of deviant behavior and values that their offspring may imitate. Many delinquent youth grow up in families that experience adversities

such as family conflict, divorce, parental illness, poverty and low socioeconomic status.¹⁰

Before exploring the correlates of delinquency further, Eysenck and Gudjonsson (1988) summarized several traits of persons with histories of serious delinquency/criminality compared with the general population:

1. "Shorter gestation periods (more premature births).
2. More rapid development to sexual functioning.
3. Greater copulatory frequency outside of bonded relationships (or at least a preference for such).
4. Less stable bonding.
5. Lower parental investment in offspring (as evidenced by higher rates of child abandonment, neglect and abuse).
6. Shorter life expectancy."

A study of juvenile murderers by Russell (1983) found several common denominators of character structures which also demonstrated problematic emotional development. Pervasive evidence of a pathologic maternal relationship will be explored throughout this section. The findings from Russell's work indicate:

1. "The personality is inadequately socialized in a dependent maternal relationship of strong ambivalence, and comes to adolescence with severe unresolved conflicts over aggression and passivity, which are precariously defended by poorly developed mechanisms for stability and maturity.
2. An intense intra-psychic struggle is engendered as the boy strives for identity and self-expression, against strong regressive forces.
3. The struggle is intensified and his defenses are further threatened by the

mother's continual insistence on her controlling and severely ambivalent orientation towards the boy, coupled with a complete lack of countering support from the father.

4. [There] ... [exists] a threat of imminent personality disintegration ... the ultimate defense of this brings projective mechanisms into operation, that he may attribute to someone else the unacceptable feelings rampant within himself.
5. The intra-psychic struggle continues now on a very primitive level, seeking outlet and self-justification through paranoid construction, and on the conscious level with mounting feelings of tension and frustration.
6. Then there may develop a fixation upon an intense hostile interpersonal relationship - with the mother directly or another close figure - with paranoid build-up to a particular incident, the circumstances and implications of which cannot be denied; or, the struggle and paranoid development may remain largely internalized until an acute special circumstance of great threat occurs; in either case the paranoid projection and breakthrough of murderous impulses is called for and the act justified" (Russell, 1983, p. 191).

This study demonstrates the prevalence of personality decompensation and pathologic familial interpersonal relationships in homicidal juveniles.

By contrast, Werner (1987) reported that certain personality traits and environmental factors were identified with the resilience needed to survive dysfunctional childhoods:

"Intelligence and high IQ. Ability to focus attention; self control.

Being the first born.

An affectionate nature, social awareness, responsiveness to people, good disposition.

Self-esteem and sense of humor.

Good relationship with a parent or substitute parent such as an aunt, godfather, grandparent, caretaker or teacher.

A lot of attention during the first years of life.

Close peer friends.

Hobbies or special interests.

Required responsibilities in the household."

Werner (1987) found that a critical component of effective coping is a sense of coherence. That is, a feeling of confidence that one's internal and external environment is predictable; that life has meaning and that life events will work out reasonably well. Juveniles maintain a small number of relationships that provide feedback which will shape their sense of coherence. Even under adverse circumstances, constructive change is possible when adolescents interact with people who give them positive reinforcement and a reason for commitment and caring. The reverse is also the case: destructive relationships with significant others can promote maladaptive behavior.

The "intergenerational links," so-called by Dr. Joan McCord of Temple University, have been well-established between criminality and aggression (Glueck and Glueck, 1950, 1970; Gelles and Straus, 1975; Lewis, Pincus, Lovely, Spitzer and Moy, 1987; McCord, 1983; Olweus, 1979; Raine, Brennan, Mednick and Mednick, 1996; Robins, 1966; Widom, 1989). Among single factors, the greatest direct influence on antisocial aggression for male offspring appears to be determined by the nature of the paternal model. McCord and others (1963) note that a significantly higher proportion of the aggressive-antisocial men than of the aggressive-socialized men had been reared by

deviant and aggressive fathers. It appears that extreme neglect and punitiveness in conjunction with a deviant-aggressive paternal model produces antisocial aggressiveness. Malmquist (1971) delineated some clinical characteristics in homicidal juveniles in "Premonitory Signs of Homicidal Aggression in Juveniles." These include use of drugs, significant "object losses (such as mothers, lovers, friends), threats to manhood in the form of provocation to fight, emotional crescendo (increasing build-up of agitation and energy accompanied by motor restlessness), disturbed sleeping and eating and "homosexual" threats along with depersonalization. Wenk, Robinson and Smith (1972) provide additional evidence of the manifestation of such symptomatology in "murderous minors."

Lewis, Moy, Jackson, Aaronson, Restifo, Serra and Simos (1985), list the childhood neuropsychiatric and family characteristics of 9 male subjects who were clinically evaluated as adolescents and were later arrested for murder. A comparison was made with 24 incarcerated delinquents who did not go on to commit violent offenses. The future murderers were found to display a constellation of biopsychosocial characteristics that included psychotic symptoms, major neurologic impairment, a psychotic first-degree relative, violent acts committed during childhood and severe physical abuse.

The authors argue that if there was an inherited predisposition to maladaptive antisocial behavior in the 9 subjects, the inheritance most likely was a predisposition to psychosis and/or neurologic dysfunction (supra, p. 1166). This vulnerability manifested itself through uncontrolled violence in the context of violent households. The issue

raised is whether or not a finding of the aforementioned constellation of factors in a given child justifies a prediction of future violence. The findings from this particular study, as well as others, suggest that violence alone is not as good a predictor of future aggression as is violence coupled with neuropsychiatric vulnerabilities, parental brutality and parental psychosis.

The adolescents on death row appear to share a battery of psychological, emotional, familial and other problems. An extensive study of 14 juveniles on death row in four states (constituting 40 percent of the total juvenile death row population) during 1986-1987 provides an excellent case in point. Dr. Dorothy Otnow Lewis, a professor of psychiatry at New York University School of Medicine, and several colleagues found that when juveniles had suffered head and/or nervous system injury or demonstrated a history of psychiatric illness coupled with growing up in a family in which he or she experienced or witnessed abuse and extreme violence, it was highly predictable that he/she would become very violent.

The team of psychiatrists and neurologists who performed detailed examination of the 14 youths found disturbingly consistent symptomatology. Specifically, all 14 inmates had sustained head injuries as children, 8 of which were serious enough to require hospitalization; 9 of the 14 were found to have serious neurologic abnormalities including but not limited to brain injury; 7 suffered from serious psychiatric disturbances exhibited during early childhood and while 4 others had histories consistent with severe mood disorders; seven were psychotic at the time of evaluation or had been diagnosed as such during early childhood (Lewis, Pincus, Bard, Richardson,

Prichap, Feldman and Yeager, 1988). Only 2 of the entire sample had full-scale IQ scores above 90; only 3 were literate enough to read; 3 had learned to read since arriving on death row (Amnesty International, 1991). All but 2 had suffered serious physical abuse in childhood and 5 had been sodomized by older male relatives (Lewis, Pincus, Bard, Richardson, Princhip, Feldman and Yeager, 1988). Within the families of the children, violence, alcoholism, drug abuse and psychiatric disorders were common.

The researchers found strong evidence that the offenders in the study were "multiply handicapped" by their natural immaturity as well as brain damage and abusive family backgrounds. Based on this research, Lewis and her colleagues formulated a new psychiatric classification: the "limbic-psychotic-aggressive syndrome" (Raeburn, 1989). This concept, explains Dr. Lewis, identifies the combination of neurologic disorders, periodic psychotic symptoms and severe physical or sexual abuse that creates a violent person (Id. at 28; Shanok and Lewis, 1981).

Wayne Thompson and Heath Wilkins provide excellent examples. Like many of the other juveniles on death row, Thompson had witnessed his share of violence, much of which was committed by the brother-in-law he was convicted of killing at age fifteen. Thompson explained to the police, "I'd seen him pull a gun on my sister and beat her up ... I'd seen him take my nephew to the roof of his trailer and hold him upside down and threaten to drop him off ..." [Thompson v. State, 724 P. 2d 780 (Okla. Cr. 1986)].

Similar to the other juveniles on death row, Thompson had a history of extensive physical abuse. In fact, he suffered from a habit of paint sniffing induced by the man Thompson later killed, from beatings at the hands of this man, and from the emotional

turmoil of violent family conflict caused in part by the same man [Thompson v. Oklahoma, No. 86-6169 (1986)]. Thompson exhibited emotional alienation, poor social judgment, hostility and nonresponsivity to the external world. Thompson, it is believed, acted out the explicit or implicit desires of his family. This is not uncommon for kids who kill relatives.

Even more poignant is the background of Heath Wilkins. Wilkins suffered from serious and profound psychiatric and emotional disorders since childhood [Wilkins v. Missouri, No. 87-6026 (1988); W.J.A. at 68, W.Tr. at 272].¹¹ The record establishes that he exhibited psychotic symptoms and bizarre behaviors throughout his adolescence and childhood (W.J.A. at 43, 68; W.Tr. at 235). Wilkins has been labeled as "borderline" and "schizotypal" as well as "diagnosed as suffering from schizophrenia" (W.J.A. at 40, 43, 50, 67-68). He has suffered from severe depression since nine years of age resulting in innumerable suicide attempts (W.J.A. at 46, 60; W.Tr. at 265). While he was in kindergarten, his uncle introduced him to drugs (W.J.A. at 29, 57; W.Tr. at 261). Since age five he has abused alcohol and a multitude of drugs, including "gasoline, glue, pot, uppers and downers" (W.J.A. at 67). Since age ten he used LSD extensively (W.J.A. at 67). This extensive drug use resulted in serious neurologic and psychologic damage (W.J.A. at 29).

The extent of such damage is apparent from the Menninger Clinic report in Topeka, Kansas, filed as part of the petitioner's case in Wilkins v. Missouri, No. 87-6026 (1988). The following information was documented in a psychological report analyzing the WAIS-R, Animal Choice Test, TAT and Rorschach from Dr. Melvin Berg

to the Supreme Court. Dr. Steven Mandracchia of the Department of Forensic Psychiatry at the Western Missouri Mental Health Center, Dr. S. D. Parwatikar,¹² a forensic psychiatrist at the Malcolm Bliss Mental Health Center in Missouri and Dr. William Logan from the Menninger Foundation also completed assessments of Heath Wilkins filed on behalf of petitioner which were consistent with Dr. Berg's report.

Dr. Berg reported the patient (referring to Heath Wilkins) had an extensive history of serious antisocial maladjustment throughout his childhood. He provided evidence of a rather morbid preoccupation with death expressed through poems and through his explicit desire to accept the penalty of death. Intellectually, he tested barely approximate to the norm (95) and demonstrated a pattern of abilities and deficits indicative of an impulsive cognitive style opting for immediate action over careful reflection. He demonstrated a blatant disinterest and/or inability to sustain logic problem-solving efforts in situations where deliberation is necessary. "His thinking impulsively starts toward glib and facile solutions as he avoids channeling effort into a deliberative process of systematic thought" (supra, p. 19).

Regarding social mores and the manner in which people typically manage and conform to the customs of society, Dr. Berg notes that Wilkins "leaps" toward impulsive easy solutions. As a consequence, his ability to apply common sense is moderately impaired. Dr. Berg explains that, "[T]his cognitive approach to problems and style of understanding the environment reflects as inaccurate, vague and mildly distorted understanding of social conventions and the rationale for how and why social mores and customs are established" (supra, p. 20).

When stirred by feelings, Wilkins' thinking allegedly becomes disorganized and permeated by highly personalized fantasies which push him toward the "outer limits of what is commonly accepted as reality and good sense" (Id. at 20). Even more significantly, "when depressive or angry affects are aroused, his thinking deteriorates, becomes diffuse, and so dominated by feeling that his thoughts then function more as a form of emotional discharge than as a rational means of understanding reality ..." (Id. at 20). Consistent with this process, "[u]nder the sway of intense feelings ... his thinking becomes subject to illogical reasoning, and his ties to reality are strained by odd ideas and perceptions of the environment and people which are vulnerable to distortion. At such times, the examiner speculates that he and the environment take on a quality of being strange, unreal, and redolent with peculiar and uncanny feelings like those which most people experience only in nightmares" (supra, p. 21). Most disturbingly, he is out of touch with these emotional stirrings and then discovers a "sudden, intense and eruptive discharge sweeping him along like a feather in a hurricane" (Id. at 21). His inadequate defense mechanisms leave him with a feeling of overwhelming anxiety and depression. "More ominously, anger can reach explosive intensity and seek discharge through sudden spasms of destructive action ... It is likely that his rage and morbid despair combine, shade into, and trigger each other, and when overcome by these feelings, his thinking is immobilized and a pawn of his uncontrolled affects" (Id. at 22).

In efforts to contain his rage and alleviate his anguish and alienation, Wilkins is likely to turn towards gratifications which provide temporary relief from despair. As such, he is likely to find pleasure in indulging himself in stimulating activities and thrill

inducing sensations which provide immediate gratification and distraction from the torment of his inner world (*Id.* at 23). When these indulgences fail, death provides a potentially welcome escape and insignificant loss since he feels not quite alive.

Diagnostic reports list the disturbing background of maladaptive behavior including emotional emptiness to icy indifference to omnipotent rage. "Despite his rage and rejection of social obligation and ties to others, he demonstrates an incipient potential for attachment and concern which leaves him vulnerable to feelings of loss and longing " (*Id.* at 22). "His depression derives primarily from a sense of utter isolation and aloneness that cause him to feel as though he were living in a world barren of life ... His fantasy life is haunted by images of death, shadows and preoccupations with emptiness ... The environment is devoid of anything to which he could warm up to and feel the rewards of a relationship. He is left with an excruciating sense of emptiness, deadness and longing for something to fill up the barren place in his life, although he does not know what that might be. Just as he has tried to deny his rage, he likewise tries to seal off his depressive experience which intermittently breaks through his defenses and is expressed in poetry or profoundly disturbing emotional states leading him to dwell on death and morbid themes ... Obviously this young man is exquisitely vulnerable as he tries to contain rage, and feelings of complete isolation ..." (*Id.* at 23).

Regardless of the "massive impairments" in Heath Wilkins' development which probably contributed to his inadequate impulse controls; Dr. Berg concluded that he cannot be regarded as "suffering from a psychotic condition which grossly impairs his attunement and reality ..." (*Id.* at 24). Dr. William Logan described his cognitive

capacity as intact yet behaving as if governed by emotions. "In conclusion, while the patient has an adequate factual understanding of his situation and his ability to cooperate with his attorney, emotional issues may prevent him from acting in his own best interests. The weighing of these two factors, the cognitive versus the emotional, is the essence of the decision before the court" (Id. at 39).

Dr. Parwatikar found Wilkins' behavior consistent with "Conduct Disorder, Undersocialized Type" under Axis I (Id. at 52). Under Axis II, "Borderline Personality Disorder" accurately depicts his pattern of vacillating between aggression towards others and self-destructiveness under stress (Id. at 52, 53). DSM-IV (Diagnostic and Statistical Manual by The American Psychiatric Association) precludes a diagnosis of antisocial personality for those persons under 18 years of age.¹³ Finally, Parwatikar found that Wilkins' irrational thinking was partly due to his age and partly due to his lack of growth in an emotionally secure environment and lack of parental supervision (Id. at 57).

His mother and her boyfriend beat Wilkins continuously and a babysitter used drugs and sexually abused him and his brother. His closest relationship was with a maternal uncle who taught him to shoot guns and who used drugs. While in a youth home he cut his wrist, put a net over his head, overdosed using alcohol and drugs and again using antipsychotic medication he had been prescribed and jumped off a bridge all in an attempt to commit suicide. At one point a psychiatrist prescribed Mellaril (an antipsychotic agent) for Wilkin's high anxiety and disoriented thinking; diagnosed as a possible schizotypal personality or schizophrenic.

Wilkins was a product of a profoundly chaotic home with a lack of supervision and encouragement of drug use on the part of parental figures. Professionals who examined him found a consistent lack of affection and nurturance resulting in developmental arrest. His ability to connect or receive affection is lacking as he views others as demanding and exploitive. The resulting lack of human connectiveness produces emptiness, loneliness and vulnerability to the disruptive emotions of anger, anxiety and depression. Wilkins uses alcohol and drugs to blot out emotions and "when his defenses fail his thinking becomes muddled and poorly organized with no conception of the rationale or consequences of his conduct" (*Id.* at 38).

Both Wilkins' brother and father have extensive histories of psychiatric illness and hospitalizations (W.J.A. at 41, 61). This is significant as there is evidence that severe mental illness (such as schizophrenia) in first degree relatives is inherited. The father abandoned the family when Wilkins was very young, but not before he left his imprint of violent abuse. Similarly, Heath's mother had violent outbursts that led her to beat him for up to two hours at a time (W.J.A. at 28, 57; W.Tr. at 261). His family was so lacking in support that in the weeks preceding the crime for which he was sentenced to death he was barred from the house by his mother and left living homeless in a park (W.Tr. at 272).

There is no denying the seriousness of the harm which resulted from Wilkin's anger. On the contrary, the intensity and severity of the harm are symptomatic of the extent of his psychopathology. He was on death row for fatally stabbing a female clerk of a delicatessen shop during the course of a robbery as a 15-year-old. At age 7 he was

burglarizing houses for knives and money; at age 8 he tried to burn down houses and on one occasion an entire apartment complex [Wilkins v. Missouri, No. 87-6026 (1988)]. For entertainment, he would shoot at passenger cars with an AR-15 semiautomatic (supra, p. 28). He succeeded in poisoning several neighborhood pets, attempted to poison his mother and forced a bag of pennies (which he stole) down a dog's throat resulting in an excruciating death for the animal (Id. at 28). After several placements in a foster home, residential treatment facilities, job corps and the like he ended up on the street.

Heath Wilkins had exposure to a constellation of psychological, physical and environmental disturbances which disrupted his natural growth and development. In conjunction with the profound psychiatric, emotional and social limitations, Heath is disturbingly typical in every aspect to the adolescents on death row (Lewis, Pincus, Bard, Richardson, Pritchep, Feldman and Yeager, 1988). Lewis and her colleagues conclude that "... juveniles accused of a capital offense are uniquely vulnerable; they lack the maturity or insight to recognize the importance of psychiatric or neurological symptoms to their defense; and they are dependent on family for assistance in a way that adult offenders are not ..." As Linda Reyes, a psychologist in charge of the Capital Offender Program in Giddings, Texas, points out: teen killers overwhelmingly come from dysfunctional families. Reyes noted that 3 out of 4 "students" she has seen in this progressive program have come from dysfunctional families. In fact, out of 45 teen killers who have been through the program, only one came from a relatively stable background (Id. at 60).

Equally disturbing is the review of 23 juvenile offenders sentenced to death in Alabama, Florida, Georgia, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Oklahoma, South Carolina, Texas and Washington (Amnesty International, 1991). The cases include three prisoners executed between 1985 and 1991, four whose death sentences were vacated on appeal and who were subsequently resentenced to life imprisonment, 14 who were still on death row as of July 1, 1991. Again, the majority of those juveniles come from particularly deprived and unstable family backgrounds. Many of them were brought up in the absence of one or both parents. Many of the parents themselves had histories of alcoholism, mental illness and the like. More than half of the juveniles had been physically or sexually abused in childhood; 10 were known to have been regularly abusing alcohol and drugs (like their parents) from as early as 6 years of age; others were under the influence of alcohol or drugs at the time of their crime. There is documented evidence of mental illness or brain damage in at least 14 cases; extensive histories of psychiatric illness or mental disorders dating from early childhood in at least six cases; IQ's of eleven prisoners were below ninety (Amnesty International, 1991).

Excluding the aforementioned, Amnesty International found a substantial lack of available information on the background of these juveniles. In one case, for example, Amnesty International reported that absolutely no information was presented about the prisoner's deprived and unstable childhood. In several other cases, lawyers were unable to obtain independent psychiatric examinations. A particularly shocking demonstration involved a 17-year-old offender with a mental age of twelve. Defense requests for funds

to hire a psychiatrist were repeatedly denied by the trial court irrespective of the fact that a psychologist for the prosecution labeled the defendant a "sexual sadist" without any one-on-one examination. In a recent case, the request for a reevaluation by a psychologist/psychiatrist was denied in spite of the fact that the examiner fraudulently represented himself as a psychologist.

Extensive research in the United States and overseas supports the contention that there exists a high risk factor of criminality for children of parents who manifest an array of psychiatric dysfunction and criminogenic conduct (U.S. Department of Health and Human Services, 1990). The discussion will provide an overview and analysis of the existing research.

B. Psychiatric Factors

Much of the research on the risks to children of parents with mental disorders has been based on the premise that the risk is genetically determined. That premise derives from empirical evidence that genetic factors play a significant role in the determination of antisocial disorders and criminality,¹⁴ schizophrenia, major affective disorders, and some varieties of alcoholism. Similarly, conduct disorder has been found to be highly familial with the parents of youths with conduct disorder exhibiting antisocial personality, substance abuse as well as criminality (Lahey, Piacentini, McBurnett, Stone Hartdagen and Hynd, 1987). Although evidence on the mechanism(s) of this pattern of cross-generational transmission is weak there is evidence suggesting heredity plays a role. Some evidence, indicates that genetic factors play a significant role in many psychiatric disorders arising specifically in childhood.

Experts have argued that even if the parental condition is in part genetically determined it does not necessarily follow that the risk to the children is genetically mediated (Rutter and Quinton, 1984). This argument is based on the following issues: a) in all adult mental disorders there is a major nongenetic component; b) the continuity between mental disorders and antisocial behaviors in children and in adults is far from complete, even when there is continuity, the genetic component may be greater for disorders that persist into adulthood than for those confined to the childhood years (Rutter and Giller, 1983); and c) importantly, parental mental disorder is frequently accompanied by major environmental disturbance (Feldman, Stiffman and Jung, 1987; Jacob and Seilhamer, 1987).

Clearly, parental symptomatology directly impinge on or involve their children to some degree (Radke-Yarrow, Richters and Wilson, 1988; Jouriles, Barling and O'Leary, 1987). For example, parental illness may interfere with parenting functions (Bettes, 1988; Field, Healy, Goldstein and Guthertz, in press; Susman, Trickett, Lannotti, Hollenbeck and Zahn-Waxler, 1985; Weissman and Paykel, 1974) or impair parent-child relationships and interactions (Cox, Puckering, Pound and Mills, 1987; Davenport, Zahn-Waxler, Adland and Mayfield, 1984; Feldman, Stiffman and Jung, 1987; Zahn-Waxler, Kochanska, Krupnic and McKnew, in press). It is not uncommon for such parental dysfunction to result in the necessity for children to go into foster care (Rice, Ekdahl and Miller, 1971) or it may be accompanied by marked marital discord and disharmony (Birtchnell and Kennard, 1983; Gotlib and Hooley, 1988; Rutter and Quinton, 1984). This discord is associated with increased conflict over child-rearing,

greater segregation in decision-making, reduced affection and altered patterns of dominance (Kreitman, Collins, Nelson and Troop, 1971).

There are additional issues regarding the specificity of the genetic effects of transmission. For example, parental schizophrenia is manifested in children through: a) abnormalities in interpersonal relationships demonstrated by odd, unpredictable behavior, as well as by social isolation and rejection by peers in conjunction with solitary antisocial behavior in the home by males; b) neurodevelopmental immaturities in the form of clumsiness, visuospatial difficulties, verbal impairment; and c) attention deficits. Of equal importance is the tendency for parental personality disorder to be associated with conduct disturbance in the sons (Rutter and Quinton, 1984) and for parental alcoholism to be linked with both alcoholism and antisocial disorders in the male offspring (Rydelius, 1981) but especially with disorders that combine both emotional and conduct disturbances (Earls, Reich, Jung and Cloninger, 1988).

C. Emotional Effects

One test of the genetic hypothesis involves studies that determine whether the association between disorders in parents and those in their children can be accounted for by environmental variables (U.S. Department of Health and Human Services, 1990). Rutter and Quinton (1984) completed a study of a heterogeneous group of mentally ill parents using a range of well-tested discriminating measures of family environment (supra, p. 161). The results indicated that risk to children is largely a function of family discord and hostility related to the parental mental disorder. Thus, the criminality of children which is strongly correlated with the father-son relationship and the psychiatric

disorder which is strongly correlated with the discordant mother-child relationship may be less reflective of the parental diagnosis per se and more reflective of the familial stress symptomatic of that condition. It is critical to note some exceptions to this finding before making generalizations.

Where discord constituted the primary factor in the conduct disturbances displayed in the children of parents with depression or personality disorder, it did not account for the increased rate of disorders in the children of schizophrenics (Emery, Weintraub and Neale, 1982). Folstein, Franz, Jensen, Chase and Folstein (1983) noted similar findings where discord accounted for conduct disturbances in children of parents with Huntington's disease but not depression. Family discord, divorce and lack of cohesion were discovered to be important risk factors for antisocial conduct disorder irrespective of the presence or absence of parental depression.

Radke-Yarrow, Cummings, Kuczynski and Chapman (1985) found that an abnormal maternal attachment was significantly correlated with offspring maladaptive behavior. This was intensified by the absence of a father in the household although it was unaffected by psychiatric disturbance in a present father. The lack of effect noted here, in conjunction with the effect of discord, suggests that genetic factors do not constitute a sufficient explanation.

Multivariate analysis has shown that parental personality disorder (of both the antisocial type and other types) is significantly associated with dysfunction in children as a consequence of their exposure to hostility and aggression (Rutter and Quinton, 1984). Even though the effect fell short of statistical significance, it appears that

personality disorder puts the children at an additional risk beyond that accounted for by exposure to hostile behavior. Even after controlling for disrupted parenting in childhood, parental deviance (the majority of which involved criminality or personality disorders) was a good predictor of the development of personality disorder in adult life in institution-reared children (Quinton and Rutter, 1984).

D. Adoption-Twin Studies

The strongest test for the genetic hypothesis consists of determining rates of disorder (criminality) in the children of maladaptive parents who are adopted in infancy and reared by non-ill parents to whom they are not biologically related. The evidence consistently supports a genetic mode of transmission in a vast array of symptomatology (Tienari, Lahti, Sorri, Naarala, Moring, Kaleva, Wahlberg and Wynne, in press). Steward and de Blois (1983) found that the association between antisocial behavior in fathers and sons was more significant when the fathers were in the home.

Eysenck and Gudjonsson (1988) conclude from twin and adoptive studies that "both genetic and environmental factors are implicated in the genesis of criminal, antisocial and psychopathic behavior" (p. 105). Their general finding is that genetic factors provide a significant influence for prosocial behavior, which explained 60 percent of the total variance (*supra*, p. 108). This section will explore the prevailing biomedical literature which is supportive of the theoretical foundations presented in this paper.

A well-known comparison study of heredity as a factor in criminality was published by Johannes Lange in 1929. Lange's conclusion was that "Monozygotic twins

showed quite considerable concordance with reference to crime; dizygotes, however, quite considerable discordance. According to the twin method, we must conclude from this that heredity is a very important cause of crime" (p. 14). The several replications of Lange's study determined that of 135 MZ twins, 67 percent were concordant, whereas of 135 DZ twins only 30 percent are concordant (Eysenck and Gudjonsson, 1989). Though significant, these studies have been criticized due to degrees of criminality, sample selection, operationalization of the concordance (Dalgard and Kringlen, 1976) and alleged similarities in treatment of MZ twins by parents.

The argument to this "similarity of treatment" theory is based on the fact that it is unlikely that superficial parental treatment would lead to greater congruence in constructs such as intelligence, personality and criminality (supra, p. 98). The issue of selectivity was resolved by Christiansen (1977), who completed an extensive study on the criminality of a total population of 3,586 twins from a defined region in Denmark. The results indicated 50 percent concordance for criminal behavior for MZ and 21 percent concordance for DZ twin pairs.

Relying on self-report data versus official statistics, Rowe (1986) found that concordance for self-reporting delinquent behavior was greater for MZ than for DZ twins (for both males and females). He also found that twins who reported more shared activities were no more similar with regards to delinquency than those who reported fewer shared activities. Rowe concluded that shared genes versus shared environment was the critical source of concordance.

Another indication of the significance of genetic factors in criminality appears in

the studies of social attitudes. These involve an analysis of religious values which favor altruism instead of antisocial conduct (Wilson and Herrnstein, 1985). Although there is evidence that such variables involve a degree of dependence on environmental factors, genetic influences have been proven to be critical. Martin, Eaves, Heath, Jardine Feingold and Eysenck (1986) found that data collected in Australia and England on the social attitudes of spouses and twins are consistent with the genetic model regarding family resemblance and social attitudes.

