

The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles

INTRODUCTION

The problem of juvenile crime is severe, both in terms of the number of crimes committed by juveniles and the seriousness of those crimes.¹ In response to what they perceive to be a national juvenile crime wave,² many people are developing a "get tough" attitude toward juvenile offenders,³ reflected in an increased willingness to prosecute them as adults.⁴ Juveniles may be prosecuted directly in the criminal courts or may be transferred to

1. See, e.g., S. REP. NO. 220, 92d Cong., 1st Sess. 3-4 (1971), reprinted in 1971 U.S. CODE CONG. & AD. NEWS 1104, 1106 (children between the ages of 10 and 17, numbering only 16% of the national population, accounted for more than 48% of all serious crimes: murder, rape, assault, robbery, burglary, larceny, and auto theft); Vandall, *The Use of Force in Dealing With Juveniles: Guidelines*, 17 CRIM. L. BULL. 124, 124 (1981).

2. The public's perception of a current national juvenile crime wave may be inconsistent with reality. "Current trends suggest that after many years of increase there is a significant downturn in the level of delinquency. However, much of the current public debate is based on an assumption of a continued rise in youth crime." Galvin & Polk, *Juvenile Justice: Time for New Direction?*, 29 CRIME & DELINQ. 325, 325 (1983). Rates of violent delinquency have remained unchanged since the mid-1970's. *Id.*; see also Krisberg & Schwartz, *Rethinking Juvenile Justice*, 29 CRIME & DELINQ. 333, 358 (1983).

3. See, e.g., Schwartz, *Getting Tough With Juveniles: Is It Working?* (pt. 1), 42 PUB. WELFARE, Summer 1984, at 40; Andersen, *An Eye for an Eye*, TIME, Jan. 24, 1983, at 28, 28; Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal,"* 65 MINN. L. REV. 167 (1981) [hereinafter *Juvenile Court Legislative Reform*]; Note, *The Death Penalty for Juveniles—A Constitutional Alternative*, 7 J. JUV. L. 54, 54 (1983).

4. Public outrage at juvenile crime is leading to increased prosecution of juvenile offenders in the adult, or criminal, courts. "This pressure to propel more juveniles into the adult system is predicated on the assumption that the adult criminal justice system is harsher and that juveniles will be given stiffer punishments than they might have received from the juvenile courts." Schwartz, *supra* note 3, at 40. Virtually every state provides some mechanism by which juveniles may be prosecuted in adult criminal proceedings and subjected to adult penalties, including the death penalty in states where the juvenile death penalty is permitted. See, e.g., ARIZ. CONST. art. 6, § 15 (1910, amended 1960); ALA. CODE § 12-15-34 (1975); ALASKA STAT. § 47.10.060 (1984); ARK. STAT. ANN. §§ 45-417, -420 (Supp. 1985); CAL. WELF. & INST. CODE §§ 707 to 707.4 (West 1984); COLO. REV. STAT. §§ 19-1-104(4)(a)-(c) to -3-108 (1973 & Supp. 1984).

the criminal courts from the juvenile courts.⁵ A juvenile offender in the criminal court is subject to adult criminal penalties,⁶ including the death

5. The two principal methods by which minors are subjected to the jurisdiction of the criminal courts are judicial waiver and legislative waiver. See Browne, *Guidelines for Statutes for Transfer of Juveniles to Criminal Court*, 4 PEPPERDINE L. REV. 479, 480-81 (1977); Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L.J. 583, 596-98 (1968); Note, *Juvenile Crime: The Misguided Target of the Current Solution*, 4 GLENDALE L. REV. 97 (1982). Under judicial waiver, the juvenile court may divest itself of jurisdiction based on its determination that a minor is not amenable to treatment or that keeping the minor within the juvenile system would pose a danger to other juveniles in the system or to the public safety. See Feld, *Juvenile Court Legislative Reform*, *supra* note 3, at 178-79. The crimes for which, and the age above which, jurisdiction may be waived vary from state to state. See Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. CRIM. L. & CRIMINOLOGY 1471, 1477 n.47 (1983). Legislative waiver means that minors charged with certain crimes automatically fall within criminal court jurisdiction, by statutory command. These are typically capital crimes and other serious offenses. Again, the age above which a minor may be transferred by legislative waiver varies from state to state. See generally Feld, *Legislative Policies toward the Serious Juvenile Offender*, 27 CRIME & DELINQ. 497, 508 (1981) [hereinafter *Legislative Policies*]; Schornhorst, *supra* at 596; Comment, *supra* at 1479 nn.60-61.

A discussion of the transfer of juveniles to the criminal courts is beyond the scope of this Note. For more complete treatment of waiver see the sources cited *supra* and Note, *Waiver in Indiana—A Conflict With the Goals of the Juvenile Justice System*, 53 IND. L.J. 601 (1978). This Note assumes, for purposes of analysis, that a juvenile has been transferred to the criminal court, has there been found guilty of a capital offense, and faces a possible sentence of death. Only the propriety of imposing the sentence of death on the minor will be discussed herein.

6. See statutes cited *supra* note 4. By contrast, juvenile court jurisdiction does not entail an adjudication of guilt or innocence, and is therefore not regarded as a criminal proceeding. The presumption of the juvenile court system is that minors are not completely responsible for their actions and should therefore be treated with more solicitude than adult offenders. See Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1189 (1970); Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 9-10. Therefore, the goal of the juvenile court system is to rehabilitate, rather than to punish, and to provide individualized treatment. See *Kent v. United States*, 383 U.S. 541, 554-55 (1966) ("The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The state is *parens patriae* rather than prosecuting attorney and judge."). Recently, some commentators have begun to question the continued validity of the rehabilitative ideal, while some state legislatures have abandoned the traditional rehabilitative philosophy of the juvenile courts in favor of a more punitive philosophy. See generally S. DAVIS, *RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM* § 1.3, at 1-4 to -6 (2d ed. 1985). Nevertheless, the idea that juvenile offenders deserve treatment, not punishment, continues to guide most juvenile courts. See *id.* at 1-4 (rehabilitative philosophy of juvenile court has for the most part survived). The National Council of Juvenile and Family Court Judges has strongly reaffirmed the rehabilitative ideal, stating that "proposals which would materially and adversely alter traditional individualized rehabilitative models and treatment philosophies of the juvenile justice system are unacceptable." Preamble, *The Juvenile Court and Serious Offenders: 38 Recommendations*, 35 JUV. & FAM. CT. J., Summer 1984.

The adult or criminal court system, on the other hand, presumes responsible actors who make blameworthy choices, punishing them in proportion to the gravity of their offenses. Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515, 515 n.1 (1978) [hereinafter *Reference of Juvenile Offenders*]. The maximum sentence that may be imposed by a juvenile court is detention until the age of majority. *Id.* at 524.

penalty.⁷

In the 1982 case of *Eddings v. Oklahoma*,⁸ the United States Supreme Court was asked to decide whether the eighth and fourteenth amendments to the Constitution prohibited the execution of a person who was sixteen at the time of his offense.⁹ Although the Court had granted certiorari on that issue, a majority of the Court held on other grounds that the death penalty had been improperly imposed on the defendant Eddings. Because the Oklahoma trial court had failed to consider mitigating evidence concerning the defendant's violent family background and personal history in its sentencing decision,¹⁰ the Court reversed the sentence and remanded the case for further proceedings.¹¹

Although the Court in *Eddings* did not hold that the Constitution forbade the execution of a minor, or of a person for a crime committed as a minor,¹² the Court's opinion clearly requires that minority be given special attention as a mitigating factor in sentencing for capital crimes, due to the inherent immaturity and irresponsibility of youth.¹³ Since *Eddings*, some state courts

7. In most capital punishment states, courts may sentence a minor convicted of a capital crime to death. Brief for Respondent at 19, *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Some states forbid the imposition of the death penalty upon persons who were under 18 at the time of the offense. See, e.g., CAL. PENAL CODE § 190.5 (West Supp. 1986); COLO. REV. STAT. § 16-11-103(1)(a) (Supp. 1984); CONN. GEN. STAT. ANN. § 53a-46a(g)(1) (West 1985); ILL. ANN. STAT. ch. 38, § 9-1(b) (Smith-Hurd Supp. 1985); NEB. REV. STAT. § 28-105.01 (Supp. 1984); OHIO REV. CODE ANN. § 2929.02(A) (Page 1982). N.Y. PENAL LAW § 125.27(b) (McKinney 1975) prohibits capital punishment of persons under 19 years of age, while TEXAS PENAL CODE ANN. § 8.07(d) (Vernon Supp. 1986) limits the death penalty to offenders over 17, and NEV. REV. STAT. § 176.025 (1986) prohibits the execution of persons under 16.

8. 455 U.S. 104 (1982).

9. *Id.* at 120 (Burger, C.J., dissenting).

10. *Id.* at 113. The majority held that the trial judge violated the rule of *Lockett v. Ohio*, 438 U.S. 586 (1978), "that the sentencer. . .not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record. . .that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604 (emphasis in original). The trial judge had erroneously found as a matter of law that he was unable to consider the fact of Eddings' violent background as a mitigating factor. *Eddings*, 455 U.S. at 113. The state appellate court took the same approach, considering "only that evidence to be mitigating which would tend to support a legal excuse from criminal liability." *Id.* The rule in *Lockett* requires the sentencer in capital cases to consider any relevant mitigating factor proffered by the defendant. *Id.* at 113-15. The purpose of this requirement is to ensure that each sentence of death comports with the eighth amendment principles that govern the death penalty generally. See *infra* notes 27-60 and accompanying text.

11. *Eddings*, 455 U.S. at 117.

12. *Id.* at 116.

13.

[Y]outh 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, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the

have relied on the defendant's minority at the time of the crime, either by itself or in combination with evidence about the defendant's background and maturity, as the decisive factor militating against the death penalty.¹⁴ In states which permit the execution of minors, however, minority is only a mitigating factor, and cannot prevent the death penalty as a matter of law.¹⁵ Thus, many state appellate courts have upheld juvenile death penalties, rejecting pleas for leniency based on the defendants' youth at the time of the crime.¹⁶ Even state appellate courts that have overturned minors' death penalties in particular cases remain ready to uphold that penalty in the future should youth be found to have too little mitigating weight.¹⁷

This Note argues that the consideration of youth merely as a mitigating factor is insufficient to guarantee the constitutionality of individual juvenile

experience, perspective, and judgment" expected of adults.

Id. at 115-16 (footnotes omitted) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)); *see also id.* at 116 ("the chronological age of a minor is itself a relevant mitigating factor of great weight"); Comment, *Eighth Amendment—Minors and the Death Penalty: Decision and Avoidance*, *Eddings v. Oklahoma*, 102 S. Ct. 869 (1982), 73 J. CRIM. L. & CRIMINOLOGY 1525, 1538 (1982) (mitigating factor in *Eddings* was the well-established one of youth).

14. *See, e.g.*, *State v. Valencia*, 132 Ariz. 248, 250, 645 P.2d 239, 241 (1982) (single factor of defendant's age sufficiently substantial to call for life imprisonment, despite aggravating circumstances surrounding crime of murder); *Legare v. State*, 250 Ga. 875, 875, 302 S.E.2d 351, 352 (1983) (state must allow consideration of any relevant mitigating evidence, including defendant's age and turbulent family history).

15. *See, e.g.*, ALA. CODE § 13A-5-51(7) (1975); ARIZ. REV. STAT. ANN. § 13-703(G)(5) (Supp. 1985); ARK. STAT. ANN. § 41-1304(4) (1977); MISS. CODE ANN. § 99-19-101(6)(g) (Supp. 1985).

16. *See, e.g.*, *Trimble v. State*, 300 Md. 387, 428, 478 A.2d 1143, 1164 (1984) ("We simply hold that on the facts of this case, Trimble's age—17 years and 8 months—does not engage the Eighth Amendment as a shield to capital punishment."); *High v. Zant*, 250 Ga. 693, 701, 300 S.E.2d 654, 662 (1983) (death penalty not cruel and unusual punishment per se simply because defendant was a minor at time of offense); *Ice v. Commonwealth*, 667 S.W.2d 671, 680 (Ky. 1984) (minority is an important factor to consider in sentencing, but it is not a constitutional distinction between juveniles and adults); *State v. Battle*, 661 S.W.2d 487, 494 n.7 (Mo. banc 1983) (imposition of death penalty is not cruel and unusual punishment per se simply because the defendant was a minor at the time of the offense).

The fact that sentencers have often imposed the death penalty on a juvenile, and that appellate courts have often upheld these penalties, does not indicate that death is an appropriate punishment for the juvenile murderer. As this Note will explain *infra* notes 84-89 and accompanying text, state courts have not come to a clear consensus regarding the propriety of the juvenile death penalty. One could also list cases in which appellate courts have overturned a minor's death sentence. *See* cases cited *infra* note 89. Strong evidence exists that courts and juries are reluctant to impose the juvenile death penalty, so that the occasional death sentences meted out by sentencers do not suggest a societal trend in favor of putting juveniles to death. *See infra* notes 84-89 and accompanying text. While the attitudes of courts and juries are important to a court's analysis of a punishment under the cruel and unusual punishment clause of the eighth amendment, these attitudes provide too ambiguous an indicator to guide the constitutional inquiry here. *See infra* notes 61-98 and accompanying text.

17. *See, e.g.*, *Cannaday v. State*, 455 So. 2d 713, 725 (Miss. 1984) ("Even though we grant Cannaday a new trial on the sentence phase, her age at the time of the crime remains a mitigating factor to be considered by the jury. Her age by itself is not grounds for reversal."); *Valencia*, 132 Ariz. at 250, 645 P.2d at 241 ("[W]e do not hold that age alone will always act to require life imprisonment in every case of first degree murder . . .").

death penalties because the death penalty is always inappropriate for minors.¹⁸

18. For the purposes of this Note, the juvenile death penalty refers not only to the execution of a minor, but also to the execution of an adult who was a minor at the time of the offense. This Note will not discuss the issue of the appropriate cutoff age for the death penalty. Throughout the Note, the terms "minors" and "juveniles" have been used to refer to minors under the age of 18, since most jurisdictions use 18 as the cutoff age for juvenile court jurisdiction. See, e.g., Comment, *supra* note 5, at 1476 n.39. In choosing an appropriate cutoff age for imposition of the death penalty, courts and legislatures might take notice of the fact that 18 is the age at which individuals first enjoy many of the privileges of adulthood. See, e.g., U.S. CONST. amend. XXVI, § 1 (right to vote). The American Law Institute takes the position that 18 is the age below which persons should not receive the death penalty. See MODEL PENAL CODE § 210.6 comment 5 (Official Draft and Revised Comments 1980). Several states that permit capital punishment for crimes committed as adults have forbidden it for crimes committed by persons under 18. See statutes cited *supra* note 7. Although a line drawn at 18 may falsely assume that virtually all capital offenders over 18 are mature enough to receive the death penalty, it has the virtue of being consistent with most of society's laws distinguishing children from adults. See *infra* notes 99-135 and accompanying text. Offenders over the cutoff age would still be free to present youth and immaturity as mitigating factors. See *supra* notes 12-17 and accompanying text.

This Note does not explicitly address the issue of the appropriate punishment for juveniles convicted of capital crimes, should the juvenile death penalty be declared unconstitutional. Proponents of the juvenile death penalty argue against alternative punishments, often making emotional appeals based on the brutality of murders committed by juveniles. See sources cited *supra* note 3. Such appeals have little constitutional significance, since the constitutionality of a punishment depends on each offender's personal culpability for the harm done, and not only on the brutality of the crime. See *infra* notes 39-40 and accompanying text. Other supporters of the juvenile death penalty argue that society must protect itself from violent juvenile offenders, and that trying these youths in criminal court and subjecting them to adult criminal penalties, including the death penalty, is the best way to contain violent juvenile crime. See, e.g., Note, *supra* note 3, at 54-55. The crux of this argument is that the juvenile justice system is an inappropriate place to deal with violent and dangerous juveniles. Violent juveniles are typically near the maximum age limit for juvenile court jurisdiction, and have often been through the juvenile system before but have failed to respond to rehabilitative treatment. Thus, the rationale for continued treatment in the juvenile justice system is diminished. *Id.* at 56. Moreover, placing violent juveniles in the juvenile system poses a threat to society, since these juveniles may corrupt other, non-violent youths. Finally, society's moral outrage at violent youth crime may require that serious juvenile offenders suffer full adult penalties. *Id.* at 57.

It does not necessarily follow, however, that society's efforts to thwart juvenile crime must include the juvenile death penalty. This Note does not take issue with the argument that society must protect itself from violent offenders, be they minors or adults, nor does the Note oppose the transfer of serious juvenile offenders to the criminal courts. Although the Note argues that the decision to try a minor in the criminal courts rather than treat him or her in the juvenile justice system does not involve a finding of adult maturity or moral responsibility, see *infra* notes 80-82 and accompanying text, the Note does not suggest that truly dangerous juvenile offenders remain in the juvenile system. The point that waiver does not involve a finding of maturity is part of a larger argument that even juvenile murderers are less mature and less responsible than adults, and therefore should suffer less severe punishments than adults. See *infra* notes 61-156 and accompanying text.