Adoption studies differ in their logic from twin studies (Eysenck and Gudjonsson, 1989). Adopted children derive their genetic material from biologic parents and environment from adoptive parents (Id. at 103). Hutchings and Mednick (1977) completed a significant adoption study which was published in the Biosocial Basis of Criminal Behavior. Out of a sample of 662 adoptive sons in which both the biologic and adoptive father is criminal, 36 percent of the sons are criminal (Id. at 104). When neither the biologic nor adoptive father was criminal, only 10 percent of the adoptive sons were criminal (Id. at 104). Among biologic, but not adoptive, fathers who were criminal, 22 percent of their sons were criminal; when the biologic father was not a criminal, but the adoptive father was, only 12 percent of the sons were criminal (Id. at 104). These findings favor the strength of the influence of the biologic father's criminality (*supra*, p. 137).

Cloninger, Sigvardsson, Bohman and von Knorring (1982) investigated the interaction of genetic and environmental antecedents of criminality. It was found that 862 Swedish males adopted by a nonrelative were studied and criminality was found in

12 percent of adopted males, 26 percent of their biologic fathers and none of their adoptive fathers. In those adopted sons with "poor post-natal background," the rate of petty criminality was approximately twice that of the control population of adoptees (Eysenck and Gudjonsson, 1988). Significantly, when both congenital and post-natal factors were present, the risk was almost 14 times that of the control population (supra, p. 105).

The significance of the twin-adoption studies for the homicidal juveniles at issue lies in this interaction effect. Overall, the studies significantly support the view that genetic factors play a role in the causation of criminal behavior with the recognition that failure of MZ concordance suggests environmental influences.

E. Gene-Environment Correlations and Interactions

Due to the seriously unstable and disorganized environments as well as the extensive histories of familial psychopathology in the lives of those juveniles on death row, this critical link must be explored.

Gene-environment correlations and interactions are influential through their effects on environmental risk mechanisms (Plomin, 1986; Pogue-Geile and Rose, 1987). Although the evidence demonstrating the operation of such mechanisms is minimal, a few findings suggest that they do occur. Such mechanisms occur in the context of the following two processes. First, there appears to be evidence that empirical studies have proven that people, to some extent, create their own environments. McGuffin, Katz and Bebbington (1988) established in "The Camberwell Collaborative Depression Study" that psychosocial stressors load in families. Individuals who display deviancy in

childhood are likely to lead disruptive lives in adulthood. That is, the "adult careers" of explosive children are characterized by significant disorganization and instability. Robins (1986) used retrospective data from the Epidemiologic Catchment Area Study and found that adverse life experiences in adulthood were linked with previous psychopathology in childhood. Although none of the studies tested the hypothesis that links over time were genetically mediated, it is possible that genetic factors played a part (U.S. Department of Health and Human Services, 1990).

Second, genetic factors are thought to increase people's vulnerability to environmental hazards. Several studies have demonstrated that the risk of antisocial behavior is greatest when there is criminality in both the biological and adoptive parents. The increase in risk is greater than would be expected on the basis of a simple additive effect (Cadoret, 1985; Cadoret, Cain and Crowe, 1983). Interestingly, studies of twins have shown that even if they are separated from their antisocial parents at birth they are still at high risk for developing antisocial tendencies. It was found if one (twin) shows the behavior, so will the other.

The available evidence on gene-environment correlations and interactions is minimal in quantity but profound in meaning. It appears there are a variety of mechanisms by which a genetic predisposition may increase environmental links for child psychiatric disorder and criminality. The main point regarding gene-environment interactions is that a genetic predisposition may create a greater vulnerability to environmental adversities.

F. Family Environmental Effects

As mentioned, children's exposure to hostile or aggressive behavior by the parents has been strongly associated with an increased risk of maladaptive behavior regardless of the parental diagnosis. The child's maladjustment correlates with the quality of family emotional resources. Rutter and Quinton (1989) found that marital discord constituted a critical source of hostile behavior within a family. Significantly, sons develop disturbances earlier than daughters in the presence of family discord; however, if the discord persists, the females suffer more over the long-term. Other studies which have included systematic discriminating measures of parent-child and marital relationships produced similar findings on the risks associated with family discord (Cox, Puckering, Pound and Mills, 1987; Feldman, Stiffman and Jung, 1987; Radke-Yarrow, Cummings, Kuczynski and Chapman, 1985; Jouriles, Barling and O'Leary, 1987). Discord plays a crucial role in the risks associated with parental mental disorder. Such a role is a consequence of the strength of the discord effect and frequency with which the mental discord is associated with marital discord. Although the effect is substantial when discord is associated with family adversities, the risks are greatest when the discord results in parental criticism or hostility that is focused on one or more child but the risk is still evident when tension and disharmony are present between the two parents. The nature of the connections are complex; however, there is evidence of causal influences in both directions. In any event, discord constitutes an important risk mechanism for children.

The discord may be derived from the reality that parental mental disorder (particularly when associated with psychosocial hazards) frequently leads to family

breakup (Rice, Ekdahl and Miller, 1971). There are a few studies which involve a systematic psychiatric assessment of the parents in families from which children in foster or institutional care (including criminal facilities) are raised. The evidence indicates the main adversity is not the child's separation from parents but rather the multiple stressors with which it is associated (St. Claire and Osborn, 1987).

Another line of research involves dysfunctional parenting and the subsequent effect on offspring. It is obvious that parental mental disorders significantly disorganize, distort and impair parenting. Only recently has there been systematic, observational studies of the parenting of mentally disordered mothers. Unfortunately, the paternal model has been neglected with the exception of one study examining its correlation with antisocial aggression (Bernard, 1990).

These studies seem to find that risk to children of dysfunctional mothering is a consequence of psychopathologic attachment. That is, mothers who are mentally disordered consistently fail to respond to their child's overtures, fail to facilitate social interactions and are less adept in responding to their child's cues (Cox, Puckering, Pound and Mills, 1987). In general, pathological mothers are more disorganized, unhappy, tense, inconsistent and ineffective with their children (Davenport, Zahn-Waxler, Adland and Mayfield, 1984; Carlson, Cicchetti, Barnett and Braunwald, 1989). Several support the finding regarding mother-infant interaction and maternal depression (Bettes, 1988; Field, 1984; Field, Healy, Goldstein and Guthertz, in press).

The next section will explore the differential impact of child maltreatment in the form of maternal rejection. One recent study of 4,269 live male births found that

maternal rejection of the child in the first year statistically ($p < .001$) interacted with birth complications in predicting criminal violence at 18 years of age (Raine, Brennan and Mednick, 1994). In support of the attachment theory, subjects with both birth complications and maternal rejection made up only 4.4 percent of the sample but accounted for a shocking 18 percent of violent crimes committed by the entire sample of 4,269. Raine, Brennan, Mednick and Mednick (1996) reexamined a random selection of this population of 4,269 males and found that overall rates of crime are particularly high in the subgroup of subjects who possess both biological (construed herein as neuromotor deficits) and psychological (construed as unstable family environments) risk factors for crime. The biosocial cluster was operationalized in part as maternal rejection. In this study, early maternal rejection was rated based the public institutional care of infant, attempt to abort fetus, and unwanted pregnancy (*Id.* at 545). These findings demonstrate the importance of early childhood intervention with particular emphasis on early attachment formation. Before discussing the impact of maladaptive attachment on a child the relatively complex ethological components of bonding/attachment ¹⁵ will be reviewed.

1. Attachment

Attachment is the most critical aspect of infancy besides meeting a baby's physiological needs. Vera Fahlberg, pediatrician and director of the Forest Heights Lodge in Evergreen, Colorado (treatment center for emotionally disturbed children) explains, "the bond that a child develops to the person who cares for him in his early years is the foundation for this future psychological development and for his future

relationships with others" (p. 5). The affectional bond or attachment is a function of much more than assurance of the child's physical survival. Fahlberg explains, "... it allows him to develop both trust in others and reliance on himself" (p. 5). As Bowlby (1979) states "... during early years of childhood the relationship between emotional state and current or recent experience is often crystal clear."

The development of attachment is at the core of meeting basic social and personality needs, such as maintaining self-esteem and being affectionate toward others. Basically, "[attachment helps the child to:

- attain his full intellectual capacity;
- sort out what he perceives;
- think logically;
- develop a conscience;
- become self-reliant;
- cope with stress and frustration;
- handle fear and worry;
- develop future relationships;
- reduce jealousy" (Fahlberg, 1979, p. 5).

There is evidence of "...a strong causal relationship between an individual's experiences with his parents and his later capacity to make affectional bonds" (Bowlby, 1979, p. 135). Although the primary caregiver is traditionally and typically the biological mother, research indicates that it doesn't matter whether or not there are blood ties to the baby. The primary caregiver could be the birth mother, foster mother, adoptive mother, father or other "...primary person to whom the child can become attached, who responds to the child's needs and who initiates positive activities with the child seems to be indispensable" (Fahlberg, 1979, p. 7). It appears that one of the primary causes of increasing crime is unattachment (Magid and McKelvey, 1987). As

Selma Fraiberg states (1977):

"The distinguishing characteristic of the disease of nonattachment is the incapacity of the person to form human bonds. In personal encounters with such an individual there is an almost perceptible feeling of intervening space, of remoteness, of 'no connection' " (p. 47).

She explains:

"The life histories of people with such a disease reveal no single significant human relationship. The narrative of their lives reads like a vagrant's journey with chance encounters and transient partnerships. Since no partner is valued, any one partner can be exchanged for any other; in the absence of love, there it is no pain in loss" (p. 47).

The disease of unattachment is thought to give rise to a broad range of dysfunction, including psychopathy and personality disorders. As is expressed repeatedly in the petitioner's briefs and supporting amici briefs for the juveniles on death row; these individuals live in the ultimate terror of not being. They are people who do not have a sense of their own existence (Magid and McKelvey, 1987). To feel alive, or to get a "kick," many resort to drugs and an endless array of brutality. In the horrifying acts that result, the victims are frequently chosen indiscriminately and anonymously with little motive or remorse (supra, p. 64). As was described by one of the killers in Truman Capote's In Cold Blood, "... he was a very nice gentleman ... I thought so right up to the minute I slit his throat" (1966, p. 302).

More often than not the early childhood experience of such persons includes broken connections with frequent changes of addresses. Several studies have even discovered that an unattached child as young as three or four cannot easily attach himself irrespective of being exposed to the most favorable conditions from the

formation of a human bond (supra, p. 66). Many researchers agree that the earlier the break in the attachment process the more damaging the results.

Studies of institutionalized infants and children found that the age at which the child suffered deprivation of human ties is closely correlated to certain effects in adult personality and the capacity to sustain human ties (Id. at 67). In fact, it appears that most significant impact occurred at 2 years of age. Dr. Fraiberg concluded: "When for any reason a child has spent the whole of a large part of his infancy in an environment that could not provide him with human partners or the conditions for sustained human attachments, the later development of the child demonstrates measurable effects" (1977, p. 51). In addition to Bowlby's work supporting this conclusion, it has been demonstrated that when a mother or father was absent from their child 6 months or more before the child reached 10 years of age the rate of the diagnosis of sociopath was significantly increased.

The character disturbed children constitute the largest single category of emotionally disturbed youth (Robins, 1970). Robins found that there is a relatively high prevalence of antisocial children and adolescents" ... (and) this group also has a poor adult prognosis ... the poorest of any children psychiatric illness" (p. 262). Magid and McKelvey (1987) agree that most delinquents are unattached children who have not had nurturing environments:

"Unattached children, like the unattached psychopathic adults they become, have an uncanny ability to appear attractive, bright, loving...helpless, hopeless, lost...or promising, creative and intelligent, as may suit their needs at the time. Therefore, strangers, helpful neighbors, even therapists, often see the parents as the problem and believe the winsome child is 'beautiful.' This can, of course,

cause the parents great consternation and frustration and - when police and other childcare agencies intervene - anguish. For these manipulative, intelligent children twist things so that the parent may even be accused of child abuse" (p. 35).

Drs. Fritsch and Goodrich (1990) extend the issue of attachment to the adolescent inpatient psychiatric setting in "Adolescent Attachment as Treatment Process" (1990). It was found that a powerful prognostic sign regarding discharge outcome was not simply the severity and chronicity of the patient's symptoms at admission. Rather, high IQ (construed as a locus of control score reflecting a sense of ego autonomy) and the post-hospital continuation of psychotherapy predicted good outcome. By contrast, severe family pathology ¹⁶ (construed as lack of attachments or more accurately, attachments to maladaptive parental figures) is associated with poor outcome.

Although the research supporting the theory of unattachment is clear, the degree of maternal deprivation which causes such "detachment" is not clear. Before discussing this correlation, it is important to recognize contributions children make to their own socialization. Even the neonate's behavior has consequences for the infant-mother interaction. The so-called "ethological attachment" theory was examined as part of a complexity of the theoretical traditions of psychoanalysis and learning theory. There are replicated findings which support this theory.

With the brain's rapid growth during infancy, the first year of life is a ripe time for learning, scientists have established there are key mother-child interactions in infancy that lay the groundwork for a child's personality and intellect. Dr. Stanley Greenspan, a child psychiatrist on the faculty of the George Washington University

Medical School in Washington, D.C., says that the simple impact of overstressed mothers can result in toddlers who are aggressive and impulsive. Later difficulties present in the form of trouble with language, difficulty knowing what is real, controlling moods and concentrating on learning. A child's most critical development is alleged to be determined from birth to age three where so many patterns are established for life (Granat, 1987).

One of the few long-term studies exploring the connection between attachment behavior and abusive parents has been underway for many years at the Minnesota Mother-Child Project. The 200 children in the study were the result of a random selection who were followed from prenatal to two years. Abuse and neglect were detected after observation began. The mothers were divided into five groups: physically abusive, verbally abusive, neglectful or uncaring, psychologically unavailable (withdrawn, unemotional or unresponsive) and normal. One shocking outcome of the study: the children of the psychologically unavailable mothers formed even weaker attachments than did those of the abusive ones. Even worse, by 18 months none of the infants with unresponsive mothers had developed an attachment. Similar findings have been reported in other studies (Wilson and Herrnstein, 1985). Overall, maltreated children tend to display more aggression in both psychological tests and play situations (Id. at 254).

2. Ethological Correlation

The significant correlation between maternal depression and child abuse cannot be ignored as the stage setting for development of the violent youth. For example,

Hawton, Roberts and Goodwin (1985) found a significantly increased risk of child abuse in mothers who attempted suicide. Unfortunately, parental suicide attempts failed to constitute a useful alerting mechanism for possible child abuse; the abuse, for the most part, precedes the suicide attempt. The significance of the child abuse and delinquency causal connection has already been discussed.

Most forms of serious mental disorder are associated with difficulties and distortions of parenting. The evidence supports the consequential abnormalities in the dyadic relationship between mother and child. As mentioned, this association plays a significant role in leading to the development of pathology in the child. To compound the consequences from maternal depression, young infants are also vulnerable to cognitive ill effects. Cogill, Caplan, Alexandra, Robson and Kumar (1986) provide evidence of cognitive deficits correlated specifically with maternal depression during the first year of motherhood. Unfortunately, this finding has yet to be replicated.

In conclusion, family background is a powerful force which shapes an individual's capacities and accomplishments throughout his/her lifetime. The educational and occupational attainments of parents, the physical resources of the home, the personal relationships between parents and children and many more factors constitute the family background. The impact of his/her background is apparent early in life; his/her intelligence and ability to perform in school are in part predictable from knowledge of this background. Not only are his/her attainments influenced by family background but the presence or absence of values, attitudes and mental health are all subject to the pervasive and continuing effects of the family. A child's inheritance is

both biological and social and such basic background facts as the parents educational attainment or lack thereof are likely to involve both aspects of that inheritance.

The evidence supports the finding that psychiatric disorder in parents constitutes a serious risk factor for offspring. The mechanisms include: genetic transmission as a contributory factor to vulnerability versus a direct inheritance of the psychiatric disorder per se; parental damage to the fetus secondary to substance abuse; and a diverse scope of family environmental effects with particular emphasis on discord and impaired parenting. These mechanisms are demonstrated in the case presentation of the young offenders on death row. As Walt Schrieberman noted, "the frightening thing about heredity and environment is that parents provide both" (Magid and McKelvey, 1987).

G. Interaction of Family, Environment and Conscience

There exists little reason to doubt that family interaction influences what children interpret as proper behavior (McCord, 1991). The intergenerational links between criminality and aggression have been discussed as has the highly criminogenic nature of parental conflict. Families that are dysfunctional in terms of conflict tend also to be families in which a parent is rejecting and aggressive which provides a model of egocentrism (supra, p. 3).

Socialization practices that increase altruism, similar to those that increase aggression, include imitation of the behavior they observe (Eron and Huesmann, 1986; Farrington, 1978; White, 1983). Unfortunately, the majority of socialization theories presuppose that a given practice will have similar effects on all children (supra, p. 7). Such a view fails to consider that mood, temperament and other highly idiosyncratic

personality factors affect responses. It has been demonstrated that socialization practices vary in effect for different children and the characteristics of children, in turn, affect the socialization practices of parents. As McCord (1991) points out, "Differences in size, health, attractiveness, intelligence, responsiveness, sex and temperament affect how adults respond to children" (p. 8). Clinical studies have provided support for this theory; for example, Dion (1972) found that attractive children were judged to be more honest and less likely to misbehave.

McCord (1991) points out that multiple studies of infants indicate children have inherent social interests. Children's level of altruistic behavior stabilizes between 12 and 18 months (Cummings, Hollenback, Iannotti, Radke-Yarrow and Zahn-Waxler, 1986). Interestingly, correlations of measures of altruism between monozygotic twins are twice those of dizygotic twins (Rushton, Fulker, Neale, Nias and Eysenck, 1986) suggesting an element of genetic transmission for altruism (McCord, 1991).

The possible genetic origins of differential behavior as well as the directionality of influence between children and parents has already been mentioned (Lytton, 1990; Reid, Patterson and Loeber, 1982; Rutter, Bolton, Harrington, Contour, MacDonald and Simonoff, 1990; Call, 1984). For example, poor socialization could be caused by hyperactivity, impulsivity and aggression. Many studies provide evidence of heritability for activity level, impulsivity, aggression and desire for excitement as well as hyperactivity (Eron, Huesmann, Dubow, Romanoff, and Yarmel, 1987; Goldsmith and Gottesman, 1981; Huesmann and Eron, 1984; Pederson, Plomin, McClearn and Fraiberg, 1988; Goodman and Stevenson, 1989). Goodman and Stevenson (1989)

found substantial heritability for twins and concluded that genetically determined hyperactivity might, in turn, cause poor socialization practices. Similarly, a literature review by Lahey, McBurnett, Loeber and Hart (1991) present convincing evidence of the biologic correlates of homogeneous subtypes of conduct disorder causing concerns for the underlying neurobiologic mechanisms and etiology of the disorder.

Lahey, McBurnett, Loeber and Hart (1991) critique biological studies of conduct disorder and suggest that subgroups of youths with conduct disorder can be distinguished from one another and from controls on a wide range of physiological measures such as skin conductance, heart rate, cortisol and several indicators of catecholaminergic activity (*Id.* at 13). It appears that biologic studies of conduct disorder are relatively consistent for psychophysiological measures of skin conductance and heart indicators but less so for neurochemical variables (*Id.* at 14). For example, serum and urinary catecholamine levels are frequently abnormal in a subgroup of youths with conduct disorder. Importantly, research has shown that abnormal infant caretaker interactions are associated with similar catecholamine abnormalities in the developing infant (Reite and Field, 1985).

Studies of the brains of adults diagnosed with antisocial personality disorder indicate they have low levels of the mood-altering chemical called serotonin. It is possible that this partially explains their ongoing need and/or desire for stimulation often criminal in nature. Several studies have provided dramatic demonstrations of the effect of severe attenuations of sensory stimulation on humans (Zubek, Pushkar, Samson and Gowing, 1961). Such experimental studies provide support for the theory

that the lack of variability in stimulation and absence of stimulation are subjectively unpleasant and highly motivating (Id. at 180, 181). The result is an increased desire, need, for excitement and inability to tolerate routine and boredom. This inordinate need for increases or changes in the pattern of stimulation suggests the antisocial personality experiences a sense of dysphoria under ordinary life conditions.

There are many theories regarding the origin of such a pathologic need for sensory input. As with the documented difference in serotonin level, these theories involve cortical functioning. One argument is that basal reactivity to stimulation is lowered such that more sensory input is needed to produce stable subjectively pleasurable cortical functioning (Id. at 181). The second hypothesis is that there is more rapid adjustment to stimulation which causes the need for stimulation variation to occur more rapidly and with greater intensity (Id. at 181).

One interesting study indicated that psychopaths learned best when reward remained uncertain. If one construes this reward condition as leading to an enhanced arousal state due to the variability of stimulation induced by the uncertainty, then the results can be seen as supportive of the basic hypothesis (supra, p. 181). Fox and Lippert (1963) completed a study with 10 male juvenile offenders who had been diagnosed as psychopathic comparing the amount of spontaneous changes in galvanic skin response (GSR) with 10 offenders who had been diagnosed with inadequate personality. This study demonstrated that the psychopathic group exhibited less spontaneous activity. It appears that the problem is one of rapid adaptation rather than diminished basal activity.

Although the evidence for lowered basal activity is inconclusive, the GSR studies demonstrate more rapid adaptation process (supra, p. 182). In fact, Petrie, McCulloch and Kazdin (1962) identified this phenomenon as "reduction" a study they conducted with juvenile delinquents. The conclusion is that the absence of sensation experienced by the reducing individual is unpleasant such that he is motivated to change his perceived reality by seeking increased sensory input.

Overall, the evidence is supportive of a correlation between physiologic deficits and the subsequent development of criminal behavior. Raine, Venables and Williams (1990) extended an analysis of skin conductance to include heart rate measures of orienting. The relationships between skin conductance and heart rate measures of orienting were analyzed in a noninstitutionalized sample of 101 15-year-old male subjects along with subsequent criminal behavior status at 24 years of age. The primary goal of this study was to conduct a nine year follow-up of the sample originally tested by Raine and Venables (1984). They found lack of any skin conductance response was significantly more prevalent in subjects with a criminal record (31 percent) than in the control subjects (10 percent). Previous research found that measures of a number of skin conductance responses produced stronger effects than measures of amplitude of skin conductance responses (Raine and Venables, 1984). This was attributed to the higher reliability of the former and the reduced affectivity by the thickness and hydration of the stratum corneum and number of sweat glands relative to amplitude data (supra, p. 936)

Additionally, smaller orienting activity in the subjects with criminal records in

the passive attention task is consistent with the theory that individuals with antisocial personality disorder and individuals with criminal records have a deficit in the allocation of attentional resources to external stimuli (Raine and Venables, 1984). Such a deficit is thought to explain some early social and cognitive impairments in antisocial individuals; for example, poor academic work, antisocial school behavior, and difficulties in sustaining training courses and jobs (Ashmore and Jarvis, 1987). In fact, "it appears that only children with conduct disorder have both lower autonomic arousal and cognitive attention deficits while children with conduct disorder and hyperactivity disorder have impairments in attention (Raine and Jones, 1987). The existence of both disorders appears to significantly predispose an individual to subsequent criminal behavior. An adequate model of biological correlates may involve complex relations between aggression, motor hyperactivity, bizarre/psychotic behavior and comorbidities such as anxiety and depression (supra, p. 15).

Needleman and colleagues (1996) demonstrated a direct correlation between lead exposure and increased risk for antisocial and delinquent behavior via a progressive developmental course. This research provides support for an earlier study by Denno (1990) who examined 987 African-American youths (487 males, 500 females) from birth through 22 years of age. She found lead poisoning in male subjects only to be the most significant predictor of disciplinary problems and among the most significant predictors of delinquency and adult criminality.

It is known that attentional impairment is a strong risk factor for delinquent behavior and that lead exposure has been shown to affect attention, reduced verbal

competence, increased rates of reading disabilities, frustration and increased academic failure. Another intervening variable in the causal chain between lead and delinquency is academic failure which is a documented consequence of lead exposure (Id. at 386). It has already been demonstrated that subjects with elevated tooth lead levels in childhood followed into adulthood had a seven fold increase in the rate of high school failure (Needleman, Shell, Bellinger, Leviton and Allred, 1990).

There is a significant amount of medical research which supports the long-standing view that impulsive and violent behavior may stem from brain dysfunction or damage secondary to head injury, disease or toxic chemical substances (Gottschalk, Rebello, Buchsbaum, Tucker and Hodges, 1991). Another case involves the relationship between potentially toxic metals and aberrant behavior (especially violent activity) via nonintrusive analysis of hair for trace elements. As discussed, in animal models, impulsivity and violent behavior have been reported to be the result of brain dysfunction or damage particularly in the cortical and limbic areas. There is substantial evidence that at least some of the most violent offenders have extensive histories of head trauma, learning disabilities and neurologic dysfunction. This observation has been corroborated by neuropsychological testing which shows evidence of brain function impairment which is well documented in the petitioner's briefs and amici briefs as well as in the presentation of the current cases from the youthful offenders on death.

Admittedly, the actual mechanism by which some brain lesions contribute to violent behavior is still not well understood. What is known is that toxic metals (such as lead) are correlated with brain lesions and/or dysfunction in humans and rats.

Similarly, elevated tissue and dentine levels of toxic metals have been correlated with learning disability and intellectual impairment. Although many researchers argue that learning disability may predispose an individual to emotional outbursts and disruptive behavior; a significant relationship between intellectual impairment, learning disability, delinquency and criminality has not been absolutely determined.

Drs. Gottschalk, Rebello, Buchsbaum, Tucker and Hodges (1991) found a higher level of manganese in prison versus control groups. It appears that manganese can operate as a neurotoxin even if there is no conclusive evidence that directly links manganese toxicity to violence. The conclusion which Gottschalk, et al. (1991) reach regarding the role of manganese in the pathogenesis of aggressive behavior is as follows: A combination of cofactors including but not limited to the abuse of alcohol and drugs in conjunction with psychosocial factors operates with mild manganese toxicity to promote violent behavior. This type of indirect, multifactorial link is the one common denominator present throughout the scientific literature regarding the correlation to criminality.

The following is a brief overview of several studies which correlate physiological, psychophysiological and neurophysiological characteristics to criminal behavior.

1. Neurophysiological Studies

Most neurophysiological studies which examine the central nervous system functioning of criminals use the EEG (electroencephalographic) scalp recordings. The primary finding herefrom is that EEGs of criminals are more often classified as

abnormal as compared to controls with a demonstrated slowing of the EEG frequency. In extremely violent offenders, Mednick, Pollock, Volavka and Gabrielli (1982) report on other types of EEG abnormalities (i.e., patterns associated with temporal lobe epilepsy and the 14-6 EEG pattern). Gabrielli and Mednick (1983) emphasize that the evidence supporting a case for abnormal brain activity in criminals does not in and of itself support the theory that brain characteristics are related to the etiology of criminal behavior. In fact, some argue that EEG differences between criminals and controls could be attributed to brain injury, drugs and the antisocial conduct itself.

There have been attempts to correct for some of the limitations herein by using prospective studies. There are at least three such well-known EEG studies. The first involved a group of subjects drawn from a Danish birth cohort consisting of all children born between 1959 and 1961 in Rigshospitalet in Copenhagen, Denmark (Mednick, Volavka, Gabrielli and Itil, 1981). The second involved examination of EEG measures in 265 children aged 11 to 13 between 1971-1972 (Gabrielli and Mednick, 1983). Herein, EEG measures obtained in 1972 were examined along with criminality information in 1978. The 1972 EEG measures on the subjects convicted of multiple offenses by 1978 exhibited significant slowing in comparison to the one-time offenders and the nonoffenders (Id. at 66).

A second study was completed on the same subjects in 1981. Again, it found that the percentage of slowed alpha activity in the 1972 EEGs still discriminated the recidivistic offenders with the greatest increase in percentage of slow alpha power in chronic offenders (Id. at 66). In the third prospective study, Petersen, Matousek,

Volavka, Mednick and Pollack (1983) replicated Mednick, Volavka, Gabrielli and Itil's (1981) findings with an independent sample in Sweden.