Many commentators have noted the problem posed by keeping violent juveniles in the juvenile justice system. As Zimring has observed:

The disadvantages of a sentencing structure that retains jurisdiction in the juvenile court for serious offenses of violence concern the low maximum sanctions practically available in the juvenile court and the special pressures that serious, violent crimes place on community acceptance of the juvenile court as an institution for dealing with youth crime. For offenses such as murder and armed robbery, low

In order to pass constitutional muster under the eighth amendment's cruel and unusual punishment clause, each sentence of death must neither offend contemporary standards of decency¹⁹ nor be excessive for the particular offense.²⁰ Although the death penalty is not unconstitutional per se,²¹ this Note will demonstrate that the death penalty always violates the eighth amendment when applied to minors.²² Since sentencers are presently entitled to impose the death penalty despite mitigating factors proffered by the defendant,²³ using youth as only a mitigating factor risks imposing the death penalty unconstitutionally.

This Note will first present the eighth amendment principles by which the validity of punishments are judged.²⁴ With this necessary background established, the Note will then show that society's standards of decency, embodied in the many statutory and judicial restraints placed upon minors due to their presumed immaturity, do not support a juvenile death penalty.²⁵ Moreover, the inherent immaturity and irresponsibility of youth, as recognized in the law, renders a death penalty for minors excessive in every case.²⁶

maximum sentences lessen the capacity of the criminal justice system to incapacitate offenders from further crime in the community and may lessen the general deterrent effect of the legal threats directed at young offenders.

Zimring, *Background Paper*, in TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 98 (1978). These commentators have typically concluded that waiver to the criminal courts and the imposition of criminal punishments are appropriate responses to violent juvenile crime. See, e.g., *id.* at 99; see also R. LUNDMAN, PREVENTION AND CONTROL OF JUVENILE DELINQUENCY 233-35 (1984). At the same time, however, commentators recommend that juveniles receive less than the maximum penalty imposed upon adults, arguing that incarceration is sufficient to control juvenile crime. See, e.g., R. LUNDMAN, *supra*, at 233 ("Recent research leaves little doubt that incarceration suppresses involvement in delinquency."); Zimring, *supra*, at 100 ("Maximum sanctions for young violent offenders tried in criminal court should be higher than those for violent juvenile offenders but lower than those for violent adult offenders.").

Minors can certainly be tried in the criminal courts without facing the severest penalties society can impose, and yet receive penalties sufficient to protect society from their violent propensities. For example, some states which prohibit the death penalty for persons who were under 18 at the time of their crime still impose a sentence of life imprisonment. See, e.g., *People v. Clements*, 135 Ill. App. 3d 1001, 482 N.E.2d 675 (1985); *People v. Taylor*, 102 Ill. 2d 201, 464 N.E.2d 1059 (1984). Imprisonment, even for life, is a less severe punishment than death as a matter of eighth amendment analysis. See, e.g., *People v. Rodriguez*, 134 Ill. App. 3d 582, 480 N.E.2d 1147, 1154 (1985) ("We see no inconsistency in a legislative scheme which subjects minors to natural life imprisonment but mercifully exempts them from the death penalty, for 'the penalty of death is qualitatively different from a sentence of imprisonment, however long.'") (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). Thus imprisonment, even for life, would be both a constitutional and a sufficient response to society's need to contain violent juvenile crime.

19. See *infra* notes 29-32 and accompanying text.

20. See *infra* notes 33-46 and accompanying text.

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

22. See *infra* notes 67-206 and accompanying text.

23. See, e.g., *Trimble*, 300 Md. at 428, 478 A.2d at 1164.

24. See *infra* notes 27-60 and accompanying text.

25. See *infra* notes 67-156 and accompanying text.

26. See *infra* notes 157-205 and accompanying text.

I. EIGHTH AMENDMENT PRINCIPLES: THE CONSTITUTIONAL PROHIBITIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT

The eighth amendment to the Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."²⁷ While the Supreme Court has never precisely defined the meaning of the cruel and unusual punishment clause,²⁸ it has discovered several principles within the clause by which the constitutionality of a punishment may be judged.²⁹ Two of these principles are relevant to the constitutionality of imposing the death penalty for the crimes of a minor. First, a punishment must not offend society's "evolving standards of decency."³⁰ In determining whether a punishment is acceptable to society, the Court will look at objective indicators of societal standards, such as the history of the particular punishment, current legislation, jury verdicts,³¹ and international opinion.³² Second, a penalty must not offend the "dignity of man" which is the "basic concept underlying the Eighth Amendment."³³ A punishment violates the dignity of man principle if it is excessive,³⁴ either by being disproportionate to the crime or by making no measurable contribution to acceptable goals of punishment.³⁵

27. U.S. CONST. amend. VIII. In *Robinson v. California*, 370 U.S. 660, 666 (1962), the Supreme Court held that the eighth amendment applies to the states through the due process clause of the fourteenth amendment.

28. See *Trop v. Dulles*, 365 U.S. 86, 99 (1958) (exact scope of the phrase "cruel and unusual" has never been detailed by the Court). See generally Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause*, 126 U. PA. L. REV. 989 (1978); Granucci, "Nor Cruel and Unusual Punishment Inflicted": *The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

29. Early cases considering the death penalty and its validity under the eighth amendment dealt with methods of execution, and not the constitutionality of the death penalty per se. See, e.g., *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879); *In re Kemmler*, 136 U.S. 436, 447 (1890). These cases stand for the proposition that the cruel and unusual punishment clause forbids punishments that are inherently cruel or barbarous. This principle is irrelevant to the issue of this Note, since the Supreme Court has held that the death penalty is not inherently cruel. *Gregg v. Georgia*, 428 U.S. 153, 178 (1976).

The cruel and unusual punishment clause also places substantial limits on what can be made criminal and be punished. See, e.g., *Robinson*, 370 U.S. 660 (it is "cruel and unusual" to impose any punishment for an individual's status or condition). An exploration of what may be made criminal under the eighth amendment is also irrelevant to the inquiry of this Note.

30. *Gregg*, 428 U.S. at 173.

31. *Id.* at 176-82. The Supreme Court has determined that the death penalty, in general, is not unacceptable to contemporary society. *Id.*; see also *Coker v. Georgia*, 433 U.S. 584, 592 (1976).

32. *Enmund v. Florida*, 458 U.S. 782, 788 (1982).

33. *Trop*, 356 U.S. at 100; *Gregg*, 428 U.S. at 173.

34. *Enmund*, 458 U.S. at 788; *Gregg*, 428 U.S. at 173. See *infra* text accompanying notes 36-40.

35. *Coker*, 433 U.S. at 592; *Gregg*, 428 U.S. at 173. See *infra* text accompanying notes 41-46.

A punishment is disproportionate if it is more punishment than the offender deserves.³⁶ In considering the constitutionality of a punishment in the abstract, a court must weigh the severity of the punishment against the degree of harm done to the victim.³⁷ Thus, the Supreme Court has held that death is not disproportionate per se as a penalty to the crime of murder.³⁸

A court must also consider the personal culpability, or moral guilt, of the offender in each particular case to determine whether the punishment is disproportionate to the crime.³⁹ The court must examine each offender's personal responsibility for the harm done, not only the degree of harm to the victim. In order to deserve a particular punishment, the offender must be as culpable as others receiving the same punishment for a similar crime.⁴⁰

36. See *Coker*, 433 U.S. at 592.

37. See, e.g., *Coker*, 433 U.S. 584 (holding that death penalty is always disproportionate to the crime of rape, since rapists do not take their victims' lives).

38. *Gregg*, 428 U.S. at 176.

39. *Enmund*, 458 U.S. at 800; see also *Lockett v. Ohio*, 438 U.S. 586 (1978) (holding that a capital defendant has an eighth amendment right to a sentencing authority with the power to consider any and all aspects of his character, record and offense that he wishes to proffer as mitigating circumstances). The purpose of individualized sentencing determinations is to ensure that each capital sentence meets eighth amendment standards of decency and dignity of man principles. Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L. REV. 317, 322-37 (1981).

40. *Enmund*, 458 U.S. at 787. The issue presented in *Enmund* was whether the eighth amendment permits imposition of the death penalty on one who aids and abets a felony in the course of which a murder is committed by others, but who does not himself kill, attempt to kill, or intend that a killing take place. *Enmund*, 458 U.S. at 786-87. The Court concluded that the death penalty would be disproportionate if imposed upon *Enmund*, who did not actually kill the victims:

The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for *Enmund's* own conduct.

The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individual consideration as a constitutional requirement in imposing the death sentence[.]"

Id. at 798 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)) (emphasis in original). Thus, *Enmund* stands for the proposition that an offender, to deserve capital punishment, must be as culpable as others who receive the same punishment for a similar crime. See Comment, *supra* note 5, at 1492 ("The thrust of *Enmund*. . . is a focus on individuals and their responsibility for the harms done, rather than on the crimes for which the offenders were convicted or the consequences to the victims."); Note, *Eighth Amendment: The Death Penalty and Vicarious Felony Murder: Nontriggerman May Not be Executed Absent a Finding of Intent to Kill*, 73 J. CRIM. L. & CRIMINOLOGY 1553, 1564 (1983) (capital punishment is to be imposed only on those who are deserving of society's ultimate sanction).

In *Pulley v. Harris*, 104 S. Ct. 871 (1984), the Supreme Court decided that the eighth amendment does not require a state appellate court to compare the sentence in a capital case with those in similar cases to make a determination of proportionality. This was not an elimination of the disproportionality arm of eighth amendment analysis. In order to deserve capital punishment, a defendant must still be personally culpable for his crime. *Pulley* merely stands for the proposition that, once a finding of personal culpability has been made and the defendant has been sentenced to death, the death penalty need not be overturned upon a finding that death is seldom imposed upon defendants convicted of similar crimes. See generally Liebman, *Appellate Review of Death Sentences: A Critique of Proportionality Review*, 18 U.C.D. L. REV. 1433 (1985).

To satisfy the "dignity of man" principle of the eighth amendment, a punishment must also make a "measurable contribution to acceptable goals of punishment."⁴¹ A penalty "so totally without penological justification that it results in the gratuitous infliction of suffering" would violate the dignity of man principle.⁴² The Supreme Court has recognized two basic penological goals of the death penalty: retribution and the deterrence of capital crimes by prospective offenders.⁴³ Capital punishment fulfills its retributive purpose by providing an institutional means for society to express its moral outrage at particularly offensive conduct, and by satisfying society's desire that criminals receive the punishments they deserve.⁴⁴ Capital punishment therefore preserves the stability of society by providing an alternative to citizens taking the law into their own hands in seeking revenge upon criminals.⁴⁵ Although research has never conclusively demonstrated the death penalty's deterrent effect, the Court has held that it will defer to the judgment of state legislatures which determine that the death penalty does, indeed, deter capital crimes.⁴⁶

The Court has held that the death penalty, in general, serves the penological purposes of retribution and deterrence.⁴⁷ As in the disproportionality analysis, however, each particular case must be examined to determine whether the death penalty serves valid penological purposes.⁴⁸ The goal of retribution is

41. *Coker*, 433 U.S. at 592.

42. *Gregg*, 428 U.S. at 182-83.

43. *Id.*

44. *Id.* at 183-84.

45. See *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring) ("When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law."). Society may also validly decide that some crimes are so heinous, the only appropriate response is to execute the offender. *Gregg*, 428 U.S. at 183-84. See generally Comment, *supra* note 5, at 1506-10; *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 55, 65-66 (1976).

46.

Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the death penalty has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. . . .

The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.

Gregg, 428 U.S. at 185-86.

47. *Id.* at 176-87.

48. "Unless the death penalty when applied to those in *Enmund's* position measurably contributes to one or both of these [penological] goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund*, 458 U.S. at 798 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)). See Hertz & Weisberg, *supra* note 39, at 335-37.

served only when the offender is personally culpable for the crime, and therefore deserves the punishment.⁴⁹ Capital punishment will serve as a deterrent only when it will send a message to potential murderers that society will respond harshly to their actions.⁵⁰ This message is sent by the execution of a murderer with whose character and actions a potential murderer can identify.⁵¹ Therefore, examination of the personal culpability, or moral guilt, of each capital defendant, along with the circumstances of his crime, is required to determine whether his execution is deserved and would serve to deter potential criminals contemplating similar acts.⁵²

As a further safeguard against violations of the eighth amendment in capital cases, no doubt must exist as to the appropriateness of imposing the death penalty on a particular defendant.⁵³ The purpose of the requirements that each sentence of death respect the dignity of man underlying the eighth amendment, and that each defendant have an opportunity to present evidence of mitigating circumstances which argue against the death penalty, is to ensure that no undeserved or unjustified executions will be carried out.⁵⁴ A

49. Thus, in *Enmund*, retribution was an insufficient justification for executing a defendant who had not intended that a murder be committed. *Enmund*, 458 U.S. at 801; see also *Tucker v. Zant*, 724 F.2d 882, 887-88 (11th Cir. 1984) (retributive justification requires that capital punishment be imposed only on defendants deserving of society's ultimate sanction); Comment, *supra* note 5, at 1509-10 (retributive theory is based on idea that punishment is proportionate to culpability of offender).

50. Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 950-51 (1966).

51. Liebman & Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757, 813-17 (1978).

52. *Enmund*, 458 U.S. at 799-801. In *Enmund*, the Court held that the deterrence goal would not be served by executing one who had not killed or intended to kill. A premeditative killer would not have been able to identify with *Enmund*, while one without a prior intent to kill would have been incapable of altering his conduct in contemplation of *Enmund's* execution. "[I]t seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation[.]'" *Enmund*, 458 U.S. at 799 (quoting *Fisher v. United States*, 328 U.S. 463, 484 (1946)).

53. See *Zant v. Stephens*, 103 S. Ct. 2733, 2748 (1983) (opinion of Burger, C.J.) ("qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); *Lockett*, 438 U.S. at 604 (death penalty must not be imposed in face of evidence which creates reasonable or substantial doubt of appropriateness of that penalty); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (due to severity of death penalty, need for reliability in determination that death is the appropriate penalty in a specific case is great); *State v. Wood*, 648 P.2d 71, 81 (Utah 1982) (respect for humanity underlying the eighth amendment can be upheld only if death penalty is imposed on the basis of a high degree of confidence that it is appropriate in a specific case).

54. See, e.g., *Zant*, 103 S. Ct. at 2747 (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)) ("It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."); *Lockett*, 438 U.S. at 605 (risk that death penalty will be imposed in spite of factors calling for less severe penalty is unacceptable); *Woodson*, 428 U.S. at 304 ("fundamental respect for humanity underlying the Eighth Amendment. . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death"); see also *Ritter*

court must resolve any doubt regarding the propriety of the death penalty in favor of the defendant.⁵⁵

The standards of decency and dignity of man principles technically are not two distinct tests, both of which must be satisfied before a punishment will pass constitutional muster. The Supreme Court has made clear that, although it will afford great weight to evidence of society's standards of decency, the ultimate decision as to whether the eighth amendment permits imposition of a punishment belongs to the Court, through its application of the dignity of man principle.⁵⁶ Nevertheless, legislative judgments, jury verdicts, and other indicators of society's standards, even if not controlling in themselves, are important to the Court's dignity of man analysis.⁵⁷ The

v. Smith, 726 F.2d 1505, 1515 (11th Cir. 1984) (individualized determination of appropriateness of death penalty is designed to ensure fairness to accused).

55.

As the Supreme Court has explained, the standard of proof in a guilt proceeding is the rigorous criterion of beyond a reasonable doubt because of our society's judgment that an erroneous decision to convict is more opprobrious than an erroneous decision to acquit. In the capital sentence proceeding, the comparative weight of the interests at stake is even more sharply pronounced. An erroneous decision to extinguish the defendant's life is far more opprobrious than an erroneous decision to spare the defendant and sentence him to life imprisonment.

Hertz & Weisberg, *supra* note 39, at 376.

56. See *Enmund*, 458 U.S. at 797; *Coker*, 433 U.S. at 597; see also *Gregg*, 428 U.S. at 173 (public perceptions of standards of decency are not in themselves conclusive).

57. See *Gregg*, 428 U.S. at 175 ("the constitutional test is intertwined with an assessment of contemporary standards"). For example, the Court has held that it owes great deference to legislative judgments on appropriate punishments, because state legislatures are presumptively accurate indicators of the standards of contemporary society. *Id.* at 175; see also *Furman*, 408 U.S. at 383 (Burger, C.J., dissenting) ("[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.").

At times, the Court has seemed to use contemporary standards of decency as only a single factor in its dignity of man analysis. See *Enmund*, 458 U.S. at 797; *Coker*, 433 U.S. at 597. This has led some commentators to conclude that standards of decency no longer deserve an independent eighth amendment inquiry. See Radin, *Cruel and Unusual Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1145 n.6 (1980); Comment, *supra* note 5, at 1488-89.