2. Psychophysiological Studies

Psychophysiological studies regarding criminality have examined the autonomic nervous system (ANS) measuring changes in skin conductance. ANS responses are monitored to "test whether or not antisocial individuals respond to normal apprehension in anticipation of an event which would be construed as painful or undesirable" (Gabrielli and Mednick, 1983, p. 67). Mednick and Volavka (1980) review the innumerable studies which report on the different patterns of ANS activity with criminals. There are only a few, mostly dated studies, which are of particular significance. Case in point, Lykken (1957) reported that psychopaths exhibit small skin conductance responses in anticipation of electric shock. Hare (1965) completed a renowned experiment which involved the presentation of numbers (1 to 12) in serial order and instruction that at number eight an electric shock would be experienced. The more psychopathic criminals exhibited less of an electrodermal response than the less psychopathic prisoners who demonstrated a significant increase in skin conductance early in the experiment (consistent with the well-known anticipatory anxiety). Other ANS research has examined responsiveness, ability to learn from punishment and other ANS parameters.

Overall, the results appear to be the same: the antisocial individual across many laboratory and natural settings and even differing constructions of antisocial behavior per se consistently provide a reduced ANS response (Mednick and Volavka, 1980)

3. Neuropsychological Studies

The findings from neuropsychological research have particularly interesting implications. Chronic criminality and persistent delinquency correlate with neuropsychologic dysfunction and impairment. Some researchers have even interpreted data as evidence that delinquents may have problems planning their actions and perceiving the consequences of such actions.

In one study, Gabrielli and Mednick (1980) found that individuals who tested neurologically left-side dominant were at significant risk for increased arrest for delinquency. In this particular study involving high-risk males it was found that 64.7 percent of left-handed individuals were subsequently arrested for delinquency. Flor-Henry (1979) has suggested that psychopathology is, in fact, related to dominant left hemisphere deficit. Interestingly enough, when subjects from the previous study were reassessed it was found that left-hemisphere dominance is consistent in adult criminality as well as juvenile delinquency (Gabrielli and Mednick, 1983).

Among the biological factors, it is well-accepted that traumatic injury to the brain is thought to impair social adjustment and in some cases lead to violence and criminality (Denno, 1990; Moffitt, 1990). However, the causal connection between the neurotoxins (excluding alcohol) and brain damage has been neglected. As has been demonstrated, the study on bone lead levels and delinquent behavior suggest that altered social behavior may provide the earliest expression of lead toxicity (supra, p. 369).

In summary, the predisposition of aggression has been an issue of great debate. Differences in temperament, physical stature, sex and other characteristics distinguish

offenders from nonoffenders (Gabrielli and Mednick, 1983). As mentioned, sons and daughters of criminal parents appear at higher risk for developing criminal behavior (Id. at 59). More current data from twin and adoption studies support earlier studies that genetic factors appear to play a role in the increased risk of criminality. Recently has there been substantive biomedical evidence to support the premise that heredity may foster aggression.

In one case report, Dutch researchers linked a profoundly disturbed family's problems to a single aberrant gene. The Dutch researchers had been pursuing the gene since 1978 when one of the men's sisters sought advice about having children at the University Hospital in Nijmegen (Cowley and Hall, 1993). When geneticist Han Brunner started studying the affected men, he found that they shared a marked inability to control their impulses. It appeared to be a distinctly male problem with 14 men fitting the profile and no women. The researchers analyzed blood samples and, after a decade, found that the men's problems appear to stem from a tiny defect in the gene that enables the body to produce an enzyme called Monoamine Oxidase A (MAOA). It has already been established that affected men fail to break down such substances. Again, studies have linked transmitters called serotonin and noradrenaline to aggressive behavior.

It is unlikely that antisocial behavior could be considered simply a matter of heredity. Even within this affected family, inheriting the gene doesn't automatically guarantee a life of violent crime. In this particular family at least one carrier managed to keep a job and family amidst a brother who raped his sister and subsequently stabbed a

warden in the chest with a pitchfork while in a mental institution for criminally insane. One relative tried to run a person down with his car, two others were known arsonists and one would creep into his sisters' bedrooms and force them at knife point to undress.

Delinquent behavior is a complex and multifaceted problem in which exploration of the etiology has centered on the following groups of determinants: social or experiential and the biological (Needleman, Riess, Tobin, Gretchen and Greenhouse, 1996). The current research seems to provide some support for Wilson and Herrnstein's (1986) arguments that criminality is primarily constitutional in origin: that criminality is more common in males, higher in those offenders with lower verbal IQ scores and with relatively extensive histories of hyperactivity.

Such evidence, however, may have important implications for treatment including pharmacological interventions to directly manipulate the suspected biologic substrate of conduct disorder and preventive strategies based on suggested environmental causes of biological abnormalities (Reite and Field, 1985). For example, preventing forms of atypical infant-mother interaction. Rutter and Garmezy (1983) found that (irrespective of the etiology) a child's misbehavior could promote marital discord which consequently increases conduct disorder. McCord (1990), however, tested this hypothesis and found no evidence that prior misbehavior of a child produced parental conflict. Before disregarding such a theory it is interesting to note the causal sequence referred to by researchers. There a variety of ways that differences among neonates might affect their social environments. For example, crying can make it difficult for a mother to sleep thereby influencing her child-rearing behavior. The poor

ability to communicate might produce failure of parental responsiveness.

Similarly, Maccoby and Jacklin (1983) showed that during infancy mothers respond to difficult behavior with reductions in pressure to conform and low levels to conform increase difficult behavior. Even more striking, Barkly and Cunningham (1979) showed that methylphenidate-induced changes in the behavior of hyperactive children produced changes in the mother's behavior. Bugental, Caporeal and Shennum (1980) used boys trained to act cooperatively and uncooperatively in an experimental situation to study these differences. Mothers and female undergraduates interacted with a responsive and a nonresponsive boy. Differences in the adult's locus of control produced opposite reactions or uncooperative behavior of the children. Adults labeled as "internals" reduced assertiveness while those labeled "externals" increased assertiveness when conveying neutral messages to the uncooperative child. Bugental and Shennum (1984) extended their studies of the interactive effects of mother's and child's personality and found: "Our results suggest that the mother who questions her own caregiving ability behaves in such a way as to maintain or exacerbate child uncontrollability" (p. 52).

From a comparison of monozygotic, same sex dizygotic, and opposite sex dizygotic twins it appears that environment accounts for most of the known variance for the neonatal temperament variables. Similarly, the degree to which children care about their own pleasures and pains and what they perceive as pleasurable and painful is primarily a function of experience.

McCord (1991) notes that many use rewards and punishments to teach children

and yet ignore the role of their use in teaching children what to value. The mistaken belief that by manipulating rewards and punishments one can generate social interest has potentially dangerous consequences (Id. at 16). His manipulations create the impression that children ought to consider only their own interests (supra, p.16). Desires for reward and avoidance of punishment are, in reality, selfish motivations. Their use by parents increases the salience of egocentric motives (Id. at 16). As McCord (1991) argues, punishments and rewards teach children to focus on their own pains and pleasures in deciding how to act.

Virtuous behavior is increased by exposure to nurturing adults modeling such behavior attributing altruistic explanations for their actions (Radke-Yarrow, Scott and Waxler, 1973). As was so eloquently put by Goldstein, Freud and Solnit (1973), "A child needs help in understanding and organizing his/her sensations and perceptions. A child needs people to love, receive affection from and to serve as safe targets for infantile anger and aggression; to curb and modify primitive drives. A child needs patterns for identification to build up a functioning moral conscience."

III: Sociomoral Issues

A. Conscience and Morality

Before exploring morality and conscience from a developmental perspective, this section will operationalize these concepts.

Kohlberg believed that conscience is organized around the dominant moral principle on which a person bases his or her moral reasoning. He postulates that conscience goes through developmental stages. Conscience is a term which has traditionally referred to the cognitive and affective processes which constitute an internalized moral governor over an individual's conduct. The first and most elementary state of conscience is organized around the principle of obedience from a fear of punishment. The second "reasons" on the basis of self-interest, while the third is most concerned with getting praise and approval. The fourth believes in law and order, while the fifth thinks in terms of a mutually beneficial social contract. The sixth and final stage reasons on the basis of a commitment to universal and ethical principles (Coles, 1986).

Kohlberg believed that children's orientation is a consequence of their cognitive development (Stantrock and Yussen, 1992). As such, children construct moral thoughts as they progress from one stage to the next versus passively accepting a cultural "norm of morality" "(*Id.* at 588-589). Tests of moral reasoning have been used by Kohlberg to identify the type of conscience a person has developed. Attempts have been made to move people up the scale by learning about these principles and their application. The viewpoint appears to be reflective of the general consensus of opinion that integration of

the self and world is a primary determinant of conscience. Conscience appears to become more stable, consistent and moral as a person's understanding of his/her own worth deepens, his/her competence with others increases, his/her understanding of the world is more insightful and his/her awareness of what constitutes "self" and "other" frees him/her from being controlled by external events and social pressures (Snyder, Snyder and Snyder, 1980).

The dysfunctional conscience is built on a different integration of self and world with different relational goals (*Id.* at 80). A critical component of this development is the reality that adults create for children. This includes the methods they use to handle feelings and solve interpersonal problems. As such, avoidance of punishment becomes the central concern of a child's conscience when he is subjected to humiliation, degradation and threats. The child's experiential comprehension of justice is then construed as punishment and revenge (*supra*, p. 82). Understanding and insight cannot be superimposed on those who have not developed such through the "conscience developing process" (*supra*, p. 84). A child's "world" cannot be given to him/her by someone else. It must be constructed from his/her experiences, intentions and the meanings attributed to these experiences and intentions. Lawrence Kohlberg (1972) explains "Moral development is ... the result of an increasing ability to perceive social reality or to organize and to integrate social experience."

There are unavoidable semantic problems as to what constitutes moral judgment. Even the broadest definition of the standards of value included within conscience must be constrained by certain critical boundaries. In order to describe conscience broadly,

one could argue that it subsumes those evaluative standards applicable to conduct (Sullivan, 1977). Conduct per se designates a broad set of behavioral dispositions which have been molded by the child's interchange with a social environment. Irrespective of the evaluative cognition which children inevitably acquire during the socialization ¹⁷ of their conduct, the intensity of affectivity will vary in relation to the social experience through which certain values have been transmitted. Even the behavior of parents and other agents of social transmission of values will establish different degrees of intensity of value for the child in different areas of conduct. Thus, the belief that "The main experiential determinants of moral development [are]... amount and variety of social experience, the opportunity to take a number of roles and to encounter other perspectives. Thus, [it is alleged] middle-class and popular children progress further and faster than do lower-class children and social isolates. Similarly, development is slower in the semiliterate village cultures that have been studied" (Coles, 1986). It is clear that other studies discussed in the forthcoming section support this argument.

Before exploring socialization as it pertains to the development of conscience it is necessary to distinguish the process of socialization from education. Specifically, socialization is the process by which an individual acquires the knowledge, skills and behavior that will make him or her an adequate member of society. The power and durability of the effects of early learning on a child's later social behavior are critical to socialization (Aronfreed, 1968). The external contingencies of the child's immediate social environment manifest a profound control over his/her behavior throughout the

course of socialization (Id. at 16). Of course, the most significant consequences of social experience is that it gives the child's "acquired behavioral disposition strength demonstrated through an increased independence of external control" (Id. at 16). By contrast, education refers to an intentional process that has objectives, content and outcomes and takes place in educational institutions as well as informal settings. Moral education refers to instruction in moral rules of conduct for the purpose of developing good character traits and ethical behavior.

There are a multitude of illustrations regarding how the term conscience is currently used far beyond the traditional perimeter of moral judgment. It is used to refer to value orientations which support the self-denial of pleasure identified in concepts of the "Protestant Ethic." Even surveys which attempt to uncover the child-rearing antecedents of conscience examine the socialization of domains such as aggression which lends itself directly to moral evaluation and more indirectly to the socialization of the child's dependence on the mother and his/her manipulative exploratory inclination (Aronfreed, 1968). Moral judgment is only one example of multiple value systems which are commonly regarded as the substance of the conscience (Id. at 5).

From a developmental perspective, moral thought is neither "wired-in" to the individual nor a copy of reality. The development of moral thought involves assimilating and integrating the external world to the structure of the individual (Coles, 1986). As such, thought is more a result of the individual's attempts to organize reality than an unfolding of innate patterns or internalization of environmental patterns. Moral development refers to growth of the individual's ability to distinguish right from wrong,

to develop a system of ethical values, and to learn to act morally. Moral development occurs through socialization, education as well as maturation (Kohlberg, 1972). The issue of maturation is critical.

Both Piaget and Kohlberg, leading figures in the field of sociocognitive moral development, have maintained that the organization of a child's thought is qualitatively different from that of an adult. As such, the study of moral development must include a sequential stage analysis of developmental changes. Current research being conducted in the field is primarily a derivative of Kohlberg's relatively complex system, it will be used as a basis of analysis. Kohlberg has developed an interdisciplinary approach with his own unique stage theory of moral development combining philosophy, psychology, education and political science. Both Piaget and Kohlberg adopt a theoretical position known as structuralism. Kohlberg postulates a series of six stages and three levels in the development and articulation of moral judgment from childhood into adulthood (Kohlberg, 1972). As the individual moves through moral levels, argues Kohlberg, more sophisticated forms of moral reassessing are apparent (Lambert and Turiel, 1986).

B. Moral Development

Regardless of the reliance on Kohlberg's theory of moral development, there have been several criticisms. They are based on the link between moral thought and moral behavior. Kohlberg's theory places too much emphasis on how people morally think and not enough on how they morally behave (Santrock and Yussen, 1992). Additonal criticism involves an overemphasis on the cognitive and underemphasis on behavior; the quality of research, inadequate consideration of the care perspective¹⁸ and

underestimation of the role of culture (*Id.* at 599). Strong developmentalists argue that more attention should be paid to the way in which moral development is assessed (*Id.* at 591). Researchers have found that hypothetical moral dilemmas presented in Kohlberg's stories do not correspond with the moral dilemmas children and adults face in their everyday lives.

Another criticism of Kohlberg's theory is that it is culturally and sexually biased. As such, examples of higher-level moral reasoning that would not be similarly recognized by Kohlberg's system are values related to the unity and sacredness of all life forms in India, and communal equity/collective happiness in Israel (*supra*, p. 526). These examples of moral reasoning would not be scored at the highest level under Kohlberg because they fail to emphasize the individual's rights and abstract principles of justice. Although the sexual inequality of morality is beyond this paper, an acknowledgment of its existence is important. A major criticism of Kohlberg's view is that it fails to reflect relationships and concern for others (care perspective).

Carol Gilligan believes that Kohlberg's theory does not place enough emphasis on the importance of caring and relationships in development. Her argument is that American culture has promoted the so-called care perspective in the socialization of females but not of males. Gilligan argues that Kohlberg reflects a basic moral inequality for both sexes which necessitates a search for moral equality between self and others. Gilligan argues that traditional Kohlbergian measures of moral development are biased against females. The rebuttal evidence indicates that research studies using Kohlberg's stories and corresponding scoring system do not find gender differences.

It appears that moral reasoning has a lot more to do with values and beliefs of a culture than is recognized by Kohlberg. In spite of criticisms, Kohlberg's theory appears to provide the most thorough explanation of moral development. His theory most efficiently represents the interdisciplinary approach with roots in maturation, education, and socialization. These components are all critical to a developmental exploration of morality.

The general consensus among theorists is that moral judgment emerges through the maturation process as a result of cognitive and emotional growth and a child's interaction with his/her environment. Both Piaget and Kohlberg believed that peer relations are critical to advancement of their moral reasoning via social stimulation (Santrock and Yussen, 1992). This mutual give-and-take in peer interaction provides children with an opportunity to take another person's perspective (*Id.* at 590). It is argued that a juvenile lacks a fully formed value system against which to evaluate his or her behavior and decisions. Kohlberg (1963) explains "... moral concepts and ways of thoughts only attain meaning at successively advanced ages and require the extensive background of social experiences and cognitive growth."

This paper adopts the basic assumption that the development of rational or mature morality is a process different from the learning of various irrational or arbitrary cultural rules and values. As such, intellectual maturity may be necessary for moral maturity but not sufficient for adequate moral development. It is clear that certain individuals may experience impediments in moral development and maintain a lesser stage of maturity unrelated to their age. As such, an adult may function at a moral

developmental stage equivalent to the norm for a juvenile. The adult, however, has had far more opportunity through life experiences to develop and act upon an acceptable system of values.

The cognitive theory of morality focuses on a distinction between a child's moral competence (construed as the ability to produce moral behaviors) and moral performance (construed as those behaviors in specific situations) (Santrock and Yussen, 1992). Moral competence (acquisition of moral knowledge) is briefly examined in the context of cognitive-sensory processes as an outgrowth of such processes.

Kohlberg argued that moral judgment is an important determinant of moral behavior stressing that an individual's interpretation of both the moral and factual aspects of a situation leads to moral decision. Kohlberg argued that "extra-moral" factors (e.g., desire to avoid embarrassment) caused children to avoid doing what they believe is morally right. In sum, Kohlberg like Piaget stressed that moral action is influenced by complex factors.

Kohlberg's use of "moral stage" does not refer simply to an application of cognitive reasoning to the moral realm. Moral reasoning, according to Kohlberg, involves structural development which is specific to its own domain even though cognitive operations constitute a necessary (but not sufficient) condition for moral development (Sullivan, 1977). A moral stage per se does not automatically signify anything about behavior. The stage concept is utilized by Kohlberg to denote a moral judgment. It is prescriptive or normative in that it deals with what a subject thinks is right and, therefore, concerns what ought to be (Coles, 1986). Moral stages are based

on the form (and not the content) of individual's reasoning (de Vries and Walker, 1986). Content refers to attitudes, beliefs, judgments and behavioral choices and form refers to reasoning that underlies this content. Kohlberg argued that each new stage represents a more complex organization of thought because it is more adequately differentiated and integrated (supra, p. 40). Integration refers to the development of complex connections among differential perspectives (right being initially defined by one's own interest and later by universal principles) (de Vries and Walker, 1986).

The stage approach, used by Piaget as well as Kohlberg, assumes each individual must pass through stages in a prescribed sequence. This implies that the child cannot skip stages and that he cannot proceed in a different order. Others have argued that it is really the order of the stages that is constant while the age at which a stage appears is variable (Cole, 1986).

Many researchers have misinterpreted the issue of the variability of progression through the stages and the corresponding significance. Dr. LeeAnn Iovanni in her 1990 dissertation entitled "Age Cohort and Period Differences in the Effect of Social Control, Social Learning and Strain Variables on Self-Reported Delinquency," University of Maryland, argued that neither Piaget nor Kohlberg focus their concern on age levels of moral development. Rather, their focus is on the "inevitability of these stages" (p. 28). On the contrary, Kohlberg specifically states that "passage through all six stages is not likely ... in the United States among urban middle-class people the dominant mode of moral reasoning is at stage 4" (Kohlberg, 1984, p. 67). Importantly, both Piaget and Kohlberg repeatedly emphasize the importance of age as it relates to moral

development. The problem lies in the lack of definitive evidence to support an absolute margin for age relative to moral development. There is no guarantee that all individuals will reach all stages. Kohlberg claims that cognitive development establishes the broad limits of the individual's progress through moral stages. As cognitive structures become more and more complex, a corresponding complexity of moral reasoning is possible but not guaranteed.

Piaget and Kohlberg submit that young children comprehend reality in ways that are qualitatively different from those in later childhood who comprehend reality different from adolescents. The child's cognitive developmental level confers meaning upon experience while at the same time limiting the scope and the depth of that meaning (Rosen, 1980). Although cognitive structural development progresses in an unvarying sequence, the demands of the environment and the nature of personal experience undergone by the interacting organism within it will greatly effect the rate of cognitive development (*Id.* at 141).

Kohlberg's moral stage model makes three claims consistent with cognitive developmental theory: (1) The order of acquisition of the stages is invariant, (2) Each successive stage represents a hierarchical integration of the preceding, (3) Each stage represents a holistic structure (Sullivan, 1977). Kohlberg argues that individuals are either at a stage or in transition between stages.

C. Kohlberg's Cognitive-Developmental Structuralism

Kohlberg has developed a philosophically sophisticated stage theory of moral development rooted in behavioral (individual level) moral psychology. He postulates a

series of 6 stages and 3 levels in the development of moral judgment from childhood to adulthood. These stages will be described using by Sullivan (1977) whose review of Kohlberg's structural theory of moral development provides analysis of structural weaknesses in Kohlberg's theory regarding separations of thought from action and is from ought.

I. Preconventional Level

The child is responsive to cultural rules and labels of good and bad, right or wrong. The child, however, interprets these concepts in terms of either physical or hedonistic consequences of action (punishment, reward, exchange of favors) or in terms of the physical power of those who communicate the rules and labels. This level comprises the following two stages.

Stage 1: Punishment and Obedience Orientation

The physical consequences of action determine its goodness/badness regardless of the interpretive meaning or value of the consequences. Avoidance of punishment and unconditional deference to power are inherently valued but not for any underlying moral order supported by punishment and authority. The desire to avoid punishment due to an underlying moral order is stage 4.

Stage 2: Instrumental Relativist Orientation

Here elements of fairness of reciprocity and equal sharing are present, but they are always interpreted in a physical pragmatic way. Reciprocity is a matter of "you scratch my back and I'll scratch yours" not of loyalty, gratitude or justice.

II. Conventional Level

The expectations of the individual's family, group is perceived as valuable in its own right, regardless of mediate and obvious consequences. The attitude is not only of conformity to personal expectations and social order but of loyalty to it, of actively supporting and justifying the order and of identifying with the persons or group involved in it. This level comprises two stages:

Stage 3: Interpersonal Concordance

This is also known as a "Good Boy" "Nice Girl" Orientation. Good behavior is that which pleases others and is approved by them. Emphasis is on conformity to stereotypical images of that is majority or "natural" behavior. One earns approval by being nice.

Stage 4: "Law and Order" Orientation.

Orientation is toward authority, fixed rules and the maintenance of social order. Right behavior consists of doing one's duty, showing respect for authority and maintaining the given social order for its own sake.

III. Postconventional, Autonomous, Principled Level

Moral values and principles have validity and application apart from the authority of the group or persons holding these principles and apart from the individual's own identification with these groups. This level has two stages:

Stage 5: Social Contract Legalistic Orientation

Right action defined in terms of general individual rights and in terms of standards that have been critically examined and agreed upon by the whole society. This is considered the official morality of the United States government and

Constitution.

Stage 6: Universal Ethical and Principle Orientation

Right is defined by the decision of the conscience in accord with self-chosen ethical principles appealing to logical universality and consistency. These principles are abstract and ethical. "At heart, these are universal principles of justice, of the reciprocity and equality of human rights and of respect for the dignity of human beings as individual persons" (Kohlberg, 1971, pp. 86-88).

Again, the implication is that the child cannot skip stages and cannot proceed in a different order (supra, p. 97). It is the order of the stage that is constant, while the age at which a stage appears is not fixed. The age of the emergence of a structure is primarily dependent on the environment which can provide or impede development. The ages related to the stages varies from culture to culture as well as from individual to individual (supra, p. 97). In no way does Kohlberg imply that all persons of a certain age will have reached a certain moral level. In fact, children at one age level could be functioning at different moral developmental stages. However, the more likely proposition is that children at certain age levels operate in relatively consistent stage levels. That, in fact, there is a correlation between age and moral development.¹⁹

Arbuthnot and Gordon (1986) systematically tested the utility of interventions to develop moral reasoning among high risk predelinquents. Kohlberg (1972) argued that the acquisition of higher stages of moral development is related to intelligence. Arbuthnot and Gordon (1986) were the first to actually link the enhancement of cognitive and moral structures with changes in antisocial behavior. That is, to test the

hypothesis that delinquents function at lower stages of moral reasoning than nondelinquents. Their study hypothesized that adolescents at risk for juvenile delinquency would benefit cognitively and behaviorally from an intervention designed to accelerate moral reasoning development. Herein, forty-eight seventh to tenth graders identified by teachers at high risk for delinquency participated in a cognitively based moral reasoning development program for 16 to 20 weekly 45-minute sessions. A one year follow-up found significant increases in moral reasoning, grades, and attendance with corresponding decreases in behavioral referrals for the treated group in comparison to a matched (according to the rated severity of behavior problems) randomly assigned nontreatment group of students. In an older and less detailed study, Campagna and Harter (1974) found that "sociopathic" children when compared to IQ matched "normal" children have a lower stage of moral development because they lack opportunities for role-taking in their families. Other comparisons suggest that parents of delinquent children may actually discourage mature moral reasoning.

The relationship which exists between a person's moral judgment and actions is critical. In Kohlberg's theory, the moral aspect is interpreted by the nature of the moral judgment. Most people identify morality with a moral commitment of action. Kohlberg uses several studies to support his two-tier claim of consistency between moral judgment and action. The first addresses the level of the structure/stage per se. One example involved cheating in sixth graders where it was found that 75 percent of subjects below principled level in moral development and only 20 percent of principled subjects (construed as at stages 5 and 6) were involved in cheating (Sullivan, 1977).

The second "tier" addresses nonmoral factors identified as attention, will and ego-strength. Kohlberg cites a study which found children with an amoral philosophy (stage 2) are more likely to cheat if they are high on ego strength. Whereas those with a conventional morality (stage 4) are more likely to cheat if they are high on measure of ego strength. At the post conventional level (5 or 6), high ego strength is less necessary as it appears even principled children measuring low in ego strength do not cheat. Kohlberg's conclusion is that this basic virtue is representative of "autonomy" as well as "justice" and the higher the stage, the greater the consistency between thought and action.

Some researchers argue that this is an oversimplification of moral consistency. There are more sophisticated arguments which focus on the idiosyncratic problems regarding the theoretical position of structuralism. In a somewhat humorous light, Sullivan (1977) even suggests Kohlberg's stage 6 ideal-principled person is a moral entity with "flesh and bones" analogous to the Beatles "nowhere man." Autonomy as a singular ideal, however, can contribute to the development of a moral agent who lacks sociability and might very well be anti-conforming and autocratic (*Id.* at 14). That is, autonomy separated from other dimensions of the moral may actually be an aberrant process.

A well-developed conscience does not necessarily translate into a morally courageous life. Similarly, powers of philosophical thinking and moral analysis in no way automatically translate into a willingness to confront the various evils of the world. The discrepancy between ideas and everyday conduct has disturbed many people. As

Kohlberg notes:

"To act in a morally high way requires a high stage of moral reasoning. One cannot follow moral principles (stage 5 and 6) if one does not understand or believe in them. One can, however, reason in terms of such principles and not live up to them. A variety of factors determine whether a particular person will live up to his stage of moral reasoning in a particular situation though moral stage is a good predictor of action in various experimental and naturalistic settings" (1976, p. 32).

Moral development refers to growth of the individuals's ability to distinguish right from wrong, to develop a system of ethical values and to learn to act morally. Kohlberg argues the age emergence of a structure/stage is largely dependent on the environment which can provoke or impede development. Kohlberg recognizes the significance of the human's interaction with the environment over time from birth onward and his/her progression from egocentricity to objectivity with objectivity presupposing a "decentering" process. Continuing to act upon the environment, the growing child constructs complex interrelated mental action systems for processing information and cognitive structures for more adaptive knowledge (Rosen, 1980). Importantly, the external world does not impose meaning on the person but rather the person confers meaning upon the environment through assimilation relative to their developmental level. As such, development can be thought of as a formation of the child's interaction with his/her environment.

Adolescents undergo many significant changes before adulthood. Before these developmental changes are completed, adolescents are vulnerable in many ways. Most significantly, they have difficulty appreciating the future consequences of their acts, lack

mature judgment and are easily influenced by family members and peers engaging in experimentation and risk-taking behavior. Adolescents are, for the most part, guided by emotions rather than reason. Accordingly, minors lack a fully formed identity or character and generally do not have the capacity for principled moral judgment.

In summary, age 18 remains the common dividing line between status as a juvenile and as an adult. Regardless of a child's advanced or retarded developmental stage, there are fixed ages for voting, joining the military, marrying, entering into a contract, attending school and driving. The most common age of majority established in American law for noncriminal purposes is age eighteen. This is based on the belief that juveniles are not fully responsible for their actions and society should share responsibility for the actions of its children. It is particularly disturbing that we continue to maintain a double standard for criminal purposes. It appears that society rationalizes use of the most severe adult sanction on juveniles with the mitigating factor approach which assumes individualized consideration. As will be demonstrated, consideration of mitigating factors are as diverse as the corresponding judge, jury and jurisdiction where they are considered. Far beyond providing individualized treatment, this judicial discretion has provided the means for serious legal abuses.