In the cases that seemed to subsume standards of decency under the dignity of man umbrella, however, the Court, having first explored those standards for the punishment in question and stated the principle that evidence of contemporary standards is not controlling, proceeded to hold the punishment unconstitutional in accord with what the standards of society seemed to indicate. Thus, in *Coker v. Georgia*, the Court found that only three states sanctioned the death penalty for the rape of an adult woman. 433 U.S. at 594. In *Enmund v. Florida*, the Court found that only eight states authorized capital punishment for "nontriggerman" accomplices to felony murders. 458 U.S. at 789. In both cases, the Court concluded that the death penalty would violate national standards of decency.

Therefore, the Court has not relegated standards of decency to an insignificant role in eighth amendment analysis, but has merely reserved the right to override those standards in an appropriate case. See, e.g., *Enmund*, 458 U.S. at 797 ("Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty."); *Gregg*, 428 U.S. at 173 ("But our cases also make clear that public perceptions of standards of decency with respect

Court's conclusion as to society's acceptance of a punishment is typically consistent with its ruling as to the constitutionality of that punishment.⁵⁸ Therefore, an independent investigation of society's standards of decency with regard to the juvenile death penalty is a valid and important ingredient of the eighth amendment analysis.

In the next section, the Note will demonstrate that society's contemporary standards of decency are violated by the juvenile death penalty, rendering it unconstitutional *per se*.⁵⁹ The conclusions about the immaturity of youth drawn from the standards of decency analysis will also guide the dignity of man analysis, where it will be shown that the common characteristics of juvenile offenders must render the death penalty excessive in every instance.⁶⁰

II. SOCIETY'S EVOLVING STANDARDS OF DECENCY AND THE JUVENILE DEATH PENALTY

In determining whether a punishment is cruel and unusual under the eighth amendment, a court must decide whether the punishment violates society's evolving standards of decency.⁶¹ In doing so, courts must consider various objective indicators of "contemporary values concerning the infliction of a challenged sanction."⁶² These include the historical development of the punishment at issue, legislative judgments, the sentencing decisions of juries, and international opinion.⁶³

to criminal sanctions are not conclusive. A penalty also must accord with the 'dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' ") (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)). Moreover, courts and commentators have continued to treat standards of decency as an independent inquiry. *See, e.g.*, *Trimble v. State*, 300 Md. 387, 428, 478 A.2d 1143, 1161 (1984); Hill, *Can the Death Penalty Be Imposed on Juveniles: The Unanswered Question in Eddings v. Oklahoma*, 20 CRIM. L. BULL. 5 (1984); Gwin, *The Death Penalty: Cruel and Unusual Punishment When Imposed Upon Juveniles*, 45 KY. BENCH & B., April 1981, at 16; Note, *Juvenile Offenders and the Electric Chair: Cruel and Unusual Punishment or Firm Discipline for the Hopelessly Delinquent?*, 35 U. FLA. L. REV. 344, 359-66 (1983); Note, *The Death Penalty for Juveniles: A Constitutional Alternative*, 7 J. JUV. L. 54, 59 (1983).

58. *See supra* notes 29-32 and accompanying text & note 57; *see also* Radin, *supra* note 57, at 1145 n.6 (contemporary standards of decency give moral content to the dignity of man standard).

59. *See infra* notes 67-156 and accompanying text.

60. *See infra* notes 157-205 and accompanying text.

61. *See supra* notes 29-32 and accompanying text.

62. *Gregg v. Georgia*, 428 U.S. 153, 173, 179-82 (1976); *see also* Hertz & Weisberg, *supra* note 39, at 334.

63. *Enmund v. Florida*, 458 U.S. 782, 788-89 (1982); *Gregg*, 428 U.S. at 179-82. Some commentators include public opinion polls on the list of indicators. *See* Gwin, *supra* note 57, at 17; Note, *Juvenile Offenders and the Electric Chair: Cruel and Unusual Punishment or Firm Discipline for the Hopelessly Delinquent?*, 35 U. FLA. L. REV. 344, 362 (1983). The Supreme Court, however, looks to legislative enactments and jury sentencing decisions as reliable indicia of public opinion, rather than to direct samples of public attitudes. *See, e.g.*, *Gregg*, 428 U.S. at 174 (legislative judgment weighs heavily in ascertaining contemporary standards); Witherspoon

A consideration of these traditional indicators is inconclusive as to whether society favors a death penalty for minors.⁶⁴ This Note will consider an alternative indicator, however, which consists of the many statutory and judicial restraints placed upon minors for their protection and safety, due to their assumed immaturity and irresponsibility. The protective attitudes embodied in these restraints do not support a juvenile death penalty.⁶⁵ The Note will also show that juveniles who commit crimes, even serious crimes, should be regarded with the same benevolent attitude that society displays towards minors in general.⁶⁶

A. A Traditional Standards of Decency Analysis

Minors have been sentenced to death and executed in the United States since colonial times.⁶⁷ Death sentences for minors have continued into the present day, with the most recent execution for a crime committed as a

v. Illinois, 391 U.S. 510, 519 n.15 (1968) (juries maintain link between community values and penal system without which punishments could not reflect evolving standards of decency). Moreover, public opinion polls are fraught with methodological difficulties. See, e.g., Ellsworth & Ross, *Public Opinion & Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116, 165 (1983) (concluding that the typical public opinion poll renders meaningless results for court capital punishment determinations). It has also been argued that reliance on public opinion polls in constitutional adjudications would lead to unconstitutional results. See, e.g., Warr & Stafford, *Public Goals of Punishment and Support for the Death Penalty*, 21 J. RESEARCH CRIME & DELINQ. 95, 107 (1984) (public opinion should not govern penal policy, since a principal aim of western legal systems is to protect offenders from public opinion, and because criminal statutes cannot be expected to change with changing public opinion); Radin, *supra* note 28, at 1035-36 ("Any degree of reliance on public opinion polls, even if accompanied by disclaimers as to their weight, is improper in constitutional adjudication. Opinion polls, ironically, show that the majority of the public favors few of the protections embodied in the Bill of Rights."); Ellsworth & Ross, *supra*, at 166 (authors' survey of 500 northern California residents showed a majority in favor of a mandatory death penalty, which had been held unconstitutional in *Woodson v. North Carolina*, 428 U.S. 280 (1976)). For these reasons, this Note will not consider public opinion as an indicator of standards of decency.

64. See *infra* notes 67-99 and accompanying text.

65. See *infra* notes 100-35 and accompanying text.

66. See *infra* notes 136-207 and accompanying text.

67. See A. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 211-12 (2d ed. 1977). Through the nineteenth century, the English common law rules concerning the criminal liability of children and older adolescents were applied in the United States. Children under the age of seven were presumed to be incapable of forming criminal intent, and were thus not held liable for their criminal acts. Frey, *The Criminal Responsibility of the Juvenile Murderer*, 1970 WASH. U.L.Q. 113, 113. For persons aged 7 to 14, the presumption of inability to entertain criminal intent became rebuttable, and if rebutted, the child could be convicted of a crime and even sentenced to death. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613, 614 (1983). No such presumption applied to persons aged 14 or over. *Id.* Prior to 1900, 95 children were executed in the United States, the youngest aged 10 years, the earliest recorded incident being in 1642 in Massachusetts. *Id.* at 619.

minor having taken placed in January, 1986.⁶⁸ Currently, at least thirty-two inmates are on death row for offenses committed while under the age of eighteen.⁶⁹ Clearly, society has been, and is still, willing to sentence minors to death.

Societal attitudes towards juvenile offenders are also reflected in the development of a special juvenile justice system, the purpose of which is to rehabilitate, not to punish.⁷⁰ Today, virtually every state has a juvenile court system designed to give special treatment to young offenders.⁷¹ Juvenile court proceedings are not considered to be criminal proceedings, and do not result in criminal punishments.⁷² The historical premise of the juvenile court system is that minors are not totally responsible for their offenses and therefore should be treated more benignly than their adult counterparts.⁷³ This premise is still the basis of today's juvenile justice system.⁷⁴ "The state is *parens patriae* rather than prosecuting attorney and judge,"⁷⁵ and in that capacity aids but does not punish young offenders. That the state should take this role is supported by the widely held view that juvenile crime results from environmental factors for which society must share the blame;⁷⁶ it is therefore

68. James Terry Roach was executed in South Carolina on January 14, 1986, for a murder he committed when he was 17. He thus became the first person to be executed against his will for a crime committed while under 18 since executions resumed in 1977. N.Y. Times, Jan. 18, 1986, at 8, col. 1. Charles Rumbaugh was executed in Texas on September 11, 1985, for a murder he committed when he was 17. Reinhold, *Execution for Juveniles: New Focus on Old Issue*, N.Y. Times, Sept. 10, 1985, at A14, col. 1. The next most recent execution of a person for a crime committed while a minor took place in 1964. Streib, *supra* note 67, at 619.

69. See Reinhold, *supra* note 68.

70. In the 1820's, reformers began seeking to put an end to the imposition of adult punishments on minors, having as their goal the rehabilitation of the young offender. See generally A. PLATT, *supra* note 67; Fox, *supra* note 4; Mennell, *Origins of the Juvenile Court: Changing Perspectives on the Legal Rights of Juvenile Delinquents*, 18 CRIME & DELINQ. 68 (1972). The goals of the early juvenile justice reformers have also been described by the Supreme Court. See *In re Gault*, 387 U.S. 1, 15-16 (1967). See generally *supra* note 6.

71. The juvenile justice reform movement culminated in the creation of juvenile courts, designed exclusively for young offenders, and authorized to make dispositions suited to the goals of rehabilitation. See Simpson, *Rehabilitation as Justification of a Separate Juvenile Justice System*, 64 CAL. L. REV. 984, 984 (1976). The first juvenile court was established in Illinois in 1899. By 1925, virtually every state had followed suit. *In re Gault*, 387 U.S. at 14-15. All the juvenile court systems pursued the goal of rehabilitation. See Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957).

72. See *supra* note 6.

73. *Id.*

74. See *supra* note 5; see also Allen, *The Juvenile Court and the Limits of Juvenile Justice*, 11 WAYNE L. REV. 676 (1965); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281 (1967).

75. *Kent v. United States*, 383 U.S. 541, 555 (1966).

76. "[Y]outh crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, *CONFRONTING YOUTH CRIME* 7 (1978) [hereinafter TWENTIETH CENTURY FUND TASK FORCE].

inappropriate to punish youthful transgressors for crimes that are the result of society's failures.⁷⁷

Despite the ideals of the juvenile justice system, society has not held all juvenile offenders immune from adult prosecution. Through waiver mechanisms, most states provide for the prosecution of certain juvenile offenders in the criminal courts.⁷⁸ Indeed, the advent of the juvenile court system and the rehabilitative ideal has not ended juvenile death sentences or executions.⁷⁹ The fact of juvenile death penalties would seem to indicate a different societal attitude toward juveniles convicted of capital crimes.

The transfer of juvenile offenders to the criminal courts, however, does not mean that the juvenile *is* an adult for sentencing purposes.⁸⁰ The decision to try a minor as an adult rarely involves a determination of the minor's maturity or responsibility for his or her actions.⁸¹ In addition, waiver does

77.

The young are not only our future, they are our present, in a sense and to a degree that cannot be said of those who have reached maturity and yet are still in need of care and aid. All juveniles, not only delinquents, are 'persons in need of supervision,' to use the now terrible and damning phrase that has become part of the juvenile justice system. When they become what society cannot or will not tolerate, it seems clear on the face of it that supervision must somewhere have broken down, which means, in short, that we, the elders, have failed. Not only as parents, as teachers, as police officers, but as a community and as a society.

Sagarin, *Foreward*, in D. SHOEMAKER, *THEORIES OF DELINQUENCY: AN EXAMINATION OF EXPLANATIONS OF DELINQUENT BEHAVIOR* ix (1984); *see also supra* note 6 (goal of juvenile justice system is to rehabilitate, not to punish).

78. *See supra* note 5.

79. *See* Streib, *supra* note 67, at 619 (192 executions for crimes committed by persons under the age of 18 since 1900); *see also supra* note 68.

80. Hill, *supra* note 57, at 32.

81. Under legislative waiver, minors are transferred to the criminal courts solely on the basis of their crime. Except for a statutory minimum age below which minors cannot be transferred, maturity does not enter into the waiver decision at all. *See supra* note 5. Legislative waiver statutes are often severely criticized for being inconsistent with the rehabilitative philosophy of the juvenile system, because they focus entirely on the offense rather than the individual characteristics of the offender. *See, e.g.,* Feld, *Legislative Policies, supra* note 5, at 508-09 (many youths who could benefit from rehabilitation and who pose no future threat to society are tried and punished as adults due to legislative waiver).

Under judicial waiver, a court typically considers the following factors in making its waiver decision: (1) the youth's age; (2) the youth's dangerousness to society; (3) seriousness of the offense; (4) past criminal activity; (5) the youth's treatment prognosis. Note, *Juvenile Offenders and the Electric Chair: Cruel and Unusual Punishment or Firm Discipline for the Hopelessly Delinquent?*, 35 U. FLA. L. REV. 344, 349 (1983). Although age is one of the factors considered by courts, a determination of the minor's maturity is rarely part of the judicial waiver decision. Most judicial waiver statutes do not require that the minor's maturity be considered. *See, e.g.,* ILL. ANN. STAT. ch. 37, § 702-7(3)(a) (West 1982); IOWA CODE ANN. § 232.45 (6)-(7) (West Supp. 1985). One commentator has argued that age plays a role in the waiver decision process only because minors may be retained in the juvenile justice system until they reach the statutory maximum age of juvenile court jurisdiction. *See* Comment, *supra* note 5, at 1478-79. Since minors in the juvenile system must be released from custody upon reaching the maximum age, the juvenile court must consider whether the period of time left to treat the youth in the juvenile system is sufficient for rehabilitation, or whether the juvenile's release upon achieving

not suggest that society can disclaim responsibility for serious youth crimes, the sorts of crime that most typically result in waiver.⁸² Thus, the societal attitudes toward juvenile offenders reflected in the ideals of the juvenile justice system are not necessarily overturned when juveniles are tried in adult courts.

Jury verdicts are also uncertain indicators of society's acceptance of the juvenile death penalty.⁸³ Clearly, some juries have been willing to sentence minors to death, since minors currently await execution in our prisons.⁸⁴ The number of death row inmates who committed their crimes while under eighteen is only a small fraction of the total number of inmates awaiting death,⁸⁵ however, indicating reluctance on the part of juries to sentence juveniles to death.⁸⁶ Consistent refusal by juries to impose a punishment is

the maximum age would pose a threat to society. "If the time is too short for proper rehabilitation or the resources too inadequate to treat the minor within the period of time available, the . . . juvenile is transferred to criminal court, where he can receive a sentence that would keep him in custody beyond his eighteenth birthday." *Id.*

Even if age could operate as a surrogate for maturity, it could easily be outweighed by other factors in the waiver decision process. Appellate courts and state legislatures typically refrain from giving any one factor controlling weight, leaving judges with wide discretion to determine which youths shall be transferred into the criminal system. *See Note, supra*, at 351 & n.48. Often, the judge's personal belief regarding the propriety of criminal punishment, or political pressure on the state judiciary to "get tough" with juvenile criminals, has a decisive effect on the waiver decision, to the exclusion of any consideration of the youth's maturity, age or culpability. *See id.* at 351 & n.49; *see also Comment, supra* note 5, at 1478 (minors are typically transferred to criminal court because they are not suitable candidates for treatment or because a disposition within the juvenile system would prove a threat to society).

In some states, the court is required to assess the juvenile's maturity. *See, e.g., ALA. CODE* § 12-15-34(d)(4)-(5) (1975); *FLA. STAT.* § 39.09(2)(c)(6) (1981). Maturity is still only one of the numerous factors the court considers in making the waiver decision. The court need not find the minor mature in order to transfer him, and a finding of maturity is rarely the decisive factor in the transfer decision. *See Comment, supra* note 5, at 1500.

82. *See Comment, supra* note 5, at 1495-96 (tracing violent youth crime to failure of families, schools and social systems to provide proper support and guidance); *see also Eddings v. Oklahoma*, 455 U.S. 104 (1982) (recognizing that a turbulent family history and beatings by a harsh father are relevant mitigating factors in sentencing a youthful capital offender).

83. The Supreme Court has stated that capital case juries play a crucial role in determining contemporary standards of decency. *See, e.g., Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968). The Court's reliance on jury verdicts has not been without criticism, however. *See, e.g., Goodpaster, Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786, 798 (1983) (a single jury may not accurately reflect dominant community or state-wide sentiment).

84. *See* Brief for Petitioner at 19a (App. E), *Eddings v. Oklahoma*, 455 U.S. 104 (1982); Reinhold, *supra* note 68.

85. *See* Reinhold, *supra* note 68 (as of August 1, 1985, youthful offenders constituted only two percent of the total number of inmates on death row).