In the preceding chapters, a review of the literature provided definitive biomedical data as well as the more abstract conceptualizations of Lawrence Kohlberg and the application of Kohlberg's theory to delinquent populations by Arbutnot and Gordon. The biomedical data demonstrate that a correlation exists between dissocial (or maladaptive) behavior and psychological, emotional, biological, genetic (familial) and

environmental factors. The correlation is much more loosely established with sociomoral (including cognitive) variables but appears to exist to some degree. The weak sociomoral correlational evidence is most likely due to the obscure nature of these concepts and the difficulty in testing related theories. Current research continues to find support for the founding sociomoral theorists.

Similar vulnerabilities are shared, to some degree, by the majority of violent youthful offenders. The small group of the most violent of these offenders are at issue in this paper. As will be demonstrated, all of these youthful offenders share the most serious risk factors. It is inequitable and immoral to treat them as if they are fully accountable and yet very much victims of a complexity of tragedies.

IV: Methodology

A. Study Design

A retrospective descriptive cohort design along with a substantive case analysis was used to collect information on death row inmates sentenced for crimes committed as juveniles. The sample collection was completed between May 1, 1997-June 1, 1998. It was limited to offenders who were under the age of 18 when the crime was committed and were on death row or sentenced to death row during the study period. The study included the following two phases. The preliminary phase, began with by the United States Supreme Court case of Thompson v Oklahoma in 1987. This involved general data collection related to capital punishment issues, current news and events, juvenile death row cases and factors associated with capital punishment. The data collection phase involved a multistep process to identify juvenile offenders on death row. The data analysis included univariate, bivariate and multivariate analyses including Fisher's Exact Test for small samples, χ^2 analysis with odds ratios and 95% confidence intervals for the 2 by 2 analyses.

B. Preliminary Phase

The preliminary phase of this study involved a two month analysis of academic and nonacademic material related to the pending Thompson v Oklahoma case in the United States Supreme Court. This phase was conducted in Spring, 1987. Initial data was collected on all juvenile death penalty cases heard before the Supreme Court at that time including Thompson v. Oklahoma, 56 LW 4892 (1988), Stanford v. Kentucky, No. 87-5765 (1988), Wilkins v. Missouri, 57 LW 7793 (1989) and High v. Zant, No.

87-5666 (1987). Although High v. Zant was dismissed due to the petitioners misrepresentation of his age, the amici curiae briefs filed on the petitioner's behalf generalize to the population at large and were used in the study. All identified cases were researched by obtaining amici curiae briefs and petitioner's briefs from the U.S. Supreme Court. The data collected included extensive references to clinical studies on juvenile murders, clinical psychological/medical exams and general theoretical discussions on capital punishment (Appendix A, Chart 4.1).

C. Data Collection Phase

1. Overall Plan

Data collection began by contacting experts and organizations focused on the death penalty and death row inmates (Appendix A, Chart 4.2). There were an estimated 58 juveniles on death row at the beginning of the study. A multistep process was conducted which involved completion of the following: case identification, validation, substantive analysis of each case, verification of death row inmates, identification of new juveniles on death row and final confirmation and validation of information from attorneys, court house personnel, correctional staff and researchers.

2. Case Identification and Validation

All of the cases initially identified by Dr. Victor Strieb in 1996 were verified by phone calls to the individual Department of Corrections in each state where the death rows were located. Death rows were located using the National Directory of Law Enforcement Administrators, Correctional Institutions and Related Agencies, 1996-1997 editions. Census sheets or death row rosters from each death row were obtained and

cross-validated. A correctional officer from of the each death rows was contacted and verified that all inmates listed on the census sheets were housed in that facility's death row. Several correctional officers provided additional relevant demographic victim and inmate information. The respective courthouse were contacted to provide an additional cross-check and to identify attorneys involved in each case. This process was repeated periodically throughout the data collection period. Frequencies of contacts in all activities varied; some involved weekly and others monthly or bimonthly contact.

3. Substantive Analysis of Cases

Once inmates were verified, a search of LEXIS/NEXIS was conducted to gather information on each case, including articles and case citations. All available trial and appellate level cases were pulled and the cases which were not located were shepardized for further information. The data collected on each case included demographic information, date of the crime, victim information, statutory/nonstatutory mitigating factors, aggravating factors and evidentiary facts. The NEXIS information also provided links to other cases and subjects who had not been included in the original list. Mr. Watt Espy, Director, Capital Punishment Research Project, Alabama, was contracted to research his database of over 19,200 cases for possible identification of unpublished cases where no information was available. Dr. Victor Streib, Dean, Petit College of Law, Ohio Northern University and noted expert on the juvenile death penalty, was contacted throughout the study for consultation.

The LEXIS/NEXIS searches were conducted daily to obtain updated information and to identify additional cases. Searches of other research databases

including the National Criminal Justice Reference Service (NCJRS) database, PSYCHINFO, MEDLINE were conducted periodically. A large number of research articles provided additional secondary information on juveniles sentenced to death row. All of the new cases were verified using the same validation methods which are described. A WESTLAW search was conducted in the final stages of the data collection to target any missing information.

Attempts were made to contact all attorneys who participated at varying levels of the case from trial level to appellate review. Approximately 75% of the involved attorneys were contacted on at least one occasion. Data was obtained including presentence reports, writs of habeas corpus and other pertinent legal documents as well as the information provided verbally by the attorneys.

There were two family members of death row inmates contacted for more detailed information on the mitigators (i.e. the type of family problems, history of sexual abuse, etc.). This provided minimal additional information.

Several organizations with special interest in the death penalty were contacted to obtain information, to verify cases and to identify new cases. Some of these organizations include the following: Southern Center for Human Rights, Amnesty International, Texas Resource Center and NAACP Legal Defense and Educational Fund, Inc. Additional referrals from these organizations included experts who had examined the death row inmates. The identified medical experts were contacted and interviewed to obtain any additional information.

4. Final Confirmation

During the week of June 1, 1998 a final call to each of the state's Department of Corrections and death rows was conducted to obtain the most current census sheet and corresponding verification. Any missing data was obtained and data collection was closed.

5. Variables

Data was collected on both the perpetrator and the victim(s) as follows:

Perpetrator

Age: The age when the crime was committed (years)

Date of Birth: As listed by the Department of Corrections in each state

Race: Race of the inmate (White, Black, Hispanic)

Date of Crime: The date the crime was committed

State: State of the death row to which the inmate was sentenced

Statutory mitigating circumstances: Lockett v. Ohio , 438 U.S. 536 (1978)
(Identified as present or absent):

Troubled family history (or "poor family history")

Psychologic/emotional disturbances

Mental Retardation/Low IQ (< 70)

Medical history

Indigent Status

Documented substance abuse (confirmed cases)

Nonstatutory mitigating circumstances varied too widely to provide a valuable comparison.

Aggravating Circumstances (Identified as present or absent):

Rape

Robbery

Burglary

Arson

Murder of a police officer
Carjacking
Multiple murder

Victim

(Data was included for up to three victims)

Age: (years)

Race: (White, Black, Hispanic)

There was extensive additional qualitative information on the circumstances surrounding many of the cases collected but this was not included in the quantitative analysis.

D. Data Analysis Phase

The data were analyzed using SAS statistical software (SAS Institute Inc, 1990).

The frequencies for each variable were calculated along with bivariate analyses by race and state. Univariate analyses of the age of the victim was conducted. Cross-tabulations with Fisher's Exact Test and χ^2 analysis was conducted to test the relationships between variables.

Fisher's Exact Test was included in the analyses due to the small numbers included in the sample. This test yields the probability of a table that provides at least as much evidence of association as the observed table. The probability of every possible table is computed and a p-value is calculated (Mehta & Patel, 1983, SAS Institute Inc, 1990). This is useful in small numbers analysis where there are less than five observations per cell and χ^2 analysis may not provide stable estimates.

V: Findings

A. Univariate and Bivariate Analyses

Currently there are 71 cases on death rows throughout the United States for crimes committed as juveniles. This analysis included 68 (95.8%) of those juveniles and an additional four cases that were on death row or sentenced to death row during the data collection including two sentence reversals and two executions. All the juveniles were male and had committed murder along with one or more aggravating circumstances. Three out of four juveniles were 17-years-old, the remainder were sixteen. Over four out of ten juveniles sentenced to death row were housed in Texas (Huntsville). Slightly more juveniles were Black (44.4%)(Appendix B, Table 5.1.).

Up to three victims for each juvenile were included in this analysis. All were more likely to be 20-69, White, and about equally as likely to be male or female (Appendix B, Tables 5.2-5.5).

Mitigating circumstances were evaluated by age of juvenile and by race of juvenile and with aggravating circumstances. Over eight out of ten juveniles used troubled family history as a mitigating circumstance. Slightly more 17-year-olds used this mitigator compared to 16-year-olds (87.3% v.75.0%). A very similar pattern was noted for psychological/emotional problems. Less than half of all the juveniles used medical problems as a mitigating circumstance. Slightly more 16-year-olds used this mitigator (43.8% v.36.4%). Two out of five juveniles used low IQ/mental retardation as a mitigator. This was slightly more common among 17-year-olds (43.6% v.37.5%). Only 12.7% of all juveniles (9 out of 71) reported no prior criminal history as a

mitigator. The number was much higher among 17-year-olds (8 v.1). Three out of four juveniles used indigent status as a mitigator. This mitigator was more prevalent among 17-year-olds (83.6% v.56.3%). There were very few juveniles who reported documented substance abuse as a mitigator. The proportion was the same for both age groups (12.5-12.7%) (Appendix B, Table 5.6).

Among all mitigating factors, slightly more Blacks were noted in each category. Two out of five Black juveniles used troubled family history and psychological/emotional problems as mitigators. The proportion was similar in Whites (36.7% for troubled family history and 40.4% for psychological/emotional problems). The proportion for these mitigators was much lower in Hispanics (21.7% for family history and 15.8% for psychological/emotional problems). Over half of Black juveniles used medical problems and mental retardation/low IQ as mitigators (51.9% and 53.5% respectively). These proportions were higher when compared to Whites and significantly higher when compared to Hispanics. In fact, medical problems was used among only 3.7% of all Hispanics juveniles. Overall, Hispanics used less mitigators than Blacks or Whites. Black juveniles were more likely to report no prior criminal history as a mitigator (44.4% v.22.2% for Whites and 33.3% for Hispanics) as well as indigent status (47.3% v.32.7% for Whites and 20.0% for Hispanics). Significantly more Black juveniles (55.6%) reported known substance abuse as a mitigator, compared to Whites (11.1%) or Hispanics (33.3%) (Appendix B, Table 5.7).

Among aggravating circumstances included in the court cases, almost half of the juveniles committed robbery. One 16-year-old committed carjacking and one 17-year

old committed arson. More 16-year-olds committed multiple murders and murder of children compared to 17-year-olds. Rape was committed about equally among both age groups (Appendix B, Table 5.8).

White juveniles were significantly more likely to commit burglary, carjacking, murder of a police officer and arson compared to the other race groups. One-half of the Black juveniles committed rape and 45.5% of them committed murder of a child and 100% of kidnappings were done by Black juveniles. Hispanics were almost twice as likely as other race groups to commit multiple murder. Hispanics were also less likely to commit robbery (Appendix B, Table 5.9).

When robbery was an aggravating factor, psychological/emotional disorders were 80% less likely to be used as a mitigator (0.2, 0.01-0.8, Fisher's Exact Test $p=0.031$). Juveniles who had rape as an aggravating factor were 5.1 (1.1-23.1, Fisher's Exact Test $p=0.045$) times more likely to use no prior criminal history as a mitigator. When the offender committed burglary, they were 90% less likely to use indigent status as a mitigator (0.12, 0.03-0.6, Fisher's Exact Test $p=0.010$). Although it did not reach statistical significance, all offenders who had committed a child murder used psychological/emotional disorders as a mitigator. No other relationships among mitigators and aggravators were noted (Appendix B, Table 5.10).

B. Multivariate Analyses

Cross-tabulations with χ^2 analyses and Fisher's Exact Test were used to evaluate the relationships among variables. Race was analyzed in a dichotomous fashion using dummy coding as follows: White v. non-White, Black v. non-Black, Hispanic v. non-

Hispanic. This method was employed because calculations indicated that analyses of the 3 by N tables required for all race categories would be computer memory intensive and require more memory than is available.

Significant relationships were noted among state and race. White juveniles were significantly more likely to be housed in Florida and Oklahoma and significantly less likely to be housed in Texas (Appendix B, Table 5.11).

Whites were 16.33 (1.81-142.6) times more likely to commit burglary than non-Whites. None of the victims of white juveniles were Hispanic and only one victim was under age twenty. This was statistically significant (Appendix B, Table 5.12).

Black juveniles were significantly more likely to have Black victims which held true for the first and second victims. The numbers were too small to attain significance in the third victim. Blacks were significantly more likely to have victims under 10 years of age, 100% of the victims under 10 were murdered by Black juveniles. There was no significant effect for young Black victims and Black offenders. Blacks were significantly unlikely to commit burglary with the murder. In fact, none of the burglaries in this population were committed by Black offenders. There were no significant relationships noted for mitigators when comparing Black and non-Black offenders (Appendix B, Table 5.13). Further analysis of the age-race relationship revealed that Black juvenile offenders were 6 (1.5-24.2, Fisher's Exact Test, $p=0.00095$) times more likely to have a victim under age 19. These victims were 9 (1.7-46.8, Fisher's Exact Test, $p=0.000996$) times more likely to be non-Black (Appendix B, Table 5.14).

Hispanic offenders were 4.7 (1.3-16.4, Fisher's Exact Test, $p=0.31$) times more likely to commit multiple murders. Second and third victims were more likely to be male and Hispanic or Asian. None of the victims among this group of Hispanic offenders were Black regardless of whether it was a single or multiple murder. There were no significant differences in age among first victims but significantly more second victims were likely to be 10-19 years old and second likely to be less than 10-years-old. Hispanics were 90% less likely (0.9, 0.01-0.8, Fisher's Exact Test $p=0.00063$) to use medical problems as a mitigator (Appendix B, Table 5.15).

VI: Constitutional Analysis

While the moral propriety of executing children may constitute an issue for legislators, the constitutional propriety of sentencing minors is an issue for the courts (Gwin, 1981). The imposition of the death penalty on minors involves a consideration of many constitutional issues. Such issues include age as a suspect classification, the right to life and other concerns regarding the disparate treatment of adults and juveniles (White, 1983).

The constitutionality of capital punishment for minors may be challenged on many grounds. The basis primarily relied upon is that sentencing minors to death violates the Cruel and Unusual Punishment Clause of the Eighth Amendment and the Fourteenth Amendment. For the most part, these challenges have been dismissed with little comment [State v. Valencia, 124 Ariz. 139, 602 P. 2d 807 (1979); Eddings v. State, 616 P. 2d 1159 (Okla. Crim. App. 1980), 455 U.S. 104 (1982)].

The Eighth Amendment provides that “excessive bail should not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted” (U.S. Const. Amend. VIII). The principle which has direct relevance in analyzing the constitutionality of imposing the death penalty on minors is that a punishment must not be excessive [Enmund v. Florida, 102 S. Ct. at 3372 (1982); Coker v. Georgia, 433 U.S. at 392 (1977); Gregg v. Georgia, 428 U.S. at 173 (1976)]. A punishment is excessive if it is disproportionate to the crime or if it makes no measurable contribution to acceptable goals of punishment (Greenwald, 1982). Although, in general, the death penalty has passed both tests; when minors are considered it appears to fail. The

following section will explore just how it fails to make a measurable contribution to the acceptable goals of punishment and the extent of its disproportionality.

A. Disproportionality

The Supreme Court has a step-by-step process for determining whether a punishment is disproportionate. First, an examination of the history of the punishment, current legislation and jury sentences is completed to determine whether imposition is acceptable to contemporary society [Enmund v. Florida, 102 S. Ct. at 3372 (1982); Coker v. Georgia, 433 U.S. at 592 (1977)]. An examination of these factors, although limited, is informative.

An analysis of Supreme Court rulings indicates Gregg v. Georgia, 428 U.S. 153 (1976) clearly launched the present era (Streib, 1987). Although the issue of age per se was not before the Court in Gregg, the concern for age of the offender was apparent. The Court approved of the Georgia statute's guided discretion for consideration of aggravating and mitigating factors in the sentencing portion of the hearing. In fact, the Court specifically inquired, while endorsing the requirement that the jury consider characteristics of the offender: "Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth . . . ?) (Id. at 197). In Jurek v. Texas, 428 U.S. 262, 273 (1976), the Court approved of a Texas statute that provided the sentencing jury "could further look to the age of the defendant" in deciding between life imprisonment and the death sentence (Streib, 1987). Subsequent cases provided for continued guided discretion statutes in lieu of mandatory death penalty statutes (Liebman and Shepard, 1978; Galbo, 1985).

Another major holding where the Court expressly mentioned the youthfulness of the offender as an appropriate factor for consideration was Roberts v. Louisiana, 431 U.S. 633 (1977). In 1978, it became quite clear with Lockett v. Ohio, 438 U.S. 536 (1978) and Bell v. Ohio, 438 U.S. 637 (1978) that sentencing juries and judges must consider all relevant mitigating factors proffered by the defendant. A few years later, the well-known Eddings v. Oklahoma, 455 U.S. 104 (1982) case provided no help in deciding the constitutionality issue (Hill, 1984); however, the language of the Supreme Court in Eddings did reflect an understanding of the nature of mitigating factors.

At the sentencing hearing following the conviction, Edding's attorney offered substantial evidence of a turbulent family history including beatings by a harsh father and serious emotional disturbances. The judge refused, as a matter of law, to consider the petitioner's unhappy upbringing and emotional disturbance as mitigating factors. In fact, the judge found the only mitigating circumstance was the petitioner's youth which was held to be insufficient to outweigh the aggravating circumstances. Referring to Lockett v. Ohio, the Supreme Court in a 5-4 opinion in Eddings v. Oklahoma, 455 U.S. 104 (1982), ordered the sentence vacated because nothing should be precluded from consideration as a mitigating factor as a matter of law. This did not mean that, upon consideration, such factors could not be dismissed as insufficient.

The Eddings court stated:

"Eddings was not a normal 16-year-old; he had been deprived of the care, concern and paternal attention that children deserve . . . [I]t is not disputed that he was a juvenile with serious emotional problems . . . All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in the case. Rather, it is to say that just

as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing” (455 U.S. at 116 [emphasis added]) [Thompson v. Oklahoma, No. 86-6169 (1987)].

Although the Court did not directly rule on the question of minors being sentenced to death, the sense of was that it would uphold such a sentence. The dissenting opinion led by Chief Justice Burger and joined by Justices White, Blackmun and Rehnquist indicated that “there comes a time in every case when a court must ‘bite the bullet’.” Chief Justice Burger noted:

“The court stops far short of suggesting that there is any constitutional proscription against imposition of the death penalty on a person who was under age 18 when the murder was committed” [455 U.S. 104 (1982)].

Since the Eddings decision, the Supreme Court has heard several cases primarily on the basis of the unconstitutionality of the execution of juveniles. These cases - Thompson v. Oklahoma, 56 LW 4892 (1988), Stanford v. Kentucky and Wilkins v. Missouri, 57 LW 4973 (1989) - will be discussed in the next section. The determination of the legality of the death penalty for juveniles continues to be left to each individual jurisdiction. Even though Justice O'Connor agreed with the majority in Thompson v. Oklahoma, 56 LW 4892 (1988), that juveniles less than 16 years of age shall be barred from execution, she argued:

“Although I believe that a national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist, I am reluctant to adopt this conclusion as a matter of constitutional law without better evidence than we now possess” [56 LW 4901].

The only express constitutional mandate that each jurisdiction must allow for is

consideration of youth of the offender as a mitigating factor (Streib, 1987). As per Eddings v. Oklahoma, 455 U.S. at 115-116 “[G]reat weight must be given to “the special mitigating factor of youth,” [Thompson v. Oklahoma, 108 S. Ct. at 2698 (plurality opinion)]. More specifically, the trial judge discussed mitigating circumstances during the penalty phase stating in Instruction No. 7 [JA 22]:

“Mitigating circumstances are those which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case” [Thompson v. Oklahoma, No. 86-6169 (1986)].

The primary safeguard against arbitrary imposition of the death penalty is the accused’s ability to present such mitigating evidence. In reality, this mitigating circumstance is a hollow safeguard because a juvenile is not statutorily given any more consideration than any other young person [Stanford v. Kentucky, No. 87-5765 (1988)]. By and large, the special status of youth as a mitigating circumstance is lost in the plain language of most death penalty statutes. “Youth” as it is used herein is in no way an absolute term. It operates on a sliding scale where it applies with equal force to a 16-year-old as it does to a 30-year-old [Stanford v. Kentucky, No. 87-5765 (1988)].

Jurisdictions which specify youth as a mitigating circumstance do not afford juveniles adequate due process protections warranted by their age (Id. at 34). In fact, these statutes in many ways undermine the significance of a juvenile’s age as a mitigating factor. Case in point, of the states which list youth as a mitigating circumstance, only Indiana, Montana, and South Carolina stipulate consideration of a defendant’s age if he/she was less than 18 at the time of the crime (Id. at 34)

(Appendix A, Chart 1.4).

Stanford noted in Ice v. Commonwealth, 667 S.W. 2d at 680 (1984), a defendant's young age "is not a constitutional distinction" between juvenile and adult status. This ruling is directly inconsistent with the Edding's requirement that a juvenile's age carry "great weight." In Stanford v. Commonwealth, 734 S.W. 2d at 792 (1987), the Kentucky Supreme Court failed to afford the petitioner's age any more weight than any other mitigating factor. As such, "[The petitioner's] age and the possibility that he might be rehabilitated were mitigating factors appropriately left to the consideration of the jury that tried him" (*Id.* at 792). This case is reflective of statutes which fail to provide for due consideration of the "great weight" which a juvenile's age should carry as a mitigating factor.

As mentioned, youths who are excluded or cast out of the sanctity of the juvenile court face adult criminal punishments (Solway, Hays, Schreiner, and Cansler, 1980). As such, 36 states provide the death penalty an option even though minors may be given special protection under death penalty statutes. The following states expressly exclude minors under age 16, 17 or 18 from the death penalty: 18 - California - Cal. Penal Code § 190.5 (West Supp. 1985); Colorado - Colo. Rev. Stat. § 16-11-103 (1)(a)(1985); Connecticut - Conn. Gen. Stat. Ann. § 53a-46a [h] (West Sup. 1985); Illinois - Ill. Ann. Stat. Ch. 38 § 9-1[b] (Smith-Hurd Sup. 1985); Nebraska - Neb. Rev. Stat. § 28-105.-1 (1984); New Jersey - N.J. Stat. Ann. § 2 c:11-3f (West 1986); New Mexico - N.M. Stat. Ann. § 31-18-14 (1979); Ohio - Ohio Rev. Code Ann. § 2929.02 [E] (Page 1984); Oregon - Oregon Stat. § 161.615 (1985); Tennessee - Tenn. Code Ann.

§ 37-1-134 [1] (1984); 17 - Georgia - Ga. Code Ann. § 17-9-3 (1982); New Hampshire - N.H. Stat. Ann. § 63:05 (1x)(1986); Texas - Tex. Penal Code Ann. § 8.07 [d] (Vernon Supp. 1985).

The death penalty for juveniles clearly violates the Eighth Amendment's ban on cruel and unusual punishment under the "evolving standards of decency." As noted in Trop v. Dulles, 356 U.S. 86 (1958), "the amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" (*Id.* at 101). Workman v. Commonwealth, 429 S.W. 2d 374 (Ky 1968), construed this standard to mean that a punishment does not comply with the "evolving standards of decency" in a society when "in view of all the circumstances, the punishment in question is of such character as to shock the general conscience and to violate the principles of fundamental fairness" (*Id.* at 101).

Certainly, the mental torture that accompanies a death sentence proceeding may, in and of itself, violate "the evolving standards of decency" in society. As Robert Johnson stated in "Under Sentence of Death: The Psychology of Death Row Confinement" (1979):

"[T]he image of confinement on death row as living death was used by many inmates to capture the essential or cumulative experience of the condemned prisoner. Living death is here intended to convey the zombie-like, mechanical existence of an isolated physical organism - a fragile twilight creature that emerges when men are systematically denied their humanity. The image spontaneously and forcefully rendered by prisoners themselves, serves as a dramatic summary statement of the death row experience, encompassing its central psychological feature, powerlessness, fear and emotional emptiness" (p. 141).

With death row appearing like "living death" to inmates and with the suicide

rate among death row prisoners exceeding the number of executions, little doubt exists that great mental stress plagues even an adult, much less a child, incarcerated on death row. The infliction of mental torment on a prisoner violates the Eighth Amendment. As such, the Court must recognize that submitting a child to the obvious stress suffered by death row inmates “shocks the conscience” and “violates the evolving standards of decency” in American society.

B. Case Law

The persuasive evidence of public opinion reflected via legislation in no way comprises all the authority in support of the proposition that a juvenile death penalty fails to comport with the “evolving standards of decency.” The execution of minors for crimes committed while still children offends fundamental standards of decency and humanity. The courts, traditionally the branch of government most cautious about conforming to societal norms, have reflected the discord regarding imposition of the death penalty on juveniles. Case law has developed in a strikingly inconsistent manner. Prior to the decision in *Eddings*, the issue of severe criminal punishments for juveniles was addressed primarily by state supreme courts (White, 1983; Wilson, 1983). For example, in *Workman v. Commonwealth*, 429 S.W. 2d 374 (Ky, 1968), the Kentucky Supreme Court determined life in prison without possibility of parole for a 14-year-old rapist was cruel and unusual punishment. *State v. Stewart*, 197 Neb. 497, 250 N.W. 2d 849 (1977), construed a statutory provision allowing for consideration of mitigating factors to apply to a 16-year-old who had no significant criminal record. *Lewis v. State*, 246 Ga. 101, 268 S.E. 2d 915 (1980), involved another 16-year-old who was sentenced

to death before Georgia amended its statute to prohibit the death penalty for crimes committed while under age seventeen [Ga. Code Ann. § 17-9-3 (1982)].

The conclusion was that “the death penalty has been so rarely imposed on persons under 17 as to make the death sentence in this case excessive and disproportionate and hence unconstitutional” (*Id.* at 107, Hill, J., concurring opinion). The justification for this opinion was that only one 16-year-old had been sentenced to death under Georgia’s 1973 statute, a case which was subsequently reversed on grounds of jury instruction errors.

Although Eddings v. Oklahoma, 455 U.S. 104 (1982), has been relied on by many lower courts, its interpretation has been misconstrued. The Court herein strictly avoided any holding on the constitutionality of the death penalty. It simply reaffirmed that the youthfulness of the offender is a mitigating factor demanding great weight.

Justice Powell, writing for the majority, stated:

“ . . . youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years are less mature and responsible than adults. Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults [Bellotti v. Baird 443 U.S. 622 (1979)]. Even the normal 16-year-old customarily lacks the maturity of an adult. In this case Eddings was not a normal 16-year-old, he had been deprived of the care, concern and paternal attention that children deserve . . . All of this does not suggest an absence of responsibility for the crime of murder . . . Rather it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing” [Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L.Ed. 2d (1982) at p. 11-12]. Despite its limitations, Eddings v. Oklahoma remains one of the most well-

defined rulings against the imposition of the death penalty upon an emotionally disturbed and socially deprived juvenile offender. The principles set forth in Eddings, however, appear not to have been followed in several cases.

Although youth of a juvenile defendant tends to be given weight, the mitigating effect of youth can and sometimes is outweighed by aggravating circumstances. Case in point, the trial judge in a Florida case sentenced a 16-year-old offender to death arguing that two aggravating circumstances outweighed one mitigating circumstance (Amnesty International, 1991). The judge specifically rejected the defendant's age as a mitigating circumstance stating that age is a factor only "when it is relevant to the defendant's mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences following from there" (*Id.* at 5). The judge determined that age was not relevant in this case because the defendant knew what he was doing, knew it was wrong and tried to cover up his crime (Case of James A. Morgan, Circuit Court, Nineteenth Judicial Circuit, Florida, Feb. 1990).

Similarly, in the Wilkins case, this 16-year-old offender with an extensive history of mental disturbance (already discussed at length) refused to be represented by a lawyer, pled guilty and requested that the death penalty be imposed. The judge gave no indication in his sentencing order that the defendant's youth or history of turmoil had been considered as mitigating factors (Amnesty International, 1991).

In several of the other recent Supreme Court cases, jurors failed to receive instructions that the defendant's age must be considered as a mitigating factor when

deliberating between a life or death sentence. In the Thompson case, the court gave no specific instructions to the jury concerning the defendant's youth (15 years of age) but advised them that "the determination of what are mitigating factors is for you as jurors to resolve" [Thompson v. Oklahoma, No. 86-6169 (1988)]. As mentioned, the Thompson death sentence was vacated on other grounds and similar instructions continued to be given in subsequent cases.

Equally disturbing is Prejean v. Blackburn, 570 F. Supp 985 (W.D. La, 1983), in which the defendant's age was not even mentioned as a mitigating factor by the trial counsel. The jury was not informed of Prejean's childhood neglect, abuse or documented history of mental illness and brain damage. In another case involving a 17-year-old offender in Florida, the trial judge overruled the jury's recommendation of a life sentence and imposed the death penalty (Case of Bernell Hegwood, Circuit Court, Seventeenth Judicial Court, Florida, March 1988). The sentencing order explicitly rejected evidence of the defendant's "impoverished, deprived and disturbed childhood" as a mitigating circumstance arguing that "[t]he mother and others who may have contributed to his childhood were not, however, on trial here" (Id. at 1).

Prejean v. Blackburn, 570 F. Supp. 985 (W.D. La. 1983), 743 F. 2d 1091 (5th Cir. 1984) and Trimble v. State, 300 Md. 387, 478 A. 2d 1143 (Md. 1984) both made relatively daring attempts to decide the constitutionality issue (Streib, 1991). The Prejean court interpreted the Eighth Amendment to focus on the kind of punishment and not the characteristics of the offender, barring prejudice or bias. The constitutionality claim of Dalton Prejean (17 at the time of crime) was determined to be "without merit"

[Prejean v. Blackburn, 570 F. Supp. at 999 (1983)]. Dalton Prejean was executed in May, 1990.

The case of Trimble involved a 17 (almost 18) -year-old who brutally kidnaped, raped and murdered his victim. [Trimble v. State, 300 Md. 387, 478 A. 2d 1143 (Md. 1984)]. He based his appeal to the Maryland Court of Appeals on the constitutionality of the death penalty for crimes committed while under age eighteen. The Trimble analysis of collateral lower court cases observed that no court had found a constitutional bar to the death penalty for juveniles (Id. at 420, 478 A. 2d at 1160). Thus, the court concluded that indicators of society's evolving standards of legislature as one of "29 states that permit the execution of juveniles in some circumstances" (Id. at 421, 478 A. 2d at 1161). The Trimble court also concluded that the penological goals of retribution and deterrence would be served by execution of juveniles and, therefore, it was not excessive or disproportionate. Furthermore, it held that it would take a case-by-case approach to future challenges. This is, of course, consistent with the approach taken in the subsequent cases of Thompson v. Oklahoma, Stanford v. Kentucky and Wilkins v. Missouri.

In Thompson v. Oklahoma (1988), the court addressed the question of whether or not the death penalty was cruel and unusual when imposed on a 15-year-old offender. As mentioned, in a 5-4 decision in June 1988 the court vacated Thompson's death sentence. Only four of the judges found that execution of a 15-year-old offender would be cruel and unusual in all circumstances. A fifth judge concurred in the decision to vacate Thompson's death sentence but did so on the narrower ground that

Oklahoma's death penalty statute set no minimum age at which the death penalty could be imposed. Justice O'Connor found that the sentencing of a 15-year-old to death under this type of statute failed to meet the standard for special care and deliberation required in capital cases. Once again, the Court did not reach a majority decision on whether the constitution forbids capital punishment for all offenders under sixteen. Thompson v. Oklahoma is not the final decision from the Supreme Court regarding the constitutionality of juvenile executions (Paternoster, 1991). In fact, the Thompson ruling does not bar states from legislating in the future to introduce ages of 15 or less in their capital punishment statutes. Since the Thompson ruling, a trial court in Alabama has sentenced a 15-year-old offender to death (Clayton Flowers in February 1990) under a capital punishment statute which, like Oklahoma, sets no minimum age.

The term following Thompson v. Oklahoma, the United States Supreme Court decided on the constitutionality of death sentences for defendants in Stanford v. Kentucky and Wilkins v. Missouri, 109 S. Ct. 2969 (1989) (*Id.* at 99). In both Stanford v. Kentucky and Wilkins v. Missouri (1989), the Court held in a 5-4 decision that execution of offenders aged 16 and 17 was permissible under the Constitution.

Justice Antonin Scalia, in a majority opinion, said that society had not formed a consensus that executions constitute "cruel and unusual punishment" [Stanford v. Kentucky, Wilkins v. Missouri (1989)]. Scalia also rejected evidence which argued that the death penalty was not a deterrent for juveniles because of their "less developed fear of death." In a rather ironic explanation, Scalia emphasized that the Court looked to U.S. conceptions of decency and not the sentencing practices of

other countries in determining what constitutes “evolving standards of decency” [Stanford v. Kentucky, Wilkins v. Missouri, (1989)]. Furthermore, Scalia construed the absence of legislative rejection of the death penalty for 16 and 17-year-olds as evidence that contemporary standards of decency would fail to find these juvenile executions as “abhorrent” (Id. at 100).

In a dissenting opinion, Justice William Brennan argued that the majority had not taken into account the reality that in addition to the 12 states which had imposed an age limit of 18 in their death penalty statutes, an additional 15 states (including the District of Columbia) did not authorize executions under any circumstances. In Brennan’s words “[t]hus it appears that the governments in fully 27 of the states have concluded that no one under 18 should face the death penalty.” Moreover, Justice Brennan stated “within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved.” The execution of juveniles, Brennan argued, was disproportionate to the offender’s blameworthiness and made no measurable contribution to acceptable goals of punishment.

Two researchers explored the issue of proportionality analysis as a reflection of subjective preferences. There is an inherent contradiction in allowing states to engage in individualized treatment but not in proportionality analysis. As represented in Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) where the mitigators of mental retardation and an abusive childhood were argued by the Court as aggravators because they suggested future dangerousness.

The Court states:

“Penry’s mental retardation and history of abuse is a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a possibility that he will be dangerous in the future. . .” 109 S. Ct. at 2949.

Theoretically, one could argue that this focus on individualized consideration is good.

Practically, one could argue this allows for an arbitrariness in the decision-making process.

C. International Standards

The fact that the execution of juvenile offenders conflicts with internationally recognized legal standards should be given particular weight in the Court’s constitutional analysis [Brief of Amicus Curiae, Amnesty International, Thompson v. Oklahoma, No. 86-6169 (1986)]. The guarantees under the United States Constitution should not provide significantly less protection than the protection afforded by international norms on the basic issues of human rights and fundamental freedoms (Id. at 10).

The Court has looked to various indicia of contemporary values and attitudes [Coker v. Georgia, 433 U.S. at 592 n. 10 (1977)] to determine whether a particular punishment once tolerated is consistent with our advancing standards of decency. The U.S. Supreme Court has looked to internationally recognized legal standards and the practices of other nations to determine the meaning of “cruel and unusual punishment” under the Eighth Amendment. Even the ABA Juvenile Death Penalty Report considered international as well as legislative norms in concluding that civilized society should no longer allow execution for crimes committed by minors.

The almost total absence of incidents of juvenile executions indicates state practice is of sufficient consistency and universality to satisfy the criteria of customary norm per Draft Restatement [Chisholm v. Georgia, U.S. 419 (1793)]. There are three major international human rights documents which explicitly prohibit the execution of persons who commit crimes while under age 18 including the International Covenant on Civil and Political Rights, the United Nations Convention on the Rights of the Child and the American Convention on Human Rights which serves to codify the established customary international law norm.²⁰ The only way a state may prevent itself from becoming bound by a customary international law is to maintain: (1) explicit and disciplined opposition to the coalescing norm; and (2) persistent and consistent opposition since the rule's formation [Brief of Amicus Curiae, International Human Rights Law Group, Thompson v. Oklahoma, No. 86-6169 (1986)]. The United States has never affirmatively or openly opposed the formation of the customary international norm prohibiting execution of juveniles and, therefore, is bound by that rule (Id. at 29).

Article (6) (5) of the International Covenant on Civil and Political Rights prohibits imposition of the death penalty for crimes committed by those under age 18; ratified by 81 nations of the world including most of the Western European countries and Canada and signed by another nine nations including the United States. GA. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A16316 (1966) [Brief of Amicus Curiae, The American Bar Association, Thompson v. Oklahoma, No. 86-6169 (1988)]. Article 4(5) of the American Convention on Human Rights, with a similar stipulation, was ratified by 19 American states and signed by an additional three [OAS T.S. No. 36,

OAS, OEEA/Ser.A/16/1969 (Id. at 11)]. The provision specifically states:

“Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age . . .” (Amnesty International, 1991, p. 78). Similarly, on September 1, 1989, the UN Subcommission on Prevention of Discrimination and Protection of Minorities adopted Resolution 1989/33, urging Member states which still applied the death penalty to juvenile offenders to take the necessary legislative and administrative measures with a view to stopping forthwith this practice.”

The UN Convention on the Rights of the Child, adopted 1989, stipulates in

Article 37(a):

“No child shall be subjected to torture or other cruel, inhumane or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below 18 years of age . . .”

This Convention has yet to be signed or ratified by the United States. In fact, a compliance report released by the State Department and prepared to conform with the 1966 International Covenant on Civil and Political Rights simply reiterated the U.S. refusal to accept a prohibition against the execution of juvenile offenders.

According to human rights information compiled by the State Department, the United Nations and Amnesty International, 42 out of 164 countries have abolished the death penalty although 19 reserve the right to invoke it for “extraordinary crimes”: Austria, Belgium, Bhutan, Brazil, Canada, Cape Verde, Columbia, Costa Rica, Denmark, Dominican Republic, Ecuador, Equatorial Guinea, Federal Republic of Germany, Finland, Guinea-Bissau, Honduras, Iceland, Indonesia, Israel, Italy, Luxembourg, Malta, Mexico, Monaco, Nepal, Netherlands, New Zealand, Nicaragua, Norway, Panama, Papua New Guinea, Portugal, San Marino, Seychelles, Solomon

Islands, Spain, Sweden, Switzerland, United Kingdom, Upper Volta, Uruguay and Venezuela.

Forty-one retentionist countries have statutory provisions recognizing youth as an exempting factor from the death sentence: 18 - Afghanistan, 18 - Albania; Minors - Algeria, 16 - Argentina, 18 - Australia, 18 - Bahrain, 18 - Barbados; Minors - Botswana, 20 - Bulgaria, 18 - Chile, 16 - Cyprus, 18 - Czechoslovakia, 18 - Ethiopia, 16 - France, 16 - Gambia, 18 - German Democratic Republic, 21 - Greece; Minors - Guatemala, 18 - Guyana, 20 - Hungary; Minors - India, 20 - Iraq, 18 - Jamaica, 18 - Japan, 18; Young People - Kenya, 18 - Lebanon, 18 - Lesotho, 18 - Libya, 18 - Madagascar, 18 - Malawi; Minors - Morocco; Young People - Nigeria, 18 - Poland, 18 - Romania, 18 - Singapore, 18 - South Africa, 18 - Sudan, 18 - Tanzania, 18 - U.S.S.R., 18 - United Arab Emirates, 18 - Zambia [Hartman, 1983; Brief of Amicus Curiae, Kentucky and Alabama, Arizona, Arkansas, Connecticut, Florida, Indiana, Mississippi, Montana, Nevada, Oklahoma, Pennsylvania, South Carolina, South Dakota, Virginia and Wyoming, Wilkins v. Missouri, No. 87-6026, High v. Zant, No. 87-5666 (1987)].

Four “abolitionist” nations retain the death penalty for extraordinary crimes but exempt juveniles: 18 - Canada, 26-Indonesia, 18 - Netherlands, 18 - New Zealand (Hartman, 1983). There are 65 retentionist states for which complete information regarding attitudes towards execution of juveniles is not readily available, according to the Department of State, Country Reports on Human Rights Practices for 1982, Report Submitted to the Senate Committee on Foreign Relations and House Committee on

Foreign Affairs, 98th Cong. 1st Session 1 (1983).

The execution of juvenile offenders on a worldwide basis is a rarity. As mentioned, the U.S. is one of only eight countries worldwide known to have executed juvenile offenders in the last decade (Amnesty International, 1991). The consensus of values is apparent in the “climate of international opinion” [Enmund v. Florida, 458 U.S. 796 n. 22 (1982)].

The United States and treaty obligations and the rules of customary international law clearly prohibit execution of offenders under age eighteen [Brief for Amicus Curiae, International Human Rights Law, High v. Zant, No. 87-5666; Wilkins v. Missouri, No. 87-6026 (1988); Skovron, Scott and Cullen (1989)]. It is clear from that the imposition of death sentences on persons under 18 at the time of the crime constitutes a violation of customary international law. Ironically, customary international law is firmly embedded in “our law,” and human rights are a fundamental aspect of international law [Hartman, 1983; Brief of Amicus Curiae, International Human Rights Law Group, Thompson v. Oklahoma, No. 86-6169 (1988)].

The data available indicate that there is almost universal adherence to international norms prohibiting executions of juveniles. Moreover, the Gallup polls reveal a national consensus as well as international consensus in opposition to executing juveniles. The social science research provides further support for this argument. Case in point, a survey of 509 adult Connecticut residents revealed that while 68 percent of the respondents favored the death penalty, only 31 percent supported its use on juveniles (Tuckel and Greenberg, 1986). Another survey of 900 Georgia residents reported that

only 48 percent favored the death penalty for persons 17 years or younger. When 600 adult residents of Ohio were asked if they would favor a state law allowing the execution of juveniles over 14 years of age convicted of murder only 31 percent responded in favor (Skovron, Scott and Cullen, 1989). In Michigan, a survey of 400 residents revealed 34.1 percent would favor such legislation (Scott and Edwards, 1991).

In general, the state may punish offenders to achieve one or more of four objectives:

“1. [T]o rehabilitate the offender; 2. [T]o incapacitate him from committing offenses in the future; 3. [T]o deter others from committing offenses; or 4. [T]o assuage the victim’s or the community’s desire for revenge or retribution.” [*Spaziano v. Florida*, 468 U.S. at 477-78 (1984); *Gregg v. Georgia*, 428 U.S. at 183 (1976)].

The following will explore how the execution of minors fails to make a “measurable contribution” to the officially recognized penological goals of capital punishment: retribution, general deterrence and specific deterrence.

D. Penological Goals

1. Retribution

The underlying principle of retribution is based on the premise that the person being punished for committing a criminal act should be “. . . hated, ridiculed, despised, scorned and receive his ‘just deserts’ for the wrongful act . . .,” explains Dr. Cecil Rhodes, an attorney and professor at California State University. The retribution purpose of punishment has been criticized because it is based on a quasi-retaliatory concept rooted in vengeance (*Id.* at 11).

Capital punishment fulfills its retributive purpose by providing an

institutional means for society to express its moral outrage at especially disturbing conduct and by satisfying the desire for punishment for those who engage in such behavior [Gregg v. Georgia, 428 U.S. at 182 (1976)]. Capital punishment allegedly preserves the stability of society by providing an alternative to citizens taking the law into their own hands in an attempt to seek revenge (Vanore, 1986).

For society to seek retribution for a crime the criminal must possess a sufficient degree of culpability or responsibility for that criminal act. As Justice O'Connor noted in California v. Brown, 107 S. Ct. 837 (1987):

“Defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. This emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence. As this Court observed in Eddings, the common law has struggled with the problem of developing a capital punishment system that is sensible to the uniqueness of the individual.”

As mentioned, both Lockett and Eddings reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant [Brief of Amici Curiae, National Legal Aid and Defender Association, National Association of Criminal Defense Lawyers, High v. Zant, No. 87-5666; Wilkins v. Missouri, No. 87-6026 (1987)]. Thus, the sentence imposed at the penalty stage should reflect a reasonable moral response to the defendant's background, character and crime rather than mere sympathy or emotion (California v. Brown, Id. at 841). As Tison v. Arizona, 109 S. Ct. at 1683 (1987), stated “[T]he heart of the retribution rationale is that criminal sentence must be directly related to the personal culpability of the criminal offender.” Retribution clearly requires an inquiry into a defendant's “personal responsibility and

moral guilt” [Booth v. Maryland, 107 S. Ct. 2533 (1987)].

The moral force of and thus the legal justification for taking human life in retribution is dependent on this degree of culpability of the offender and not just injury to the victim. In other words, retribution justifies an execution only if a defendant’s culpability is of the highest degree [Thompson v. Oklahoma, Brief of the Petitioner, No. 86-6169 (1987)]. “[I]n the final analysis, capital punishment rests on not a legal but an ethical judgment - an assessment of what is called in Enmund the ‘moral guilt’ of the defendant” [Spaziano v. Florida, 468 U.S. at 481 (citing Enmund, 458 U.S. at 800-801); Tison v. Arizona, 55 U.S.L.W. at 4499-50]. Due to our societal attitudes and well-established legal presumptions regarding the status of minority, a minor cannot be held to the same degree of culpability and accountability as an adult.

Although execution of an adult for retributive purposes is considered constitutional, this rationale appears to lose some legitimacy once juveniles become the object. As demonstrated, juveniles do not “deserve” the harshest punishments in the same manner as mature, responsible adults [Thompson v. Oklahoma, Brief of Petitioner, No. 86-6169 at 17 (1987)]. Those who kill are not held personally responsible unless they are determined to have the capacity to function as moral beings. Only those persons who are able to act out of a fully developed moral awareness and who choose to act contrary are judged “deserving” of the full measure of punishment allowed by law (Enmund, 458 U.S. at 800-01).

The Supreme Court’s analysis of the retributive foundations of capital punishment incorporates two models of retribution: an “institutional revenge model”

and a “just deserts model” [Gregg v. Georgia, 428 U.S. at 183-84 (1976)]. The former ensures that citizens do not seek personal revenge. Ironically, the evidence seems to indicate there is more outrage when a minor is subjected to such penalties. Bedau (1971) reported, that the youngest age group (15-19) had a significantly higher rate of commutations when compared to older age groups. In fact, only three people in the youngest age group were executed and four had their sentences commuted. By contrast, the next age group (20-24) had 34 executions with only two commutations. This research as well as other data seem to reflect a public outcry against juvenile executions.

2. Institutional Revenge Model

The evidence indicates it is unlikely members of society will seek personal vengeance if minors do not receive the death penalty for their crimes. Since minors are less responsible than adults for their crimes there should be less moral outrage toward a juvenile offense/offender which is reflected in the commutations as well as the trend of the Supreme Court and legislators to draw progressively older and older age limits for execution (Hertz and Weisberg, 1981). Even if there is moral outrage, the transfer to adult court and stiffer penalties should appease it. In other words, the fact that such juveniles are tried in criminal courts and eligible for life imprisonment provides an outlet for some societal vengeance.

The notion that the purpose of retribution is to obviate personal revenge takes two forms: social contract notions or deterrence notions [Gregg v. Georgia, 428 U.S. at 183 (1976)]. Under the deterrence notion, “governmental revenge is necessary to deter those who commit private acts of violence in the name of revenge”

(Id. at 183). In both forms, the implicit idea is that the social costs of systematic revenge will be less than the social costs of random private revenge (Greenwald, 1983). Many researchers have since argued that such utilitarian notions of retribution can never justify punishment because they fail to take the offender's culpability into account.

A similar argument concerning the notion of retribution is rooted in the belief that criminals owe a debt to the community. This "debt" approach has critics who argue this notion of law abiders restraining themselves based on reliance of others doing likewise makes more sense for traffic offenders than for murderers or rapists. A variant of this "debt" view of retribution assumes that some extent of the criminal's personal interests are forfeited to the community as payment for the personal interests of which he/she deprived the victim (Greenwald, 1983). Others submit that it is unfair for the criminal to "pay" the entire community when harm has been done to the individual victim.

3. Just Deserts Model

This model of retribution holds even less justification for executing minors. As pertains to adults, the Supreme Court held this type of retribution as not being a "forbidden objective" of punishment [Gregg v. Georgia, 428 U.S. at 183-83 (1976)]. An entirely different conclusion is reached for minors using the following justifications: protection of society, deterrence, and inability of juvenile justice system to rehabilitate the offender with available resources. When minors are waived to adult court it may mean the facilities of the juvenile justice system are inadequate and unable to effectively handle their delinquent or dangerous tendencies (Browne, 1977). Therefore, it is clear

the criminal justice system is not justified in punishing those minors for retributive reasons when they are not always placed in the system for such reasons.

One of the reasons for waiver of certain juvenile offenders is to subject the offenders to harsher punishments than they would receive in the juvenile justice system (Greenwald, 1983). Once minors are in the adult system, however, every effort is made to ensure that they do not receive their “just deserts” [*Santana v. Collazo*, 714 F. 2d 1172 (1st Cir. 1983)]. The National Institute for Juvenile Justice and Delinquency Prevention found that many states allow for juveniles sentenced by criminal courts to be placed in juvenile facilities. A few states, Kentucky and Delaware, bar placement of minors in adult prisons.

Numerous legislators have enacted programs for minors sentenced by criminal courts with the sole purpose of rehabilitation. Case in point, the 1976 Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 obligated federal judges to consider the “special rehabilitative sentencing alternatives” created prior to sentencing any person between 16 and 22 years of age (Greenwald, 1983). This Act was expressly “designed to provide a better method for treating young offenders convicted in federal courts in that vulnerable age bracket, to rehabilitate them and to restore them to normal behavior patterns” [*Dorszynski v. United States*, 418 U.S. 424, 432-33 (1974)]. Similarly, there have been several incidents of a reduction in sentence at the appellate level on the grounds that the retributive punishment imposed failed to reflect the young defendant’s potential for rehabilitation (*Ahvik v. State*, 613 P. 2d 1252 (Alaska, 1980)).

Even if one accepts that one of the purposes of judicial and legislative waiver

is for juveniles to get their “just deserts,” capital punishment for minors can never make a “measurable contribution” to this goal (Greenwald, 1983). Such a model of retribution is based on desert and, therefore, the proportionality of the punishment is, contingent on the culpability (blameworthiness) of the offender and offense. As the Supreme Court stated in Enmund v. Florida, 458 U.S. 782, 800 (1982), “retribution as a justification for [the death penalty] . . . very much depends upon the degree of [the defendant’s] culpability.” Tison v. Arizona, 55 U.S.L.W. 4496, 4501 (U.S., April 27, 1987), observed that “the critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime.” The ultimate sanction of death is reserved for those who engage in acts of “intentional wrongdoing” (Enmund, *supra*, p. 800) and “purposeful . . . criminal conduct” (Tison, *supra*, p. 4501); those individuals who intentionally kill or who “knowingly engag[e] in criminal activities known to carry a grave risk of death” (*Id.* at 4502).

Throughout the history of Anglo-American criminal law, less mentally competent persons (i.e., the mentally ill, the retarded and the young) have not been perceived as deserving the full force of criminal punishment [Ford v. Wainright, 106 S. Ct. 2595 (1986); Pastroff, 1986]. Minors lack the independent ability to know the moral implications of their behavior and, therefore, cannot form the “highly culpable mental state[s]” that warrant the retributive imposition of the death penalty (*Id.* at 4502).

The execution of a minor would in no way satisfy society’s need for retribution (Wilson, 1983). As demonstrated, minors do not have the same capacity as

adults to function as moral beings, able to evaluate their behavior in light of socially accepted values [Brief of Amici Curiae, Child Welfare League of America, National Council on Crime and Delinquency, Children's Defense Fund, National Association of Social Workers, National Black Child Development Institute, National Network of Runaway and Youth Services, National Youth Advocate Program and American Youth Work Center, Thompson v. Oklahoma, No. 86-6169 (1986)]. They do not yet know the standards for appropriate behavior within the society in which they live and cannot evaluate the appropriateness of their own behavior. Instead, the majority of minors are profoundly dependent on their parents and their family (or surrogate family) to define the appropriate boundaries for them (Id. at 15). Families which often do a sadly substandard job.

Children are, for the most part, barely more than what they will become as adults [Brief of Amici Curiae, Child Welfare League of America, National Parents and Teachers Association, National Council on Crime and Delinquency, Children's Defense Fund, National Association of Social Workers, National Black Child Development Institute, National Network of Runaway and Youth Services, National Youth Advocate Program, American Youth Work Center, High v. Zant, No. 87-5666; Wilkins v. Missouri, No. 87-6026 (1988)]. Their potential to develop into morally responsible productive adults is unlimited (Id. at 14). In fact, "the spectacle of our society seeking legal vengeance through the execution of children" is horrifying (American Bar Association, 1998).

As is argued in Thompson and the multitude of supporting evidence,

adolescents are not yet fully operational moral beings in spite of the fact that the capacity to form moral standards to guide behavior allegedly emerges in adolescence. Kohlberg explains, “[L]arge groups of moral concepts and ways of thought only attain meaning at successively advanced ages and require the extensive background of social experience and cognitive growth represented by the age factor” (Kohlberg, 1963).

E. Deterrence

1. General Deterrence

One of the most complex and hotly debated issues is whether capital punishment is more effective than life imprisonment as a deterrent to crime (American Bar Association, Report to the House of Delegates, 1983). A critical issue is whether adolescent’s perception of death acts as a more significant deterrent than life imprisonment. Once again, less is known about death as a deterrent for adolescents than about death as a deterrent for adults. The meager research on the issue leads to the conclusion that threatening a child with death does not have the same impact as threatening an adult.²¹ Even if one were to assume there exists for adults a significant deterrent effect of the death penalty; this deterrent effect appears to lose its power once it is translated into the adolescent’s world.

Deterrence is defined as the restraining influence that the threat of punishment has on potential offenders (Andenaes, 1966). Traditionally, a distinction has been made between what is normally termed general deterrence or prevention and specific, special or individual deterrence (Chappel, Geis and Hardt, 1972). “[By] general prevention we mean the ability of criminal law and its enforcement to make

citizens law-abiding. If general prevention were 100 percent effective, there would be no crime at all" (Andenaes, 1952, p. 179).

The degree to which a penalty actually achieves deterrent objectives depends on two factors: (1) There must be a probability that an individual would commit a particular crime if that crime were not punished in a prescribed manner; and (2) The certainty of punishment must be sufficiently communicated to the potential offender (Wilson, 1983). The Supreme Court has admitted proof of the death penalty's deterrent effect is inconclusive [Gregg v. Georgia, 428 U.S. at 183 (1976)].

Even proponents of deterrence have found that an individual must have the intellectual capacity to understand the threat of punishment and the control mechanisms to conform to that understanding for a deterrent effect. (Andenaes, 1966). Minors appear to lack any meaningful concept of death or the threat of death (Haas and Inciardi, 1988). The prospect of death is so often a vague and distant notion to adolescents that they are undeterred by the existence of a death penalty. The defiant attitudes and risk-taking behavior of adolescents are related to their developmental state of defiance about danger and death. In fact, they often seem attracted to behavior which could result in their death.

Adolescents are infamous for their involvement in dangerous driving, ingestion of drugs, suicide attempts and so on. They live for the moment, for an "intense present," with little thought of the future consequences of their actions. Everything important or valuable lie either in the immediate life situation or close future. Adolescents are in a developmental stage when defiance of danger and death is

often not controlled by a sense of mortality. They have little fear of death because they have a “profound conviction of their own omnipotence and immortality” [Brief of Amici Curiae, American Society for Adolescent Psychiatry and American Orthopsychiatric Association, Thompson v. Oklahoma, No. 86-6169 (1987)]. It seems clear that teenagers would be much more deterred by the threat of long-term imprisonment (resulting in no girlfriends, no parties, etc.) than by their fantasized romantic perception of death (Id. at 250).