86. *See, e.g., Trimble v. State*, 300 Md. 387, 422-23, 478 A.2d 1143, 1161 (1984) (that only 17 out of 800 death row inmates were under 18, fewer than expected given the number of homicides committed by juveniles, showed "some reluctance on the part of juries to sentence juveniles to death"); Hill, *supra* note 57, at 9 & n.23 (number of juveniles awaiting execution is small given number of homicides committed by juveniles, suggesting societal attitudes are rejecting juvenile death penalty). Many commentators have observed that juveniles typically do not receive the maximum allowable penalty for their crimes, even their homicides, despite the

an indication of society's distaste for that punishment.⁸⁷

It is also instructive to examine the ways in which state courts have treated jury verdicts on appeal.⁸⁸ Though no clear pattern is discernible, many state courts have refused to uphold a death sentence imposed on a minor.⁸⁹ For this reason, and due to the relative infrequency of death sentences for minors, jury verdicts do not indicate that society favors the juvenile death penalty.

International opinion seems to weigh against the juvenile death penalty. One study found that out of 101 countries setting a minimum age for capital punishment, seventeen set the minimum age at eighteen and seventy-seven set it at twenty.⁹⁰

The most telling evidence that societal attitudes favor a juvenile death penalty would seem to be the legislative enactments of the states. Out of thirty-five capital punishment states, twenty-nine permit the execution of at least some minors.⁹¹ This represents a majority of all states, and more than three-fourths of capital punishment states. In all states, however, youth is a mitigating factor that can be offered by the defendant to secure leniency

public's growing "get tough" attitude toward juvenile crime in general. The reason assigned for this phenomenon is reluctance on the part of sentencers to put minors to death. *See, e.g.,* W. HEAPS, *JUVENILE JUSTICE* 11 (1974) ("the usual sentence for minors found guilty of homicide. . . is life imprisonment, without parole, because of their ages"); Hill, *supra* note 57, at 17; Jolly & Sagarin, *The First Eight After Furman: Who Was Executed With the Return of the Death Penalty?*, 30 *CRIME & DELINQ.* 610, 618 (1984) (predicting that reluctance of juries to impose the death penalty on juveniles will continue).

87. *Furman v. Georgia*, 408 U.S. 238, 300 (1972) (Brennan, J., concurring); Hill, *supra* note 57, at 17.

88. Though the sentencing decisions of juries are an established ingredient of a standards of decency analysis, *see supra* note 63 and accompanying text, jury sentencing in capital cases has been severely criticized as unfair and liable to racial prejudice. *See, e.g.,* S. RUBIN, *LAW OF CRIMINAL CORRECTION* 94 (2d ed. Supp. 1981). At least one Supreme Court justice is skeptical about the reliability of jury verdicts as indicators of societal standards. *Enmund v. Florida*, 458 U.S. 782, 816-18 (O'Connor, J., dissenting). That jury verdicts can be unreliable indicators of constitutional values is shown by the frequent reversal of death sentences. *See infra* note 89 and accompanying text.

89. Death sentences for minors have been upheld on appeal in *Trimble*, 300 Md. 387, 478 A.2d 1143; *Leatherwood v. State*, 435 So. 2d 645 (Miss. 1983); *Tokman v. State*, 435 So. 2d 664 (Miss. 1983); *State v. Battle*, 661 S.W.2d 487 (Mo. banc 1983); *High v. State*, 247 Ga. 289, 276 S.E.2d 5 (1981); *State v. Prejean*, 379 So. 2d 240 (La. 1979); *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979). Cases overturning a death sentence include *State v. Valencia*, 132 Ariz. 248, 645 P.2d 239 (1982); *State v. Maloney*, 105 Ariz. 348, 464 P.2d 793 (1970); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *State v. Hall*, 176 Neb. 295, 125 N.W.2d 918 (1964); *Commonwealth v. Green*, 396 Pa. 137, 151 A.2d 241 (1959).

90. Sixteen countries did not have a minimum age or did not provide adequate information. *See* Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J. CRIM. L. CRIMINOLOGY & POL. SCI. 397, 398-404, 410 (1965); *see also* International Covenant on Civil and Political Rights, U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966) ("a sentence of death will not be imposed for crimes committed by persons below eighteen years of age").

91. Reinhold, *supra* note 68. The remaining six death penalty states forbid execution for a crime committed by someone under 18, while several states set the statutory minimum age at 17 or 16. *See supra* note 7.

in sentencing.⁹² Many states have designated the offender's youth as a mitigating factor by statute.⁹³ Thus, some legislative concern about the execution of minors exists even in states that authorize it. Moreover, combining the fifteen non-capital punishment states with the six capital punishment states that forbid the juvenile death penalty yields twenty-one states that forbid the execution of minors, a substantial minority. Thus, no clear consensus in favor of the juvenile death penalty exists among state legislatures.⁹⁴ Finally, although the Supreme Court is willing to afford great weight to legislative judgments as indicators of contemporary standards,⁹⁵ it is also willing to override those judgments when necessary to protect individual rights.⁹⁶ Whatever force legislative judgments in favor of the juvenile death penalty carry can therefore be overridden by appropriate eighth amendment arguments.

The above discussion makes clear that traditional objective indicators of society's evolving standards of decency give at best an ambiguous picture of the acceptability of the juvenile death penalty. This ambiguity alone argues against capital punishment for minors, since certainty as to the validity of a punishment is required under the eighth amendment.⁹⁷

This Note proposes, as an alternative indicator of standards of decency, a review of judicial and legislative attitudes toward minors in general, at-

92. Sentencers are required to consider the defendant's youth, if proffered in mitigation, by decisions of the Supreme Court. See *Eddings*, 455 U.S. at 115; *Lockett v. Ohio*, 438 U.S. 586 (1978) (holding that sentencing authority must consider any and all aspects of defendant's character offered in mitigation, including youth).

93. In 24 states, an offender's youth is designated as a mitigating factor by statute. Brief for Petitioner at 46-47, *Eddings v. Oklahoma*, 455 U.S. 104 (1982); see also Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1233 (1984) (listing states which explicitly make age at time of crime relevant to sentencing decision).

94. One commentator argues that because states are divided on the death penalty issue, no national moral consensus for or against the death penalty exists. Either the definition of cruelty differs from state to state, or there is a consistent moral standard on the issue having an external source, to which some states fail to adhere. Rather than citing state court decisions and state laws that support the death penalty, decisions and laws which represent the views of only a part of the country, the Supreme Court should decide what the national moral standard is to be. See *Radin*, *supra* note 28, at 1038-39; *Radin*, *supra* note 57, at 1158-59. Another commentator has argued that, in states that permit the juvenile death penalty, lack of legislative prohibition cannot be equated with legislative approval. Often, a state legislature does not act upon a problem until specific action is required. Since death penalties for juveniles are rare, the need for a specific prohibition of the juvenile death penalty may not have been perceived in the states that allow it. See *Hill*, *supra* note 57, at 16. *But see Trimble*, 300 Md. at 387, 478 A.2d at 1143 (concluding society has not rejected juvenile death penalty from fact 20 states permit it).

95. See *Gregg v. Georgia*, 428 U.S. 153, 174 (1976).

96. "Although legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values, it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power." *Id.* at 174 n.19 (citations omitted).

97. See *supra* notes 53-55 and accompanying text.

titudes rooted in the belief that minors are inherently less mature and responsible than adults.⁹⁸

B. Judicial and Legislative Attitudes Toward Minors

The Supreme Court, in *Eddings v. Oklahoma*,⁹⁹ discussed the importance of youth as a mitigating factor in sentencing for capital crimes.

[Y]outh 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, generally are less mature and responsible than adults.¹⁰⁰

Thus, the Court recognized the relevance of non-criminal laws dealing with the maturity and judgment of minors to capital sentencing decisions for minors.¹⁰¹

A brief overview of the protections afforded to, and limitations placed upon, minors by courts and legislatures will illustrate the general view in the law that minors are inherently less mature and responsible than adults.¹⁰² This societal attitude is consistent with the rehabilitative philosophy of the juvenile court system, but is at odds with the punitive philosophies inherent in capital punishment.¹⁰³ Our contemporary standards of decency include a protective and nurturing attitude toward minors, due to their inherent immaturity. Subjecting minors to the ultimate punishment for their crimes would violate that protective attitude.¹⁰⁴

98. See *infra* notes 100-35 and accompanying text.

99. 455 U.S. 104 (1982).

100. *Id.* at 115-16.

101. Quoting from *Bellotti v. Baird*, 443 U.S. 622, 635 (1979), the Court pointed out that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults." *Eddings*, 455 U.S. at 116. *Bellotti* concerned the rights of minors to secure abortions.

102. This Note will not attempt to catalogue the differences from state to state in laws concerning the welfare and legal incapacity of minors. Nor will it attempt to explore the various ages at which persons are considered adults for the purposes of driving, contracting, working, etc. Rather, this Note will attempt to present some generally held doctrines in the law which are based on the assumption that children are inherently less mature than adults. For a more detailed analysis of specific laws and interstate variations, see A. SUSSMAN, *THE RIGHTS OF YOUNG PEOPLE* (1977).