Gibbs (1975) found that the certainty of receiving a particular punishment is critical to its preventive effect. It is uncertain that even an adult will receive a death sentence. In fact, the Supreme Court held that mandatory death penalty statutes which provide that the death penalty must be imposed on all offenders convicted of certain crimes is unconstitutional [Roberts v. Louisiana, 428 U.S. 325, 330 (1976); Woodson v. North Carolina, 428 U.S. 280, 293, 304 (1976)]. The certainty of a juvenile receiving the death penalty is less than 0.5 percent chance (Streib, 1998). That is, of approximately 300 total death sentences imposed each year, juveniles receive only five of them (Id. at 4).

Judicial discretion ²² is a keystone in the treatment of minors in the juvenile and adult system. The “insidious frailty” of most statutes in which juvenile judges decide to retain jurisdiction or waive to criminal court is reflective of the pervasive lack of legislative standards dealing with juvenile offenders (Browne, 1977). Each state has transfer criteria exclusive of age and instant offense that stipulate such factors as amenability to treatment, dangerousness and appropriateness for criminal court

processing (Rudman, Hartstone, Fagan and Moore, 1986). Ironically, legal scholars have argued that judicial waiver has contributed to the erosion of deterrence due to the lack of certainty in such a discretionary certification system.

Regardless of the evidence, the deterrence doctrine assumes that punishment can be an effective means of control (Bridges and Stone, 1986). The theory asserts that punishment assists in deterring criminal recidivism by heightening the perceived threat of punishment. As such, the more certain and severe the experience of punishment, the higher the perceived threat which is supposed to then reduce criminal activity (Parker and Grasnack, 1979). This is not reflective of the reality which exists.

The issue of perceptual deterrence has been extensively researched and empirically tested by experts in the field such as Dr. Raymond Paternoster, professor of criminology at University of Maryland. Paternoster, Saltzman, Waldo and Chircos (1983), explain in one study that perceptions can be influenced not only by one's own experience in criminal behavior (or experience with "formal sanctions") but may also be affected vicariously through other's experience. Paternoster and Iovanni (1986) found evidence in support of the allegation that "peer behavior, moral beliefs, and social disapproval [are] more strongly related to criminal behavior than fear of formal sanctions" (p. 769). This is similarly supported by Tittle (1980), Meier and Johnson (1977), and Meier, Burkett and Hickman (1984).

Researchers found that actual levels of certainty of arrest influence involvement in illegal behavior after a minimum threshold effect has been reached (Green, 1989). In a cross-sectional deterrence study, Grasmick and Bryjak (1980)

found that perceptions of both certainty and severity of sanctions must be "high" in order for perceived threats of legal punishment to have a deterrent effect. Professor Donald Green (1989) explains that, "... an interaction effect between perceptions of certainty and severity must exist before threat of sanction affects behavior" (p. 800).

Green suggests future studies should focus on select offenses for which the threat of legal punishment has reached a minimum "threshold" effect in order to assess the importance of both perceptions of certainty and severity of legal punishment. One interesting departure from earlier panel deterrence studies is the lack of support in Green's work for the so-called experiential effect between perceptions and behavior.

The findings from Paternoster's work primarily support a conclusion that earlier perceptual research provides us with inconclusive evidence of actual deterrent effects. That is, he notes that regardless of extensive research efforts which conclude that individuals who view the threat of punishment for crime as high typically commit few offenses the reality fails to support such a proposition. The relationship which actually exists between "peoples estimates of the certainty and severity of punishment and their behavior" is probably insignificant. The Supreme Court agrees with this argument [*Gregg v. Georgia*, 428 U.S. at 183 (1976)].

Importantly, Paternoster (1989) and others have pointed out the assumption of rationality which exists within the concept of deterrence. This assumption clearly does not reflect the adolescent state of mind. As noted in Thompson, "the likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." With

all of these issues considered, it is unlikely that capital punishment for minors would be justified under the general deterrence doctrine.

2. Specific Deterrence

Under specific deterrence, the purpose of capital punishment is to protect society from the threat of future crimes by the particular capital offender. In Gregg v. Georgia, 428 U.S. 183 (1976), the Supreme Court noted that specific deterrence may be one of the purposes of capital punishment (Id. at 183 n. 28). The Court, however, did not rely solely on this justification in finding that the death penalty served acceptable goals of punishment. Some have argued incarceration is equally effective in preventing future crime by criminals.

Even if capital punishment makes some necessary contribution to the goal of specific deterrence in regard to adult offenders, it is completely unnecessary in order to prevent juvenile offenders from engaging in future criminal conduct. The simple fact that a minor is found to be “dangerous” or incapable of being rehabilitated by the resources available in the juvenile justice system does not mean that he will not reform as he grows older. As has been noted “It is impossible to make a judgment that a 14-year-old, no matter how bad, will remain incorrigible for the rest of his life” [Workman v. Commonwealth, 429 S.W. 2d 374, 378 (Ky. 1968)].

Most juvenile crime (including violent crime) abates with age. Wolfgang, Figlio and Sellin (1972) note that juveniles who repeat violent crimes tend to persist in criminal activity in their twenties until gradual reduction results in cessation. In fact, the possibility of significant character and behavioral changes in young adults aged 18 to 25

is a recognized phenomenon and the evidence shows that juvenile murderers are low-rate recidivists.

In fact, juveniles convicted of murder and incarcerated are considered model prisoners and rarely commit further crimes after incarceration. As adolescents mature into adults they mature out of criminality. The statistics reveal that as minors move from the turbulence of adolescence to a calmer period of early twenties they commit fewer crimes regardless of whether or not they are apprehended or participated in an extensive rehabilitation program [Office of Juvenile Justice and Delinquency Prevention, 1982; Thompson v. Oklahoma, Brief of Petitioner, No. 86-6169 (1986)].

The goal of incapacitation or specific deterrence does not justify capital punishment of juvenile offenders. Unlike deterrence and retribution, “[I]ncapacitation has never been embraced as a sufficient justification for the death penalty” [Spaziano v. Florida, 468 U.S. at 461 (1984)].

In conclusion, one of the chief justifications for the death penalty has been its alleged unique power to deter crime. The deterrence theory postulates that offenders weigh the consequences of crime and act according to the relative certainty of punishment. Experts have found no credible evidence exists to support the contention that the death penalty is an effective deterrent among either adult or juvenile offenders.

As Paternoster and others have noted, the necessity of recognizing rationality as an underlying premise in the deterrence theory provides additional support for the argument against use of the death penalty on juveniles. Social scientists almost universally reject the concept of free will and rational calculation as the major

motivating factors behind juvenile crime and delinquency.

The empirical evidence suggests that deterrence can be achieved only when potential offenders know the commission of a particular crime will result in a particular punishment (Bedau, 1977). The death penalty is so infrequently imposed on minors that capital punishment fails to have a deterrent effect on juveniles. A deterrent that does not deter juveniles should not be applied against them as it furthers no constitutionally valid societal interest and would be “nothing more than the purposeless and needless imposition of pain and suffering” [*Coker v. Georgia*, 433 U.S. at 592 (1976)]. As stated in *Kent v. United States*, 383 U.S. 541, 554-555 (1966), “. . . reformers generally rejected deterrence and retribution as adequate notions to justify criminal sanctions . . . Children were considered educable and reformable.”

Youths are particularly impressionable and, therefore, crimes may not be exclusively their fault but symptomatic of the conglomerate failure of family, school and the social system (*Id.* at 1539). Juveniles deserve leniency due to their early stage of development as well as amenability to rehabilitation.

F. Rehabilitation

The death penalty totally rejects the one sentencing goal considered most appropriate for young offenders - rehabilitation [*People v. Hiermel*, 49 A.D. 2d 769, 770, 372 NYS 2d 730, 731 (1975); *Thompson v. Oklahoma*, No. 86-6169 (1988)]. The U.S. Supreme Court recognized in *Jurek v. Texas*, 428 U.S. 262 (1976), and again in *Skipper v. South Carolina*, 476 U.S. 1 (1986), the determination of the suitability of the use of the ultimate death penalty inevitably involves a “predict[ion] . . . [of the]

convicted person's probable future conduct" [Brief of Amici Curiae, Child Welfare League of America, National Parents and Teachers Association, National Council on Crime and Delinquency, Children's Defense Fund, National Association of Social Workers, National Black Child Development Institute, National Network of Runaway and Youth Services, National Youth Advocate Program and American Youth Work Center, High v. Zant, No. 87-5666 (1988); Wilkins v. Missouri, No. 87-6026 (1988)].

There is substantial evidence in the social scientific literature that even the most violent adolescents are capable of dramatic change and rehabilitation (Goldstein, Freud, Solnit, 1973; Braithwaite and Shore, 1981). A two-year follow-up study entitled "Offender Based Institutional Tracking System" (1987) found that 76.7 percent of homicide offenders paroled from the California Youth Authority (CYA) successfully completed their period of parole versus those CYA parolees convicted of non-homicide offenses which had a success rate of only 41.9 percent (Wenk, Robinson and Smith, 1972). The Capital Offender Program in Giddings, Texas, has been quite successful with as few as 17 percent of offenders recidivating versus 50 to 60 percent in other programs (Capital Offender Program, personal communication, October 12, 1997).

It appears that the more risk factors present, the greater the probability that the child will develop violent behavior patterns. As such, early programs that decrease the number of risk factors have the potential to reduce later violent crime. Long-term follow-up studies on programs providing a variety of services including housing and food, prenatal and child care, preschool education, and parent training have been completed. The outcome demonstrates that children in such programs later engaged in

less aggressive, acting-out behavior. Dr. Edward Zigler described the High Scope Foundations preschool project in Michigan which provided an intensive, high-quality preschool which children attended for two years. The follow-up data on the preschool graduates of up to 27 years have been very positive (*Id.* At 1). In fact, less than 60 percent were arrested one to four times and only 12 percent were arrested more than four times. These outcomes were by far better than the control groups (*Id.* at 3). During the early developmental years, programs such as Head Start preschool and early tutoring for the purpose of reducing the risk of school failure are critical as school failure is a well known precursor to violent behavior.

Clearly, rehabilitation via resocialization is less ideal than initial efforts of positive developmental socialization. As Magid and McKelvey (1987) state, “The time to teach obedience is in the playpen and not the state pen” (p. 27).

Special treatment of juvenile offenders is a reflection of the belief that the young must have time and opportunity to escape from the disadvantages, deprivations and abuse that may be responsible for their behavior California v. Brown, 107 S. Ct. 837, 841 (1987) . This special treatment, including the availability of rehabilitation programs, derives from a prevalent, compassionate and decent sense that government must be restrained from adding additional undue punishment to the existing pain and handicaps attributed to fate and circumstance (*supra*, p. 24). This restraint, of course, parallels the “belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse”

[California v. Brown, 107 S. Ct. 837, 841 (1987); cf. Eddings v. Oklahoma, 455 U.S. at 115 n. 11 (1982)].

Rehabilitation constitutes an essential function of “punishment” in juvenile cases. Fryear v. Commonwealth, 507 S.W. 2d 144 (Ky. 1974) stated:

“Juvenile offenders have historically been within the exceptions to the regular mode of procedure in dealing with criminal offenders. This came about as a result of society’s desire to rehabilitate rather than punish. Juveniles were looked upon as being essentially good not evil.”

The Illinois Constitution even mandates that “[a] proper objective in determining the extent and nature of a criminal penalty is the restoration of the offender to useful citizenship” [Ill. Const. 1970 art. I §§ II, cited in People v. Horton, 356 N.E. 2d 1044, 1049 (Ill. 1976)]. It is clear that Illinois maintains a commitment, especially in juvenile cases, to emphasize rehabilitation as a penal function even though Illinois no longer imposes the death penalty upon juveniles [Ill. Ann. Stat. ch. 38 s 9-1(b) (1979)]. The U.S. Supreme Court stated in Dorszynski v. U.S., 418 U.S. 424 (1974), that the Federal Youth Corrections Act, 18 U.S.C.A. §§ 5005 et. seq (West, 1950) “was . . . designed to provide a better method for treating young offenders convicted in federal courts in the vulnerable age bracket (16-22) to rehabilitate them and restore normal behavior patterns” [H.R. Rept. No. 2979, 81st Cong. 2d SESS, 2-3 (1950) cited in Dorszynski v. U.S., 418 U.S. at 433].

As can be observed throughout history, “children have a very special place in life which the law should reflect” (May v. Anderson, 1953). In cases which present crucial questions involving minors one cannot ignore the significance of the status of

minority. It has been proven that minors are in the early stages of their emotional growth; their intellectual development is incomplete; they have only limited practical experience, and their value systems are not yet clearly identified and firmly adopted (Schall v. Mart, 1984; Wayburn v. Schupf, 1976). Unlike adults, minors are always in some form of custody and subject to the control of their parents or the state upon whom the responsibility of making decisions rests.

While adults may have widely varying degrees of potential for rehabilitation, the class of children/adolescents share a common trait of their potential for rehabilitation. Execution abandons and denies the promise of adolescence: that the impulsive, antisocial acts of teenagers will naturally moderate as they become adults. Killing children and adolescents for their crimes offends the fundamental premise of juvenile justice. Dr. Victor Streib (1987) explains, "Capital punishment of our children inherently rejects humanity's future which rests with the habilitation and rehabilitation of today's youth." The special place in society occupied by minors should not include death row (Vanore, 1986).

G. Prediction

In Thompson v. Oklahoma, No. 86-6169 (1987), the state relied on evidence of his reputation in the community, his arrest record, his failure in one juvenile rehabilitation program, and the opinion of Dr. Helen Klein, a clinical psychologist, to demonstrate that Thompson would likely commit more violent acts. After summarizing the boy's arrest record, Klein characterized him as "physically aggressive" and "a bully, an antisocial person" [Tr. 783-84]. She expressed her view that the boy "will . . .

become a hardened criminal” and “will become more violent” if he goes to prison [Tr. 783-84]. The petitioner notes that a different description of Thompson evolved from Dr. Klein’s psychological report which was used by the District Court during certification proceedings [JA 6,7].²³ The trial judge attached it to his sentencing report [R. 487-91]. Dr. Klein explained:

“During the initial stage of the interview, he attempted to portray himself as macho, tough and cavalier. This facade tended to dissipate as his anxiety abated.

Individuals who obtain MMPI (Minnesota Multiphasic Personality Inventory) profiles similar to Wayne’s typically are described as hyperactive, restless and indecisive, and as persons who may keep people at a distance (emotional alienation) and show poor social judgment. A profile such as that obtained by Wayne must be interpreted with caution as it suggests the possible effect of a response set which may have led to exaggeration or distortion of his current status. Such a profile reveals the possible presence of a desire to appear independent of social ties and to “fake bad,” i.e., to exaggerate symptomatology.

Rorschach test data support the MMPI data in that test results are indicative of a person whose entire focus is external. He is excitable, hostile, and is responsive to the external world to the extent he cannot organize his inner experience. He has a stereotypical, concrete view of the world and demonstrates little ability to organize or to conceptualize his experience beyond that. Wayne does not have enough ego to handle or to control his impulses and therefore tends to act them out” [R. 487-91].

Although the form and level of an individual’s aggression varies considerably, it has been argued that an individual’s relative level of aggression among age-mates demonstrates continuity and predictability over time.²⁴ By contrast, the “maturing-out” of many antisocial behaviors is common knowledge. There appear to be a number of factors which contribute to keeping a pattern of violence consistent. These factors are

alterable at the early stages of child development. The identification of protective factors in children at high risk for violent behavior can cushion the impact of constitutional vulnerabilities, poverty, family distress and the occurrence of deviant behavior.

Prediction of future conduct in the very best of circumstances is an inexact science, the uncertainties of which trigger moral questions. When one establishes the expected rates at which a given event occurs, this is known as the base expectancy rate (Monahan, 1992). Base expectancy rates reflect the current level of violent behavior by a particular group. Only by comparing the base expectancy rate of violence for individuals within relevant groups can the decision be made about the use of explicit predictions (*Id.* at 5). There is a vast array of discretionary decisions made which are based on implicit assessments of future violence by violent offenders. The two principal methods for anticipating behavior are clinical and actuarial prediction with a definite preference for use of the actuarial (Monahan, 1992). For juveniles, such methods are unreliable.

Some of the predictive statistics related to familial factors have already been discussed. First, Drs. Sheldon and Eleanor Glueck (1970) developed a delinquency prediction scale which is based on five social factors: 1) affection of the father for the child, 2) discipline by the father, 3) affection of the mother for the child, 4) supervision and discipline by the mother, and 5) overall cohesiveness in the family. Some of their research included traits of juvenile temperament and character. As expected, the Gluecks found delinquents far more than nondelinquents come from homes of little

affection, stability, moral fiber or understanding of parent-child responsibilities. They found that delinquents temperamentally tended to be more restless, impulsive, aggressive and self-destructive;²⁵ in attitude, more defiant, hostile, resentful and nonsubmissive to authority. Characteristics which enable some degree of predictability.

Consistent with the Gluecks' theory regarding the predictive risk factors, the American Psychological Association (1993) identified factors contributing to the child's risk profile. These factors include: biological factors, childbearing conditions, ineffective parenting, emotional and cognitive development, gender differences, sex role socialization, relations to peers, cultural milieu, social factors (economic inequality, lack of opportunity, media influences) (*Id.* at 17).

Such youth tend to have experienced weak bonding to caretakers in infancy and ineffective parenting techniques including but not limited to lack of supervision, inconsistent discipline, highly punitive/abusive treatment and failing to reinforce positive, prosocial behavior (*supra*, p. 21). These developmental deficits lead to poor peer relations and high levels of aggressiveness (*Id.* at 21). Of equal importance, such youth have learned attitudes accepting aggressive behavior as normative and as an effective way to solve interpersonal problems (*Id.* at 21). They frequently do poorly in school.

Drs. Huizinga, Loeber and Thornberry (Denver Youth Survey, Pittsburgh Youth Survey and Rochester Youth Development Study, respectively, in press) are examining delinquency as part of a broader context of nonconforming behavior, including drug use and school failure, to establish whether a single path or multiple

paths exist toward different serious delinquent and antisocial outcomes. From these three prospective studies ²⁶ under the title Program of Research on the Causes and Correlates of Delinquency, data collected for five years will permit the interpretation of the causal sequencing of key events in childhood and adolescence (Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, Program Summary, undated). The goal of this research is to benefit from the experiences of high risk juveniles who are able to overcome the odds and allow for identification of pathways that might prevent other high risk youth from entering delinquent careers (*Id.* at 1).

The past research indicates that many variables correlate with delinquency and many factors tend to increase the risk of later delinquent behavior. Many such risk factors which have been discussed include: “birth trauma, child abuse and neglect, ineffective parental discipline, family disruptions, conduct disorder in children, school failure, learning disabilities, negative peer influences, limited employment opportunities, inadequate housing and residence in a high crime area” (OJJDP, U.S. Department of Justice, Program Summary, p. 1). It is important to note that neither correlates nor risk factors are synonymous with causal factors.²⁷

Current ability to predict long-term violent behavior is no better than one accurate prediction out of every three (Monahan, 1992). Many argue this one-in-three accuracy rate is most likely the best social scientists will achieve. However, predictions may be improved by focusing on situational and environmental factors, random elements in behavior and other factors which address the places and people with whom the targeted individuals interact (*Id.* at 7).

The importance of improving accuracy of predictions of violence is in part based on the Supreme Court ruling in a 1983 death penalty case that estimations of a person's future dangerousness does not violate constitutional guarantees. At the same time, limits on current ability to predict are widely recognized in the legal and psychiatric professions as stipulated in Barefoot v. Estelle, 463 U.S. 880 (1983).

Society must determine the point at which data become adequate as a guidepost for decision-making. Although some argue that basing decisions on predictions of dangerousness is always inappropriate, the policy regarding the appropriateness of using predictions relies on a risk-benefit analysis. Specifically, weighing the level of risk and harm expected against the intrusions on individual liberty. In a legal system founded on notions of justice and mercy and faced with limited resources, predictions of "nondangerousness" may justify exceptional uses of predictions to lessen sentences.

Regardless of the accuracy of predictions of future violence, it remains the primary purpose of punishment today. The principles of retribution and deterrence are the primary purposes for punishment defended politically, socially and judicially for and in support of capital punishment. When considering juveniles such legal and moral issues take on particular significance. The amici curiae in their extensive work with adolescents and children concur that children have "boundless capability for change" since the personality that the individual will have as an adult is still in the process of being formed.

It is precisely this malleability and ability to develop very different

personalities and values as they mature with experience and perspective which makes it impossible to conclude definitively that a particular youth must be executed in order to incapacitate him or her from committing future crimes. Children and adolescents deserve understanding and treatment instead of revenge by an outraged society.

H. Recidivism

Risk assessment, in spite of its many problems, is becoming increasingly important in the decision-making process. Recidivism has been the traditional measure for assessing the effectiveness of rehabilitation efforts. As an outcome measure, however, recidivism is unreliable. Although a reduction in criminal activity is a fundamental consequence of a successful program of offender rehabilitation, alternative ways of assessing the effectiveness of rehabilitation programs are needed. The treatment paradigm itself has operated on the premise that an offender's progress is a good indicator of whether an inmate is able to function in society. Recidivism data differ depending on how terms are operationalized (in particular, the concept violent predator). Experts argue that some samples of violent youth were no more "violent" than those included in other studies such as in high risk probation studies. Undeniably, violent youthful predators exist, the small population on death row are a testament to such a reality.

Society has recognized the qualitative difference between juveniles and adults (Rudman, Hartstone, Fagan and Moore, 1986). The difference is reflected in an endless array of laws which restrict the rights and conduct of juveniles. The underlying premise of those laws is that juveniles lack the maturity, social and emotional

development as well as cognitive skills to assume the same responsibilities of adulthood. “Children, by definition, are not assumed to have the capacity to take care of themselves” [Schall v. Martin, 467 U.S. 253, 265 (1984)]. The dominant tradition of American law provides that people are not fully responsible until 18 years of age. This is the most common age of majority established in American law for noncriminal purposes [Streib, 1983; Brief of Amicus Curiae, Office of State Appellate Defender of Illinois, Thompson v. Oklahoma, No. 86-6169 (1986)].

Consistent with society’s regulation and supervision of juveniles, the “evolving standards of decency” prohibits the imposition of capital punishment on a person under 18 years of age during the commission of a crime. Due process compels the state to provide the treatment to which a juvenile offender is amenable, regardless of the adequacy of treatment programs available in that particular state’s juvenile justice system.

The underlying belief is that responsibility for juvenile crime must be shared by social and educational systems as well as the adolescent’s home and family. Peer pressure and chaotic dysfunctional family environment subject adolescents to significant psychological and emotional stress and they respond by acting impulsively and without the mature judgment expected of adults. A disproportionate number of violent youngsters grow up in families that experience adversities such as marital conflict, parental illness, poverty and low socioeconomic status ²⁸ (Loeber and Stouthamer-Loeber, 1986). It has been demonstrated repeatedly that these indicators of family disruption or inadequacy are correlated with delinquent behavior.

The emotional and psychological immaturity of adolescents preclude them from fully understanding the nature of their actions and appreciating their consequences. Adolescence is a stage of life symbolized by an invincible sense of self and absence of fear (Kastenbaum and Aisenberg, 1972). Death provides not only a remote possibility but a macabre challenge.

The perception of execution is contingent on many extraneous variables which appears to have little deterrent effect. Upon examination of the goals of retribution and deterrence in light of the lessened moral culpability of juveniles as a class, the Eighth Amendment proscribes execution of persons under the age of 18 at the time of crime. The extent of retribution depends on one's culpability which depends on one's capability. Society holds juveniles less morally culpable for their acts than adults because juveniles are subjected to internal and external pressures over which they have no control.

The various legal disabilities are based on the common sense and empirically supportable assumption that minors lack the maturity, experience, sophistication and judgment necessary to make significant decisions. Society treats juveniles as a class (not as individuals) and governs their rights and conduct with inflexible laws. The death penalty jurisprudence focuses on "individualized consideration" of the accused and the harm done. As such, there is a fundamental inconsistency in the two approaches which is inadequate to protect juveniles from the arbitrary imposition of the death penalty.

International standards on the death penalty are also unanimous in

prohibiting imposition of death sentences on persons under the age of 18 at the time of offense. Treaties and instruments containing such a prohibition include the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (ACHR) and the United Nations (UN) Convention on the Rights of the Child. The United States is one of only eight countries known to have executed juveniles in the last decade. As late as June, 1989, the U.S. Supreme Court ruled that the execution of offenders as young as 16 years of age was permissible under the Constitution. Innumerable professional organizations including but not limited to the American Bar Association oppose the death penalty in such cases.

Our juvenile justice system recognizes the emotional and intellectual immaturity of juveniles holding them less culpable than adults. However, juveniles are tried and punished in the criminal justice system for certain kinds of serious offenses as though they were as culpable as adults. This inherent lack of consistency precludes equity and fairness in our special treatment of the juvenile. As such, the mitigating factor approach fails to achieve its goal within the context of individualized consideration. Juveniles, as defined by the law as age eighteen, should be constitutionally barred from the death penalty.

VII: Conclusion

A. Summary

The data reflect the inherent unreliability of our discretionary approach to justice. The mandate to provide individualized consideration has resulted in a highly disparate system of justice. As such, the race of the offender as well as the victim, and jurisdiction all impact what kind of individualized consideration a youth receives. In fact, the findings appear to support the research which has historically provided evidence of the existence of racial disparity in sentencing (Gross and Mauro, 1989; Radelet, 1981; Baldus, Woodworth and Pulaski, 1970). Over all jurisdictions, offenders are significantly more likely to have killed white victims (70%). Texas, as one of the three identified states in the "death belt" (along with Florida and Georgia), has significantly less white offenders on death row (17%). Overall, 60% of the offenders were nonwhite.

In addition to these important but incidental findings, the analysis of the 71 youths on death rows throughout the United States provides an offender profile. This included the predicted correlation between family trouble and psychological/emotional disturbance. The majority of subjects used both of these statutory mitigators at trial level. The evidentiary support ranged from minimal to substantial. In fact, if the offender was included in the study completed in 1988 by Drs. Dorothy Otnow Lewis and others, the scope of tests completed was impressive. The findings from this study clearly support the existence of familial, psychological, emotional and medical problems. Unfortunately, this evidence did not prevent the final outcome with approximately 25% of their original sample now executed.

Due to the lack of legitimate testing to determine if there were medical problems or subnormal IQs, these categories were less reliable as actual indicators of their presence or absence. Along with known substance abuse, medical problems and subnormal IQ were used less often as mitigators and more difficult to interpret. The explanation for this appears to be the limited finances available to attorneys to test for organic problems and psychometric deficiencies. The two categories of mental retardation and low IQ were collapsed into one category because of the wide range of use (or misuse). Interestingly, Hispanics were 90% (0.09, 0.01-0.75) less likely to use medical as a mitigator. The use of no prior criminal history as well as known substance abuse as mitigators was also less frequent due to the potential backfire effect. In fact, both issues were presented in at least three cases as mitigators and construed as aggravators by the respective courts.

As mentioned, the nonstatutory mitigating factors proved far too diverse and ambiguous to be used as a basis of comparison. One of the unexpected outcomes of the analysis herein was the ability to establish a profile using not just the mitigators but the aggravators. As such, associations between several of the mitigators and aggravators were demonstrated as well as interactions between race and age of the victim. There was a significant association between race and burglary with whites 16.33 (1.9-142.9) times more likely to engage in burglary than nonwhites. Among victims who were not black, if the offender was black, they were 9.0 (1.73-46.8) times more likely to kill a youth under 19 year of age. Blacks were also more likely to kill blacks. The Hispanic offender was significantly more likely to kill another Hispanic or Asian victim. In this

population on the death rows throughout the United States, none of the Hispanic offenders killed blacks. For Hispanics, the age of the victim was most likely to be 10-19 years old and next likely to be less than 10 years of age. Hispanics were 4.7 (1.4-16.4) times more likely to commit multiple murders. This might be due to the offenders on death row in Texas and their alleged involvement gang-related offenses.

Upon further analysis of mitigators by aggravators, it is clear that family trouble is not often used as a mitigator when the offender has committed a robbery. In fact, among offenders who commit robbery they are 80 percent less likely to use psychological or emotional disturbance as a mitigator. Importantly, when rape is the aggravator the offender is 5.1 (1.3-23.2) times more likely to have no prior criminal behavior. This is consistent with the research on sexual offenders which finds that these individuals do not test high on other criminal behavior. One could theorize that at least some of the youths on death row committed the murder to cover up for the sexual offense. Upon review of some of the relevant presentence investigation reports it appears that at least two of the offenders had engaged in possible sexual offending behavior but no other identified criminal activity prior to the offense.

Offenders who commit burglary as an aggravator are over 80 percent (0.12, 0.3-0.59) less likely to use indigent status as a mitigator. These offenders are predominantly white. All child murderers used psychological/emotional disturbance as a mitigator along with troubled family history. The other aggravators including carjacking, arson, kidnaping, and murder of a police officer proved to be too small in number to achieve statistical significance.

B. Limitations

There are limitations in a study which involves reliance on legal cases for data. There is a significant degree of variation in what is reported and in how it is reported. Additionally, different concepts may be construed similarly or similar concepts differently. The fact that many different jurisdictions, correctional facilities and people were involved increases the risk of error. This problem became apparent at the initial data collecting phase. When the simple process of collecting and confirming who was on death row was complicated by incorrect spelling of names, dates of birth, etc.

Ironically, a limitation to this study is also a strength of the theory behind the study. The diverse statutes represent diverse mandates for mitigating and aggravating factors. Moreover, these inherently diverse factors are construed by different courts (including judges, juries and attorneys) in even more varied ways. Case in point, there were many examples of mitigating factors being interpreted and used by the court as aggravating factors often as justification for use of the death penalty. There were instances when an offense in one jurisdiction was charged as a carjacking or armed burglary yet an almost identical crime in another jurisdiction was charged under a different offense.

The strategic decision not to use a mitigator in spite of its presence appeared often with substance abuse and criminal background. Somewhat less intentional was the lack of use or lack of documentation regarding indigent status. An even more ambiguous mitigating factor was subnormal intelligence level. When it was derived from formal testing the interpretation ranged from identifying an IQ of 78 as "profoundly

retarded" to an IQ of 80 as "relatively within the range of normal." More often, intelligence level and medical testing was not done and not used as a mitigator in spite of clear evidence that serious problems existed in this area.

Equally disturbing were the reports by attorneys who described the difficulty in getting families to corroborate well documented family abuse and psychological or emotional problems. At one point during the data collection phase of this project a mother of an offender was contacted to provide additional information on these two documented mitigators. The mother denied the existence of any family problems in spite of her admission that the juvenile was a victim of extensive physical abuse.

From an analytic standpoint, the limitations include the lack of a comparison group to establish the actual differences due to race, state, mitigating factors and aggravating factors. A sample of juveniles with similar characteristics who were not sentenced to death row would have provided the ability to compare across groups. The small sample size with even smaller cell sizes may have produced nonsignificant results due to small numbers when an effect may have been present. Small sample sizes also made significant results unstable, as noted by wide confidence intervals in some of the findings. Although Fisher's Exact Test was used to account for the small samples, some nonsignificant associations may have proved to be significant if larger numbers were available.

Information, if available, was gathered on all the offenders. The total number including names, date of birth, race, race of victims, date of crime, and other demographic information is reasonably reliable allowing for the unexpected analysis

concerning race disparities to be calculated. The 71 juveniles identified in this study represent the full population of juveniles currently on death rows throughout the United States, which adds to the relative strength of the relationships and increases the generalizability of findings.

C. Future Research

Future research should explore within jurisdiction differences and then compare across jurisdiction. The addition of a comparison study of a similar group of youthful offenders who did not receive the death penalty would provide valuable information about sentencing practices.

Of particular interest, are those mitigators which are considered credible by jurors and those which are considered unreliable. Further exploration of the small group of offenders who were convicted of rape as part of their offense as this group appears to present a profile different from the rest of the population of offenders on death row. They uniformly have no criminal history and a significant troubled family history and psychological or emotional disturbance.

During data collection, extensive detailed information on each juvenile was collected through interviews with attorneys, court and corrections personnel. This data should be carefully analyzed to determine if other patterns may emerge.

D. Implications

The existing research on biophysical and socioscientific data support the age of majority being drawn at eighteen. At this age juveniles appear to become capable of understanding the consequences of their actions and able to make choices accordingly.

There are studies which dispute even this capability in a relatively small proportion of high risk youth. As such, these disadvantaged youths appear less able than the population at large to make reasoned moral judgments. There are a multitude of explanations for this distinction including family dysfunction, organic disease process, head trauma, subnormal intelligence levels, psychological, emotional and ethological deprivations.

Just as the legal definition of juvenile is in conflict with the biophysical and socioscientific evidence, it is in direct conflict with its own demarcation between the period of childhood and adulthood. As such, the individual under the age of 18 by virtue of his or her status as a minor can be deprived of the rights and privileges of adults. The necessity for parental consent, the denial of the right to drink or buy liquor, vote and compulsory school attendance laws are all justified on the basis of being in the best interest of the child.²⁹ The same criminal justice system holds such an identified "child" responsible as if an adult. The rationale for such a system is rooted in the concept of individualized consideration, namely, the mitigating factor approach.

This analysis indicates that our judicial system varies considerably in the definition and corresponding treatment of the so-called youthful super-predator. One of the most disturbing differences appears to be in the use of mitigators and aggravators. A substantial factor in the judicial decision-making process is clearly based on the availability of funds and time. Even when the evidence exists in favor of the juvenile, it can and often is widely construed by various judges, juries and legislators.

E. Recommendations

The individual difference factor has emerged as critical to an analysis of the legitimacy of capital punishment for juveniles. Unfortunately, this individual difference factor has resulted in a system that is plagued with flaws. As the criminal justice system exists today, there is no way to impose a sentence of death on a person under 18 years of age in a fair and equitable manner.

Under Lockett v. Ohio, 438 U. S. 586. 98 S. Ct. 2954 (1978), a sentence is supposed to be structured within statutory limits to suit the individual offender and the particular circumstances of the offense. The judges are given broad discretion regarding the type and source of information which can be considered for such a determination. As this paper demonstrates, it is the very nature of individualized consideration, using the mitigating factor approach, which requires the broad use of discretion.

There are changes underway in our criminal justice system which allow for more just treatment of serious juvenile offenders. The trend to use blended sentencing allows for a bridge between the adult and juvenile system. Its increasing popularity allows the courts to impose juvenile and/or adult sanctions on offenders. These state statutes provide flexibility in dealing with the more problematic of our offenders and satisfy the need for treatment, confinement and accountability. Moreover, the restorative justice philosophy behind these sentencing schemes encourages the use of sanctions to include accountability to victims, community safety and the development of offender competency.

Blended sentencing is one of many solutions regarding the inherent inequities which exist in the present system. Graduated sanctions which include a broad range of

intermediate correctional programs, such as secure care and progressive aftercare, all allow for a balance between the interests of community, victims and offenders. The use of a multisystemic and restorative justice approach to alter life circumstances and behavioral patterns allows for consideration of every element of the juvenile's pathology.

This paper has demonstrated the wide variability in use of both mitigators and aggravators and the corresponding failure to provide an equitable imposition of the death penalty on juvenile offenders. The socioscientific literature demonstrates that prior to age 18, youths are biologically, psychologically and morally more immature than adults. Our legal system represents a dichotomy: treating these individuals as immature in the civil system, but mature in the criminal system. An analysis of the population of juveniles currently on death rows throughout the United States demonstrates patterns that reflect the confusion and ambiguity in the management of kids who kill. This paper demonstrates the need to establish a bright line at age 18 for purposes of the death penalty.

APPENDIX A
Charts and Fact Sheets

Chart 1.1: Minimum Death Penalty Ages by Jurisdiction in the United States

<u>Age Eighteen</u>	<u>Age Seventeen</u>	<u>Age Sixteen</u>
California *	Georgia *	Alabama *
Colorado *	New Hampshire *	Arizona **
Connecticut *	North Carolina *	Arkansas **
Illinois *	<u>Texas *</u>	Florida ***
Maryland *	4 states	Idaho **
Nebraska *		Indiana *
New Jersey *		Kentucky *
New Mexico *		Louisiana *
New York *		Mississippi **
Ohio *		Missouri *
Oregon *		Montana **
Tennessee *		Nevada *
and		Oklahoma *
<u>Federal *</u>		Pennsylvania **
13 states and federal		South Carolina **
		South Dakota **
		Utah **
		Virginia **
		Washington **
		<u>Wyoming *</u>
		21 states

* Express minimum age in statute

** Minimum age required by U.S. Constitution per U.S. Supreme Court
Thompson v. Oklahoma (1988)

[Thirteen American Jurisdictions without the Death Penalty: Alaska, District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin]

Source: Dr. Victor Streib, Dean, Petit College of Law, Ohio Northern University
Ada, Ohio 45810

Chart 1.2 Minimum Age at Which Children Can Be Tried As An Adult By
Jurisdiction in the United States

Age 15 Louisiana	No Age Minimum Alaska Arizona Delaware Florida Georgia Indiana Maine Maryland Massachusetts Michigan Mississippi Montana Nebraska Nevada New Hampshire Ohio Oklahoma Oregon Pennsylvania Rhode Island South Carolina South Dakota Tennessee Washington Washington D.C. West Virginia Wyoming
Age 14 Alabama Arkansas California Connecticut Hawaii Idaho Iowa Kansas Kentucky Minnesota Missouri New Jersey New Mexico North Dakota Texas Utah Virginia Wisconsin	
Age 13 Illinois North Carolina	
Age 12 Colorado	
Age 10 Vermont	
Age 7 New York	

Source: National Center for Juvenile Justice: National Conference of State
Legislatures reproduced in Time, April 6, 1998, p. 36

Chart 1.3: Death Penalty Statutes in the United States

Alabama	Ala. Code Ann. 13A-5-45 (1975)
Arizona	Ariz. Rev. Stat. Ann. 13-703 (1989)
Arkansas	Ark. Code Ann., sec. 5-4-602 (Michie 1987)
California	Cal. (Penal) Code. Sec. 190.1 (West 1988)
Colorado	Colo. Rev. Stat. Ann., sec. 16-11-103 (West 1990)
Connecticut	Conn. Gen. Stat. Ann., sec 53a-46a (West 1985)
Delaware	Del Code Ann., tit. 11, sec 4209 (Michie 1974)
Florida	Fla. Stat. Ann. 921.141 (1985)
Georgia	Ga. Code Ann., sec 17-10-30 (West 1985)
Idaho	Idaho Code sec. 19-2515 (Michie 1987)
Illinois	Ill. Rev. Stat., ch. 38, para. 9-1 (Smith-Hurd 1979)
Indiana	Ind. Code, sec. 35-50-2-9 (Michie, Bobbs-Merrill 1985)
Kentucky	Ky. Rev. Stat. Ann, sec. 532.025 (Michie 1990)
Louisiana	La. Code Crim. Pro. Ann, art. 905.3 (West 1984)
Maryland	Md. Code Ann., (Crim. Law.), art. 27, sec 413 (Michie 1992)
Mississippi	Miss. Code Ann. 99-19-101 (1972)
Missouri	Mo. Ann. Stat. 565.032 (Vernon's 1979)
Montana	Mont. Code Ann., sec. 46-18-301 (Leg. Council 1991)
Nebraska	Neb. Rev. Stat. sec. 29-2520 (1943)
Nevada	Nev. Rev. Stat. sec. 175.552
New Hampshire	N.H. Rev. Stat. Ann., sec. 630:5 (1987)
New Jersey	N.J. Stat. Ann., sec 2C:11-3 (West 1987)
New Mexico	N.M. Stat. Ann., sec 31-20A-1 (Michie 1978)
New York	N.Y. (Penal) Law, sec. 125.27 (McKinney 1987) (ruled unconstitutional)
North Carolina	N.C. Gen. Stat. 15A-2000 (Michie 1991)
Ohio	Ohio Rev. Code Ann., sec. 2929.04 (Anderson 1987)
Oklahoma	Okla. Stat. Ann., tit. 21, sec. 701.10 (West 1983)
Oregon	Or. Rev. Stat., sec. 163.150 (Butterworths 1990)
Pennsylvania	Pa. Stat. Ann. tit. 42, sec. 9711 (Purdon's 1987)
South Carolina	S.C. Code Ann., sec. 16-3-20 (Law.Co-op 1976)
South Dakota	S.D. Codified Laws Ann., sec. 23A-27A-1 (1987)
Tennessee	Tenn. Code Ann., sec. 39-13-204 (Michie 1987)
Texas	Tex. (Penal) Code Ann., sec. 37.071 (Vernon's 1989)
Utah	Utah Code Ann., sec. 76-3-207 (Michie 1953)
Vermont	Vt. Stat. Ann., tit. 13, sec. 2303 (1973)
Virginia	Va. Code , Ann., sec. 53.1-232 (Michie 1950)
Washington	Wash. Rev. Code Ann., sec. 10.95.050 (7)(West 1990)
Wyoming	Wyo. Stat., 6-2-102 (Michie 1977)

Source: Dr. Victor Streib, Dean, Petit College of Law, Ohio Northern University
Ada, Ohio 45810

Chart 1.4: State Statutes Specifically Listing Youth as a Mitigating Factor

Alabama	Ala. Code Ann. 13A-5-51(7) (1982)
Arizona	Ariz. Rev. Stat. Ann. 13-703G.5 (Supp.1986)
Arkansas	Ark. Code Ann., 41-1304(4) (Repl 1977)
California	Cal. (Penal) Code. Sec. 190.05(h)(9) (Supp. 1985)
Colorado	Colo. Rev. Stat. 16-11-103(5)(a) (Supp. 1985)
Florida	Fla. Stat. Ann. 921.141(6)(g) (Supp. 1985)
Indiana	Ind. Code Ann. 35-50-2-9(c)(7) (H.B.1022, 1987)
Kentucky	Ky. Rev. Stat. 532.025(2)(b)(8) (1984)
Louisiana	La. Code Crim. Pro. Ann, art. 905.5(f) (1984)
Maryland	Md. Code art. 27, sec 413(g)(5) (Supp. 1986)
Mississippi	Miss. Code Ann. 99-19-101(6)(g) (Supp. 1986)
Missouri	Mo. Ann. Stat. 565.032(3)(7) (Supp. 1987)
Montana	Mont. Code Ann., sec. 46-18-304(7) (1984)
Nebraska	Neb. Rev. Stat. 29-2523(2)(d) (1985)
Nevada	Nev. Rev. Stat. 200.035(6) (1985)
New Hampshire	N.H. Rev. Stat. Ann. 630.5(II)(b)(5) (1986)
New Jersey	N.J. Stat. Ann., sec 2C:11-3(c)5© (Supp. 1986)
New Mexico	N.M. Stat. Ann. 31-20A-6(I) (Supp. 1986)
North Carolina	N.C. Gen. Stat. 15A-2000(f)(7) (1983)
Ohio	Ohio Rev. Code Ann. 2929.04(B)(4) (1982)
Pennsylvania	Pa. Con. Stat. Ann. art. 42, 9711(e)(4) (1982)
South Carolina	S.C. Code Ann. 16-3-20(c)(b)(7 & 9) (1985)
Tennessee	Tenn. Code Ann., sec. 39-2-203(j)(7) (Repl. 1982)
Utah	Utah Code Ann. 76-3-207(2)(e) (Supp. 1982)
Virginia	Va. Code 19.-364.4(B)(v) (Repl. 1983)
Washington	Wash. Rev. Code 10.95.070 (7)(Supp. 1987)
Wyoming	Wyo. Stat., 6-2-102(j) (Repl. 1983)
Source:	Dr. Victor Streib, Dean, Petit College of Law, Ohio Northern University Ada, Ohio 45810

Chart 4.1: Amici Curiae Briefs filed on Behalf of Thompson v. Oklahoma,
Stanford v. Kentucky, Wilkins v. Missouri, High v. Zant

The American Bar Association
The American Jewish Committee
The American Orthopsychiatric Association
The American Society for Adolescent Psychiatry
American Youth Work Center
Amnesty International
Child Welfare League of America
Children's Defense Fund
Defense for Children International - USA
International Human Rights Law Group
Kentucky and Alabama, Arizona, Arkansas, Connecticut, Florida,
Indiana, Mississippi, Nevada, Oklahoma, Pennsylvania, South
Carolina, South Dakota, Virginia and Wyoming [In support of
Respondents Missouri and Georgia in Wilkins v. Missouri and
High v. Zant, Nos. 87-6026 & 87-5666 (1987)]
National Association of Criminal Defense Lawyers
National Association of Social Workers
National Black Child Development Institute
National Council on Crime and Delinquency
National Legal Aid and Defender Association
National Network of Runaway and Youth Services
National Parents and Teachers Association
National Youth Advocate Program
Office of the Capital Collateral Representative for State of Florida
Office of State Appellate Defender of Illinois

Chart 4.2: Inmates under Juvenile Death Sentence by State, United States, June 1998

State	Inmate	Age at Crime	Date of Crime	Race	Victim 1 Gender Race	Victim 2 Gender Race
Alabama	Burgess, Willie Roy, Jr.	16	8-12-93	White	Male-Unk.	None-None
	Davis, Timothy Charles	17	7-20-78	White	Female-White	None-None
	Hart, Gary Davis II	16	8-12-89	White	Male-White	None-None
	Hyde, James Matthew	17	1-7-95	White	Male-White	None-None
	Knotts, William Thomas	17	10-18-89	Black	Female-Black	None-None
	Pressley, Marcus Dewayne	16	7-25-96	White	Male-White	Female-White
	Slaton, Nathan D.	17	6-4-87	White	Male-White	None-None
Arizona	Fong, Martin Paul (aka Soto-Fong) ^{1,4}	17	6-24-92	Asian	Male-Asian	Male-Asian
	Jackson, Levi James	16	12-7-92	White	Female-White	None-None
	Laird, Kenneth Jeremy	17	9-3-92	White	Female-White	None-None
Arkansas	Sanford, Damien	16	1-1-95	Black	Female-Black	None-None
Florida	Bonifay, James	17	9-2-91	White	Male-White	None-None
	Brennan, Keith M.	16	3-1-95	White	Male-White	None-None
	LeCroy, Cleo Douglas	17	1-4-81	White	Female-White	Male-White
	Ramirez, Nathan	17	3-7-95	White	Female-White	None-None
	Snipes, David	17	2-9-95	White	Unk.-Unk.	None-None
	Urbain, Ryan	17	9-1-95	White	Male-Unk.	None-None
Georgia	High, Jose Martinez	17	7-2-76	White	Male-White	None-None
	Williams, Alexander Edmund IV	17	3-4-86	White	Female-White	None-None
Kentucky	Stanford, Kevin N.	17	1-7-81	White	Female-White	None-None
Louisiana	Cousin, Shareef	16	3-2-95	White	Male-White	None-None
Mississippi	Blue, David	17	6-6-92	Black	Female-Black	None-None
	Foster, Ronald Chris	17	6-10-89	White	Male-White	None-None
	Holly, William	17	7-12-92	Black	Male-Black	None-None
	McGilberry, Stephen ¹	16	10-13-94	White	Male-White	Male-White
Missouri	Richardson, Antonio	16	4-4-91	White	Female-White	Female-White
	Simmons, Christopher	17	9-9-93	White	Female-White	None-None

Chart 4.2: Inmates under Juvenile Death Sentence by State, United States, June 1998

State	Inmate	Age at Crime	Date of Crime	Race	Victim 1 Gender Race	Victim 2 Gender Race
Nevada	Domingues, Miguel (aka Michael)	16	8-?-93	Asian	Female-Asian	Male-Asian
North Carolina	Womble, Curtis Ray	17	3-1-93	Black	Male-Black	None-None
Oklahoma	Hain, Scott Allen	17	10-6-87	White	Male-White	Female-White
	Mooney, Jerry	16	5-11-93	White	Male-White	None-None
	DuWane Sellers, Sean Richard	16	9-8-85	White	Male-White	Female-Unk.
Pennsyl- vania	Hughes, Kevin	16	3-1-79	Black	Male-Black	None-None
	Lee, Percy	17	2-26-86	Black	Female-Black	Female-Black
South Carolina	Conyers, Robert Lewis	16	11-24-91	White	Female-White	None-None
	Hudgins, Joseph	17	12-7-92	White	Male-White	None-None
	Hughes, Herman Lee Jr.	17	3-18-94	Black	Male-Unk.	None-None
	Powers, Ted Benjamin	16	9-8-90	White	Male-White	None-None
Texas	Alvarado, Steven	17	9-22-91	Hispanic	Male-Hispanic	Female- Hispanic
	Arthur, Mark Sam	17	12-21-96	Hispanic	Male-Hispanic	None-None
	Barraza, Mauro Morris	17	6-14-89	White	Female-White	None-None
	Beazley, Napoleon	17	4-19-94	White	Male-White	None-None
	Bernal, Johnnie	17	1-19-93	Hispanic	Male-Unk.	None-None
	Cannon, Joseph John ²	17	9-30-77	White	Female-White	None-None
	Capetillo, Edward	17	1-16-95	White	Female-White	Male-White
	Carter, Robert Anthony ²	17	6-24-81	Hispanic	Female- Hispanic	None-None
	Cobb, Raymond Levi	17	12-27-93	White	Female-White	Female-White
	Dewbury, John Curtis	17	12-23-94	White	Male-White	None-None
	Dickens, Justin Wiley	17	3-12-94	White	Female-White	None-None
	Dixon, Anthony Jerome	17	5-15-94	White	Female-White	None-None
	Graham, Gary L.	17	5-13-81	White	Male-White	None-None
	Johnson, Eddie C.	17	1-6-96	White	Male-White	None-None
	Jones, Anzel	17	5-2-95	White	Female-White	None-None

Chart 4.2: Inmates under Juvenile Death Sentence by State, United States, June 1998						
State	Inmate	Age at Crime	Date of Crime	Race	Victim 1 Gender Race	Victim 2 Gender Race
Texas (continued)	Jones, T. J.	17	2-2-94	Black	Male-White	Unk.-Unk.
	Martinez, Miguel Angel ⁴	17	1-18-91	Hispanic	Male-Hispanic	Male-White
	McGinnis, Glen Charles	17	8-1-90	White	Female-White	None-None
	Miles, Laquan ³	17	8-24-91	Black	Male-Black	Male-Black
	Mitchell, Gerald L.	17	6-4-85	White	Male-White	None-None
	Monterrubio, Jose Ignacio	17	9-5-93	Hispanic	Female-Hispanic	None-None
	Ortiz, Oscar III	17	1-19-94	Hispanic	Male-Hispanic	None-None
	Patterson, Toronto ⁴	17	6-6-95	Black	Female-Black	Female-Black
	Perez, Efrain	17	6-24-93	White	Female-White	Female-Hispanic
	Rey, Johnny ³	17	5-12-91	White	Male-White	None-None
	Soriano, Oswaldo Regaldo	17	11-17-92	Hispanic	Male-White	None-None
	Villareal, Raul	17	6-24-93	White	Female-White	Female-Hispanic
	Williams, Nanon McKewn	17	5-4-92	White	Male-White	None-None
	Wills, Robert James	17	1-17-85	White	Female-White	None-None
Virginia	Jackson, Chauncey	16	8-31-94	Black	Male-Black	None-None
	Roach, Steve E.	17	12-3-93	White	Female-White	None-None
	Thomas, Douglas Christopher	17	11-10-90	White	Male-White	Female-White
	Wright, Dwayne Allen	17	10-13-89	Black	Female-Black	None-None

¹ Race recorded as Hispanic/Asian

² Executed during sample collection

³ Sentence reversed during sample collection

⁴ Denotes multiple victims

The list does not include four additional unpublished cases from January, 1998–June, 1998:

Carroll, Taurus, 17, Black Male, Alabama
 Ferrell, Roderick Justin, 16, White Male, Florida
 Golphin, Kevin, 17, Black Male, North Carolina
 Arroyo, Randy, 17, Hispanic Male, Texas

APPENDIX B

Tables

Table 5.1: Juveniles on Death Row--Demographic Characteristics by Age †			
Characteristic (N=71)	Age of Juvenile at Commission of Crime		
	16 years old (Col Percent)	17 years old (Col Percent)	Total
State Jailed			
Alabama	3 (18.8%)	4 (7.1%)	7 (9.7%)
Arizona	1 (6.3%)	2 (3.6%)	3 (4.2%)
Arkansas	1 (6.3%)	0 (0.0%)	1 (1.4%)
Florida	1 (6.3%)	5 (9.1%)	6 (8.5%)
Georgia	0 (0.0%)	2 (3.6%)	2 (2.8%)
Kentucky	0 (0.0%)	1 (1.8%)	1 (1.4%)
Louisiana	1 (6.3%)	0 (0.0%)	1 (1.4%)
Mississippi	1 (6.3%)	3 (5.5%)	4 (5.6%)
Missouri	1 (6.3%)	1 (1.8%)	2 (2.8%)
Nevada	1 (6.3%)	0 (0.0%)	1 (1.4%)
North Carolina	0 (0.0%)	1 (1.8%)	1 (1.4%)
Oklahoma	2 (12.5%)	1 (1.8%)	3 (4.2%)
Pennsylvania	1 (6.3%)	1 (1.8%)	2 (2.8%)
South Carolina	2 (12.5%)	2 (3.6%)	4 (5.6%)
Texas	0 (0.0%)	29 (52.7%)	30 (4.9%)
Virginia	1 (6.3%)	3 (5.4%)	4 (5.6%)
Race of Juvenile			
White	6 (37.5%)	20 (35.7%)	26 (36.1%)
Black	9 (56.3%)	23 (41.1%)	32 (44.4%)
Hispanic¶	1 (6.3%)	13 (23.2%)	14 (19.4%)
† Includes two juveniles who have been executed and two juveniles who have been reversed			
¶ One Hispanic was Hispanic/Asian			

Table 5.2: First Victim--Age, Race and Gender by Age of Juvenile (N=71)†			
Characteristic	Age of Juvenile		
	16 years old (Col Percent)	17 years old (Col Percent)	Total (Percent))
Age			
< 10	2 (13.3%)	1 (2.9%)	3 (6.0%)
10-19	2 (20.0%)	7 (20.0%)	10 (20.0%)
20-69	8 (53.3%)	23 (65.7%)	31 (62.0%)
> 69	2 (13.3%)	4 (11.4%)	6 (12.0%)
Unknown	-	-	22
Race			
White	12 (75.0%)	33 (68.8%)	45 (70.7%)
Black	3 (18.8%)	8 (16.7%)	11 (17.2%)
Hispanic	0 (0.0%)	6 (12.5%)	6 (9.4%)
Asian	1 (6.3%)	1 (2.1%)	2 (3.1%)
Unknown	-	-	7
Gender			
Female	5 (31.3%)	25 (47.2%)	30 (43.5%)
Male	11 (68.8%)	28 (52.8%)	40 (56.5%)
Unknown	-	-	1
† Includes two juveniles who have been executed and two juveniles who have been reversed			

Table 5.3: Second Victim--Age, Race and Gender by Age of Juvenile†			
Characteristic	Age of Juvenile		
	16 years old (Col % in Parentheses)	17 years old (Col % in Parentheses)	Total
Age			
None	11 (68.8%)	42 (82.4%)	53 (79.1%)
< 10	2 (12.5%)	2 (3.9%)	4 (6.0%)
10-19	0 (0.0%)	2 (3.9%)	2 (3.0%)
20-69	3 (18.8%)	5 (9.8%)	8 (11.9%)
> 69	0 (0.0%)	0 (0.0%)	0 (0.0%)
Unknown	-	-	4
Race of 2nd Victim			
None	11 (68.8%)	41 (75.9%)	52 (74.3%)
White	4 (25.0%)	6 (11.1%)	10 (14.2%)
Black	0 (0.0%)	3 (5.6%)	3 (4.3%)
Hispanic	0 (0.0%)	3 (5.6%)	3 (4.3%)
Asian	1 (6.3%)	1 (1.9%)	2 (2.9%)
Unknown	-	-	1
Gender of 2nd Victim			
None	11 (68.8%)	41 (75.9%)	52 (74.3%)
Male	3 (18.8%)	8 (14.8%)	11 (15.7%)
Female	2 (12.5%)	5 (9.3%)	7 (10.0%)
Unknown	-	-	1
† Includes two juveniles who have been executed and two juveniles who have been reversed			

Table 5.4: Third Victim--Age, Race and Gender by Age of Juvenile†			
Characteristic	Age of Juvenile		
	16 years old (Col % in Parentheses)	17 years old (Col % in Parentheses)	Total
Age of 3rd Victim			
None	14 (87.5%)	51 (94.4%)	65 (92.9%)
< 10	0 (0.0%)	1 (1.9%)	1 (1.4%)
10-19	0 (0.0%)	1 (1.9%)	3 (4.3%)
20-69	2 (12.5%)	1 (1.9%)	1 (1.4%)
> 69	0 (0.0%)	0 (0.0%)	0 (0.0%)
Unknown	-	-	1
Race of 3rd Victim			
None	15 (93.8%)	51 (94.4%)	66 (94.3%)
White	1 (6.3%)	1 (1.9%)	2 (2.9%)
Black	0 (0.0%)	1 (1.9%)	1 (1.4%)
Hispanic	0 (0.0%)	0 (0.0%)	0 (0.0%)
Asian	0 (0.0%)	1 (1.9%)	1 (1.4%)
Gender of 3rd Victim			
None	15 (93.8%)	52 (94.6%)	67 (94.4%)
Female	1 (6.3%)	1 (1.8%)	2 (2.8%)
Male	0 (0.0%)	2 (3.6%)	2 (2.8%)
Unknown	-	-	1
† Includes two juveniles who have been executed and two juveniles who have been reversed			

Table 5.5: Race of Victim by Race of Juvenile†				
Race of Victim	Race of Juvenile			
	White (Col Percent)	Black (Col Percent)	Hispanic¶ (Col Percent)	Total (Percent)
Victim #1				
White	21 (91.3%)	18 (62.1%)	6 (50.0%)	46 (70.8%)
Black	2 (8.7%)	9 (31.0%)	0 (0.0%)	11 (17.2%)
Hispanic	0 (0.0%)	2 (6.9%)	4 (33.3%)	6 (9.4%)
Asian	0 (0.0%)	0 (0.0%)	2 (16.7%)	2 (3.1%)
Unknown	-	-	-	7
Victim #2				
None	20 (76.9%)	25 (83.3%)	7 (50.0%)	53 (74.7%)
White	6 (23.1%)	2 (6.5%)	2 (14.3%)	10 (14.3%)
Black	0 (0.0%)	3 (10.0%)	0 (0.0%)	3 (4.3%)
Hispanic	0 (0.0%)	0 (0.0%)	3 (21.4%)	3 (4.3%)
Asian	0 (0.0%)	0 (0.0%)	2 (14.3%)	2 (2.9%)
Unknown	-	-	-	1
Victim #3				
None	25 (96.2%)	29 (96.7%)	12 (85.7%)	66 (94.3%)
White	1 (3.9%)	0 (0.0%)	1 (7.1%)	2 (2.9%)
Black	0 (0.0%)	1 (3.3%)	0 (0.0%)	1 (1.4%)
Hispanic	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
Asian	0 (0.0%)	0 (0.0%)	1 (1.7%)	1 (1.4%)
Unknown	-	-	-	1
† Includes two juveniles who have been executed and two juveniles who have been reversed				
¶ Includes one Hispanic/Asian juvenile				
*Unknown race not included in percentages				

Table 5.6 Juveniles on Death Row--Statutory Mitigating Circumstances by Age†			
Statutory Mitigating Circumstance (N=71)	Age of Juvenile at Commission of Crime		
	16 years old (Col Percent)	17 years old (Col Percent)	Total
Troubled Family History	12 (75.0%)	48 (87.3%)	60 (84.5%)
Psychological/Emotional Problems	12 (75.0%)	45 (81.2%)	57 (80.3%)
Medical Problems	7 (43.8%)	20 (36.4%)	27 (38.0%)
Low IQ/Mental Retardation	6 (37.5%)	24 (43.6%)	30 (42.3%)
No Prior Criminal History	1 (6.3%)	8 (14.5%)	9 (12.7%)
Indigent Status	9 (56.3%)	46 (83.6%)	56 (77.5%)
Documented Substance Abuse	2 (12.5%)	7 (12.7%)	9 (12.7%)
† Includes two juveniles who have been executed and two juveniles who have been reversed			

Table 5.7: Statutory Mitigating Circumstances by Race of Juvenile†				
Statutory Mitigating Circumstance (N=71)	Race of Juvenile			
	White	Black	Hispanic‡	Total
Troubled Family	22 (36.7%)	25 (41.7%)	13 (21.7%)	60 (84.5%)
Psychological/Emotional Problems	23 (40.4%)	25 (43.9%)	9 (15.8%)	57 (80.3%)
Medical Problems	12 (44.4%)	14 (51.9%)	1 (3.7%)	27 (38.0%)
Mental Retardation/Low IQ	9 (30.0%)	16 (53.3%)	5 (16.7%)	30 (42.3%)
No Prior Criminal History	2 (22.2%)	4 (44.4%)	3 (33.3%)	9 (12.5%)
Indigent	18 (32.7%)	26 (47.3%)	11 (20.0%)	55 (77.5%)
Documented Substance Use	1 (11.1%)	5 (55.6%)	3 (33.3%)	9 (12.5%)
† Includes two juveniles who have been executed and two juveniles who have been reversed				
‡ Includes one Hispanic/Asian juvenile				
*Unknown race not included in percentages				

Table 5.8 Statutory Aggravating Circumstances by Age†			
Statutory Aggravating Circumstance (N=71)	Age of Juvenile at Commission of Crime		
	16 years old (Col Percent)	17 years old (Col Percent)	Total
Robbery	7 (46.7%)	22 (41.5%)	29 (42.7%)
Rape	2 (13.3%)	10 (18.9%)	12 (17.7%)
Burglary	3 (20.0%)	5 (9.4%)	8 (11.8%)
Carjacking	1 (6.7%)	0 (0.0%)	1 (1.5%)
Murder of Police Officer	0 (0.0%)	2 (3.8%)	2 (2.9%)
Kidnaping	0 (0.0%)	2 (3.8%)	2 (2.9%)
Arson	0 (0.0%)	1 (1.9%)	1 (1.5%)
Multiple Murder	5 (31.3%)	12 (21.4%)	17 (23.6%)
Murder of a Child	4 (26.7%)	7 (13.2%)	11 (16.2%)
† Includes two juveniles who have been executed and two juveniles who have been reversed			

Table 5.9: Statutory Aggravating Circumstances by Race of Juvenile†				
Statutory Aggravating Circumstance	Race of Juvenile			
	White	Black	Hispanic¶	Total
Robbery	11 (37.9%)	13 (44.8%)	5 (17.2%)	29 (42.7%)
Rape	2 (16.7%)	6 (50.0%)	4 (33.3%)	12 (17.7%)
Burglary	7 (87.5%)	0 (0.0%)	1 (12.5%)	8 (11.8%)
Carjacking	1 (100%)	0 (0.0%)	0 (0.0%)	1 (1.5%)
Murdered Police Officer	2 (100%)	0 (0.0%)	0 (0.0%)	2 (2.9%)
Kidnaping	0 (0.0%)	2 (100%)	0 (0.0%)	2 (2.9%)
Arson	1 (100%)	0 (0.0%)	0 (0.0%)	1 (1.5%)
Multiple Murder	5 (29.4%)	5 (29.4%)	7 (48.2%)	17 (23.6%)
Child Murder	3 (27.3%)	5 (45.5%)	3 (27.3%)	11 (16.2%)
† Includes two juveniles who have been executed and two juveniles who have been reversed ¶ Includes one Hispanic/Asian juvenile *Unknown race not included in percentages				

Table 5.10: Significant Relationships between Aggravating Circumstances and Statutory Mitigating Factors with Fisher's Exact Test for Significance and Odds Ratios with 95% CI				
Significant Statutory Mitigating Circumstances	Robbery		Fisher's Exact Probability	Odds Ratio (95% CI)
	Yes	No		
Psychological/Emotional Disorder				
Used as a Mitigator	19 (35.2%) (0.70)	35 (64.8%) (0.52)	p=0.031	0.22 (0.06-0.78)
Not used as a Mitigator	10 (71.4%) (2.72)	4 (28.6%) (2.02)		
Significant Statutory Mitigating Circumstances	Rape		Fisher's Exact Probability	Odds Ratio (95% CI)
	Yes	No		
No Prior Criminal History				
Used as a Mitigator	4 (44.4%) (3.66)	5 (55.6%) (0.78)	p=0.045	5.1 (1.3-23.2)
Not used as a mitigator	8 (13.6%) (0.56)	51 (86.45) (0.12)		
Significant Statutory Mitigating Circumstances	Burglary		Fisher's Exact Probability	Odds Ratio (95% CI)
	Yes	No		
Indigent Status				
Used as a Mitigator	3 (5.7%) (1.68)	50 (94.3%) (0.22)	p=0.010	0.12(0.03-0.59)
Not used as a Mitigator	5 (33.3%) (5.9)	10 (66.7%) (0.79)		

Table 5.11: State Jailed by Race of Juvenile with χ^2 Analysis and Fisher's Exact Test for Significance

State Jailed	Race of Juvenile				
	White (Row %)	Black (Row %)	Hispanic¶ (Row %)	Total (Column %)	χ^2 (Fisher's Exact)
Alabama	4 (57.2%)	3 (43.9%)	0 (0.0%)	7 (9.9%)	NS
Arizona	2 (66.7%)	0 (0.0%)	1 (33.3%)	3 (4.2%)	NS
Arkansas	0 (0.0%)	1 (100%)	0 (0.0%)	1 (1.4%)	NS
Florida	5 (83.3%)	0 (0.0%)	1 (16.7%)	6 (8.5%)	$\chi^2=3.6$ (p=0.013)
Georgia	0 (0.0%)	2 (100%)	0 (0.0%)	2 (2.8%)	NS
Kentucky	0 (0.0%)	1 (100%)	0 (0.0%)	1 (1.4%)	NS
Louisiana	0 (0.0%)	1 (100%)	0 (0.0%)	1 (1.4%)	NS
Mississippi	2 (50.0%)	2 (50.0%)	0 (0.0%)	4 (5.6%)	NS
Missouri	1 (50.0%)	1 (50.0%)	0 (0.0%)	2 (2.8%)	NS
Nevada	0 (0.0%)	0 (0.0%)	1 100%	1 (1.4%)	NS
North Carolina	0 (0.0%)	1 (100%)	0 (0.0%)	1 (1.4%)	NS
Oklahoma	3 (100%)	0 (0.0%)	0 (0.0%)	3 (4.2%)	$\chi^2=3.3$ (p=.0009)
Pennsylvania	0 (0.0%)	2 (100%)	0 (0.0%)	2 (2.8%)	NS
South Carolina	2 (50.0%)	2 (50.0%)	0 (0.0%)	4 (5.6%)	NS
Texas	5 (17.2%)	13 (44.8%)	11(37.9%)	29 (40.8%)	$\chi^2=2.9$ (p=.0009)
Virginia	2 (50.0%)	2 (50.0%)	0 (0.0%)	4 (5.6%)	NS
¶ Includes one Hispanic/Asian juvenile					

Table 5.12: Significant Associations--White v. Non-White with Fisher's Exact Test for Significance and Odds Ratios with 95% CI				
Factor	Race of Juvenile		Fisher's Exact Probability	Odds Ratio (95% CI)
	White (Percent) (χ^2)	Non-White (Percent) (χ^2)		
State				
Florida	5 (83.3%) (3.70)	1 (16.7%) (2.07)	p=0.013	
Oklahoma	3 (100%) (3.29)	0 (0.0%) (1.92)		
Texas	5 (17.2%) (2.97)	25 (82.8%) (1.71)		
Burglary	7 (87.5%) (5.60)	1 (12.5%) (3.26)	p=0.00029	16.33(1.9-142.6)
Race of 1st Victim				
White	21 (46.7%) (1.44)	24 (53.3%) (0.75)	p=0.033	
Black	2 (8.7%) (0.97)	9 (81.8%) (0.54)		
Hispanic	0 (0.0%) (2.16)	6 (100%) (1.76)		
Asian	0 (0.0%) (0.72)	2 (100%) (0.40)		
Age of 1st Victim† < 10	0 (0.0%) (1.26)	3 (100%) (0.91)	p=0.014	
10-19	1 (10.0%) (2.44)	9 (90.0%) (1.77)		
20-69	18 (58.1%) (1.91)	13 (41.9%) (1.38)		
> 69	2 (33.3%) (0.11)	4 (66.7%) (0.08)		
† N=50, age was not available for 21 victims				

Table 5.13: Significant Associations--Black v. Non-Black with Fisher's Exact Test for Significance and Odds Ratios with 95% CI

Factor	Race of Juvenile		Fisher's Exact Probability	Odds Ratio (95% CI)
	Black (Percent) (χ^2)	Non-Black (Percent) (χ^2)		
Race of 1st Victim				
White	18 (40.0%) (0.28)	27 (60.0%) (0.23)	p=0.032	
Black	9 (81.8%) (3.24)	2 (18.2%) (2.68)		
Hispanic	2 (33.3%) (0.19)	4 (66.7%) (0.16)		
Asian	0 (0.0%) (0.91)	2 (100%) (0.75)		
Race of 2nd Victim				
None	25 (48.1%) (0.33)	27 (51.9%) (0.25)	p=0.022	
White	2 (20.0%) (1.2)	8 (80.0%) (0.91)		
Black	3 (100%) (2.29)	0 (0.0%) (1.71)		
Hispanic	0 (0.0%) (1.29)	3 (100%) (0.96)		
Asian	0 (0.0%) (0.85)	2 (100%) (0.64)		
Burglary	0 (0.0%) (3.4)	8 (100%) (2.5)	p=0.00083	Zero Cell, not calculated
Age of 1st Victim† < 10	3 (100%) (3.04)	0 (0.0%) (1.86)	p=0.025	
10-19	6 (60.0%) (1.27)	4 (40.0%) (0.78)		
20-69	9 (29.0%) (0.66)	22 (71.0%) (0.40)		
> 69	1 (16.7%) (0.71)	5 (83.3%) (0.44)		

† N=50, age was not available for 21 victims

Table 5.14: Age-Race Interactions--Black v. Non-Black with Fisher's Exact Test for Significance and Odds Ratios with 95% CI†				
Factor	Race of Juvenile		Fisher's Exact Probability	Odds Ratio (95% CI)
	Black (Percent) (χ^2)	Non-Black (Percent) (χ^2)		
Age of 1st Victim ≤ 19	9 (69.2%) (3.34)	4 (30.8%) (2.05)	p=0.00095	6.1 (1.52-24.2)
> 19	10 (27.0%) (1.17)	27 (73.0%) (0.72)		
Controlling for Race of 1st Victim				
1st Victim Black ≤ 19	3 (100%) (0.015)	0 (0.0%) (0.6)	p=0.467 (NS)	
> 19	5 (71.4%) (0.06)	2 (28.6%) (0.26)		
1st Victim Non-Black ≤ 19	6 (60.0%) (4.3)	4 (40.0%) (1.5)	p=0.00096	9.0 (1.73-46.8)
> 19	4 (14.3%) (1.5)	24 (84.7%) (0.54)		
† N=50, age was not available for 21 victims				

Table 5.15: Significant Associations--Hispanic v. Non-Hispanic with Fisher's Exact Test for Significance and Odds Ratios with 95% CI

Factor	Race of Juvenile		Fisher's Exact Probability	Odds Ratio (95% CI)
	Hispanic (Percent) (χ^2)	Non-Hispanic (Percent) (χ^2)		
Race of 1st Victim				
White	6 (13.3%) (0.70)	39 (86.7%) (0.16)	p=0.00038	
Black	0 (0.0%) (2.06)	11 (100%) (0.48)		
Hispanic	4 (66.7%) (7.35)	2 (33.3%) (1.70)		
Asian	2 (100%) (7.04)	0 (0.0%) (1.7)		
Race of 2nd Victim				
None	7 (13.5%) (1.11)	45 (86.5%) (0.28)	p=0.00095	
White	2 (20.0%) (0)	8 (80.0%) (0)		
Black	0 (0.0%) (0.6)	3 (100%) (0.15)		
Hispanic	3 (100%) (9.6)	0 (0.0%) (2.4)		
Asian	2 (100%) (6.4)	0 (0.0%) (1.6)		
Age of 2nd Victim				
None	7 (13.2%) (0.65)	46 (86.8%) (0.14)	p=0.011	
< 10	2 (100%) (2.3)	0 (0.0%) (0.50)		
10-19	2 (100%) (7.53)	0 (0.0%) (1.64)		
20-69	1 (12.5%) (0.13)	7 (87.5%) (0.03)		
> 69	0 (0.0%) (0)	0 (0.0%) (0)		
Gender of 2nd Victim				
None	7 (13.5%) (1.11)	45 (86.5%) (0.28)	p=0.019	
Female	3 (27.3%) (0.29)	4 (72.7%) (0.07)		
Male	4 (59.1%) (4.83)	3 (42.9%) (1.20)		
Medical	1 (3.7%) (3.5)	26 (96.3%) (0.86)	p=0.00063	0.09(0.01-0.75)
Multiple Murder	7 (41.2%) (3.97)	10 (58.8%) (0.98)	p=0.031	4.7 (1.4-16.4)

ENDNOTES

1. Herein, profiling is indicative of a person who shares similar behavioral, personality, social and other characteristics. This psychosocial profiling should be distinguished from criminal profiling.
2. Empirical data demonstrate that bright-line age requirements are quite arbitrary (Anders, 1986). State legislators have recognized this by making age "a factor to be considered" or a "mitigating circumstance" versus an absolute limit [cf. Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982)]. Similarly, the arbitrariness of age limits is demonstrated by the practice of state juvenile courts such that when aggravated crimes are involved youthful offenders are "waived" or "certified" to adult criminal court.
3. Refer to Brief Amici Curiae, American Society for Adolescent Psychiatry and American Orthopsychiatric Association, Thompson v. Oklahoma, No. 86-6169 (1986) for a listing of scientific studies.
4. Refers to subjects in a study completed by Lewis, Bard, Feldman, Pritchep and Yeager in (1988) entitled "Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States."
5. Bondless men, women and children constitute one of the largest aberrant populations.
6. Research has made it painfully clear that the rate of child maltreatment in a neighborhood is tied to the quality of life in that neighborhood. Neighborhoods that are considered dangerous and frightening by its residents have higher rates of maltreatment than neighborhoods that residents regard more positively even when those neighborhoods have equivalent income levels and similar ethnic composition (supra, p. 9). Problems in neighborhoods are alleged to be both sociologic and economic. Case in point, studies have shown that children who live in overcrowded, dilapidated and under furnished housing are more vulnerable to abuse and neglect than those in safe and clean facilities.
7. Bandura and Walters (1959) also found that delinquent boys experienced significantly higher rates of physical punishment by their fathers than nondelinquents.
8. This study is distinguishable from previous studies on the intergenerational transmission of violence based on certain design features. Most significantly, by following a large number (1575) of cases from childhood through adolescence and into young adulthood long-term consequences of abuse and neglect could be examined. Additionally, clear operationalization of the concepts of abuse and

neglect allowed for a separate examination of physical abuse, sexual abuse and neglect (National Institute of Justice, Research in Brief, "The cycle of violence" by Widom, 1992). For additional information cf. Widom, C. "Child abuse, neglect and adult behavior: Research design and findings on criminality, violence and child abuse," *American Journal of Orthopsychiatry*, 59 (1938):355-367.

9. It has been repeatedly demonstrated that boys, overall, are much more at risk for psychopathy than girls. This may, in fact, be attributed to the males apparent predisposition to be more aggressive than females. Case in point, Eleanor Maccoby, a professor of psychology at Stanford University and Carol Jacklin, a psychologist at University of Southern California, reviewed evidence on sex differences in aggression. Herefrom, they concluded that the average male is more aggressive than the average female in all cultures. That, in fact, boys are harder to socialize than girls. Some have even argued that civilization is an attempt to restrain male aggressiveness or at the very least, turn it into appropriate channels.
10. The strength of the relationship between class and crime varies significantly depending on the measure of class used. Nearly all carefully designed studies find that social class is either very small or nonexistent correlate of self-reported delinquency (Tittle, Villimez and Smith, 1978). Nearly all studies of delinquency use the occupation or education of the father as the sole indicator of social class disregarding other possible measures.
11. References preceded by "W.J.A." are to Wilkins Joint Appendix. References preceded by "W.Tr." are to Wilkins trial transcript.
12. Dr. S.D. Parwatikar was the only court-appointed psychiatrist who examined Bobby Lewis Shaw on death row in Missouri after stabbing to death a guard and injuring another. At the time of his trial for the shooting death of Calvin Morris (Shaw's common-law brother-in-law) many allege he was prompted by auditory hallucinations. Irrespective of this fact, no psychiatric evaluation was performed before the first trial. In preparation for the second trial, Dr. Parwatikar testified that Shaw suffered from "mild depression" and was a "borderline mental defective" but not afflicted with mental disease or defect. Some years later after being presented with additional information by the Missouri Capital Punishment Resource Center in Kansas City, Parwatikar recanted his testimony. In an affidavit, Dr. Parwatikar reported that he new evidence created "a substantial probability that my previous diagnosis is incorrect. I now believe that at the time of my evaluation, he was suffering from the early stages of dementia, and possibly the early onset of schizophrenia" (Walsh, 1993).

13. "The character development which continues to take place during adolescence, until eighteen years of age, can very well overcome features of an antisocial personality that appear during adolescence. For this reason, the diagnosis of Antisocial Personality cannot be made until a person has reached eighteen years of age" [*Thompson v. Oklahoma*, o. 86-6169 (1986) (pp.21-22)]. "Since [the typical childhood signs of Antisocial Personality Disorder] may terminate spontaneously ... a diagnosis of Antisocial Personality Disorder should not be made in children; it is reserved for adults (18 or over), who have had time to show the full longitudinal pattern" (American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorder III*, 319 (1980); Wilson and Herrnstein, 1985). Updated: "The diagnosis of Antisocial Personality Disorder cannot be given to individuals under age 18 years." [American Psychiatric Association, *Diagnostic and Statistical Manual IV* (1994) (p. 90)]. An interesting sidenote, Dr. Ben Karpman who is renowned for his lifelong work in psychopathy, identified the "anethopath." A person whose personality has an irreducible unanalyzable core of antisociality. He distinguishes this youth (the true psychopath) from the youth who accidentally kills another during "careless play." The anethopath (or 'true psychopath'), Karpman explains, shows his difficulty in adjustment as early as the sixth year. This child's rebelliousness is deep-seated and pervasive (Bromberg, 1961).
14. Many researchers have noted that while mental disorder does not seem to predispose people to criminality it is an unarguable reality that the amount of mental disorder among criminals and the amount of criminality among those who are mentally disordered is higher than in the population at large. Evidence indicates that young males with paranoid schizophrenia who do not reliably take antipsychotic medication, have a history of violence, substance abuse and experience command hallucinations instructing them to harm others are at highest risk.
15. The term "bonding is frequently and incorrectly used synonymously with attachment. They are recognized as different phenomena in diagnostic classification systems [e.g., "Synopsis of Psychiatry: Behavioral Sciences Clinical Psychiatry" by Kaplan, Sadock and Grebb 1994)] and will be distinguished in this document. There are, of course, many definitions of attachment but most refer to the "emotional tone" that exists between child and caretaker (traditionally referred to as the mother). Herein, when reference is made to maternal or mother it should be construed to mean caretaker, provider or significant other operating as the surrogate mother. Bonding, by contrast, refers to the mother's feelings for the child. The critical difference is that a mother does not (in normal circumstances should not) rely on her infant/child as a source of security (*supra*, p.161). The critical component of the attachment behavior with this interpretation is the reliance by developing infant on caretaker for a source of security.

16. An interesting point made by the authors is that it is possible for some adolescents, as the data suggest is the case for psychotic adolescents, to resist forming an attachment to maladaptive parental figures. They argue, this might be indicative of health versus pathology. The underlying theory herefrom is that even in a treatment setting, attachment to a pathologic family can be detrimental to the individual's well-being (Fritsch and Goodrich, 1990, p. 260). Noteworthy, not all the research supports this argument.
17. According to Hirschi's popular social control theory, individuals conform to conventional norms and refrain from deviance because they are strongly bonded to the conventional moral order (Matsueda, 1989). This bond to society is an ongoing "stream of socialization" which consists of four interrelated elements: attachment, commitment, involvement and belief (Id. at 430). Attachment to others contains a moral element in which attached persons process the reactions of parents, peers and teachers with respect to their potential deviant acts. The theory follows that with the existence of only one moral order such reaction will inevitably be negative; consequently, attachment dissuades persons from deviance (supra, p. 430).
18. The care perspective refers to a moral perspective developed by Carol Gilligan which views people in terms of their connectedness to others and focuses on interpersonal communication, relationships with others and concern for others (supra, p. 591). By contrast, Kohlberg's theory is thought to be a justice perspective. That is, a moral perspective that focuses on the rights of the individual which see individuals as standing alone and independently in moral decisions.
19. In simplistic terms, moral development or moral reasoning refers to the ability to distinguish right and wrong based on value judgment. After reviewing the literature, it appears that children of the relative same age appear to share particular characteristics that differ from those of children of another age who may be at a different stage of development. As mentioned, intellectual maturity may be a necessary element for moral maturity but it is not sufficient for adequate moral development. Kohlberg as well as others agree the association between age and intellectual and moral development involves the interaction of many different factors. This would explain why certain individuals may experience impediments in moral development and maintain a lesser stage of maturity unrelated to their age. In addition to the cessation or regression in moral development, discontinuities in both mental and physical development may exist during childhood and adolescence for a variety of reasons. Thus, the impressive nature of studies (such as Arbutnot and Gordon's) which actually tests such theories becomes evident.

20. An international legal norm is binding on all members of the international community regardless of whether they consent to it [Brief of Amicus Curiae, Defense for Children International - USA, Thompson v. Oklahoma, No. 86-6169 (1986)].
21. The widely respected Thorsten Sellin studies conducted on adults in the United States during 1962, 1967 and 1980 found no deterrent effect with the death penalty. In fact, Professor Sellin found that less than one-third of 1 percent - .31 percent - of paroled murderers in the United States were subsequently convicted of another homicide (The 1988 Report to the United Nations Committee).
22. The length of commitment received by violent delinquents in juvenile court depends in large part on the jurisdiction in which they are adjudicated. Analogously, the length of sentence imposed at the criminal court level is mandated by statute contingent on the discretion of the sentencing judge (Rudman, Hartstone, Fagan and Moore, 1986).
23. References to the Record on Appeal are designated [R . . .]. References to the Joint Appendix are designated {JA . . .}.
24. There are many researchers who disagree with this claim. Case in point, Wolfgang, Figlio and Sellin (1972), argue that the reality is juveniles with a history of a serious violent act will seldom commit another violent act, yet research suggests that a record of past violent behavior is the best predictor of future violent behavior.
25. Such results are supported by Sherry Olson, associate professor of clinical psychology at the University of Michigan, who found in a study on impulse control, significant problems in boys four and a half to five years of age. That is, "delay of gratification" was found to be the strongest predictor of subsequent problems. She examined a group of 79 children in preschool and the following year in kindergarten. She tested them for a series of self-regulation skills, puzzles requiring sustained attention and teacher's estimation of their aggression and anxiety. In the delay of gratification test subjects were given a very boring puzzle to do after a brightly wrapped present is brought out and the child is informed it may be opened after the puzzle is completed. One child grabbed the gift and ran into a bathroom stall where he hid. Dr. Olson argues that the more patient children had a "clearer understanding of social rules and of implicit adult expectations" (Rovner, 1993). Interestingly, she argues that the impatience is not predictive in girls for whom this seems to be indicative of a developmental problem.
26. Few prospective studies of future violence have been completed. Prospective studies, of course, have a much higher validity than retrospective studies because

they help determine causal relationships rather than simply identify correlations of specific factors and violent behavior.

27. Although social scientists have thus far been unable to identify the causal factors that produce criminal behavior; age, sex, race and *socioeconomic status appear to be the most obvious correlates with official delinquency (Huizinga, Loeber and Thornberry, 1972). There are, however, opponents to this theory (Tittle, Villimez and Smith, 1978).
28. Note the literature which argues against the existence of a correlation between low socioeconomic status and crime. For further discussion refer to Tittle, Villimez and Smith, 1978.
29. One reviewer observed that the Supreme Court has traditionally allowed states to set certain limits regarding noncriminal behaviors. As such, it would be consistent to allow states to continue to set different ages for the death penalty. This paper argues against such a position due to the gravity of the death penalty.

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Constitution

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