103. See *supra* notes 78-83 and accompanying text.

104. "If anything, prohibiting the death penalty for juveniles would be consistent with the actions of state governments around the country in protecting juvenile welfare and promoting juvenile guidance." Comment, *Eddings v. Oklahoma: A Stay of Execution for Juveniles?*, 9 *NEW ENG. J. CRIM. & CIV. CONFINEMENT* 407, 423 (1983).

Moreover, given the presumption that minors are less responsible than adults, the juvenile death penalty would seem to violate the constitutional requirement that the recipient of capital punishment be culpable for his crime. This point is addressed more fully *infra* notes 169-81 and accompanying text.

The law has long recognized that minors have "a very special place in life which law should reflect."¹⁰⁵ The law contains many age-based distinctions between minors and adults, limiting minors' freedoms and powers of self-determination, premised upon their presumed immaturity and need for special protection.¹⁰⁶

The Supreme Court has recognized that certain restrictions upon minors are necessary to protect them from the consequences of their own decisions. Chief Justice Burger has written that "most children, even in adolescence, simply are not able to make sound judgments concerning many decisions. . . . Parents can and must make those judgments."¹⁰⁷

Traditionally, the law has recognized the rights of parents to speak for their minor children and to exercise authority over them.¹⁰⁸ Laws designed to support the parental role in child-rearing further a state interest in the proper upbringing and support of children.¹⁰⁹ Two common restrictions designed both to promote parental authority and to protect minors from the consequences of their own decisions are the requirements of parental consent for marriage and for obtaining a driver's license.

The age at which marriage can be contracted without parental notification or consent is at least eighteen in all states.¹¹⁰ The minimum age at which

105. *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

106. See generally A. SUSSMAN, *supra* note 97; Hafen, *Children's Liberation & the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. REV. 605; Wald, *Children's Rights: A Framework for Analysis*, 12 U.C.D. L. REV. 255 (1979).

107. *Parham v. J.R.*, 442 U.S. 584, 603 (1979); see also *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693 n.15 (1977) ("the law has generally regarded minors as having a lesser capability for making important decisions"); Batey, *The Rights of Adolescents*, 23 WM. & MARY L. REV. 363, 369 (1982) ("The traditional view of the law. . . reflected in Chief Justice Burger's comment in *Parham v. J.R.*, is that a person does not acquire the skills of moral choice until the end of adolescence."). *Parham* involved the constitutionality under the due process clause of the fourteenth amendment of Georgia procedures for the parental commitment of children under the age of 18 to state mental hospitals.

108.

Our jurisprudence historically has reflected western civilization concepts of the family as a unit with broad parental authority over minor children. . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgments required for making life's difficult decisions.

Parham v. J.R., 442 U.S. at 602.

109. See Comment, *The Constitution & The Family*, 93 HARV. L. REV. 1156 (1980).

110. See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *THE LEGAL STATUS OF ADOLESCENTS* 1980, at 43-47 (1981) [hereinafter *THE LEGAL STATUS OF ADOLESCENTS*]. In Mississippi, Nebraska, and Wyoming, the minimum age requirements for marriage without parental consent are 17, 19 and 19 respectively. MISS. CODE ANN. § 93-1-5d (Supp. 1985); NEB. REV. STAT. § 42-105 (1981); WYO. STAT. § 20-1-102(c) (1977). In Mississippi, parental notification is required until the parties are 21. MISS. CODE ANN. § 93-1-5(b) (Supp. 1985). Most states set an age below which marriage is entirely prohibited. See, e.g., NEB. REV. STAT. § 42-102 (1984) (17 years old). Other states declare that marriage below a certain age is void and prohibited, unless a judge of competent jurisdiction approves the marriage. E.g., N.Y. DOM. REL. LAW § 15(3) (McKinney Supp. 1986); WYO. STAT. § 20-1-102(b) (1977) (16 years old).

marriage can be contracted with parental consent varies from fourteen to sixteen years of age.¹¹¹ The right of a state to regulate the age at which a minor may marry has withstood constitutional attack, on the grounds that such regulation is justified by the state's interest in preventing unstable marriages among those lacking the capacity to act in their own best interests.¹¹²

The requirements and conditions for a minor to obtain a driver's license vary greatly from state to state. The most common requirement is the consent of a parent or guardian.¹¹³ Other restrictions commonly applied only to young applicants are the completion of a driver education course,¹¹⁴ or the limitation of driving to specified purposes, such as attending school, unless accompanied by an adult licensed driver.¹¹⁵ The purpose of such limitations is to base the extent of the privilege of driving a motor vehicle on the fitness of the operator.¹¹⁶

Minors are subject to many other restrictions that do not apply to adults, arising from their presumed lack of mature judgment. For example, many jurisdictions have curfew statutes or ordinances, designed to reinforce parental authority and to protect young people from harm in situations likely to encourage delinquent actions.¹¹⁷ Most states specify a minimum age below which minors may not enter a pool hall.¹¹⁸ Minors are typically prohibited

111. See THE LEGAL STATUS OF ADOLESCENTS, *supra* note 105, at 43-47; see, e.g., N.Y. DOM. REL. LAW § 15(2) (McKinney Supp. 1986) (16 years old).

112. See *Moe v. Dinkins*, 669 F.2d 67, 68 (2d Cir. 1982) (upholding New York law requiring that all male applicants for marriage license between 16 and 18, and all female applicants between 14 and 18, obtain consent of parents).

113. See, e.g., CAL. VEH. CODE § 12650(b) (West Supp. 1986); FLA. STAT. ANN. § 322.09(1)(a) (West Supp. 1985); PA. STAT. ANN. tit. 75, § 1507(a) (Purdon 1977); TENN. CODE ANN. § 55-7-104(8)(c) (1980).

114. See, e.g., CAL. VEH. CODE § 12507 (1971 & West Supp. 1986); N.Y. VEH. & TRAF. LAW § 502(2) (McKinney Supp. 1986); PA. STAT. ANN. tit. 75 § 1503(b)(1) (Purdon 1977).

115. See, e.g., CAL. VEH. CODE § 12513(a) (West Supp. 1986); PA. STAT. ANN. tit. 75, § 1503(c)(2) (Purdon 1977); see also *People v. Joy*, 50 Misc. 2d 690, 271 N.Y.S.2d 15 (1966) (purpose of junior license would normally be to permit a young person to run errands for his parents, to drive to the beach on a summer day and to drive to school or to work).

116. See, e.g., *State v. Balmotritis*, 5 Conn. Cir. 72, 242 A.2d 99 (1967) (license to operate motor vehicle is purely a personal privilege issued by state on account of fitness).

117. See, e.g., *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1256-57 (M.D. Pa. 1975), *aff'd mem.*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U.S. 964 (1976) (upholding juvenile curfew ordinance affecting minors under 18 on basis of state's right to protect children from their own immaturity and vulnerability); *In re C.*, 28 Cal. App. 3d 747, 105 Cal. Rptr. 113 (1977); *City of Eastlake v. Ruggiero*, 7 Ohio App. 2d 212, 220 N.E.2d 126 (1966). See generally Note, *Assessing the Scope of Minors' Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163 (1984); Comment, *Juvenile Curfew Ordinances and the Constitution*, 76 MICH. L. REV. 109 (1977).

118. See, e.g., GA. CODE ANN. § 84-1611 (1979) (18 years of age); MASS. ANN. LAWS ch. 140, § 179 (Michie/Law. Co-op. 1981) (18 years of age); N.Y. GEN. BUS. LAW § 465(3) (McKinney 1984) (16 years of age); PA. STAT. ANN. tit. 53, § 15404 (Purdon 1957) (18 years of age).

from buying cigarettes¹¹⁹ or alcohol.¹²⁰ States or municipalities may forbid the mere presence of minors in an establishment where alcohol is sold.¹²¹

The freedoms of minors are often restricted in the name of ensuring their proper moral development. For example, a vast majority of states control the sale of pornographic material to minors by regulating the exhibition and distribution of such material.¹²² The Supreme Court has upheld the constitutionality of a law prohibiting the sale to minors of material classified as obscene based on its appeal to minors, although it would not be considered obscene for adults.¹²³ The law was justified by the state's interest in protecting children from abuses which might prevent their growth into free and well-developed persons.¹²⁴ The Court has recognized that children may be prevented from enjoying full first amendment freedoms in the name of ensuring their proper growth and development.¹²⁵ In general, the Court has recognized, in cases involving legislation restricting or prohibiting the sale or distribution

119. See, e.g., CAL. PENAL CODE § 308(a) (West Supp. 1986); MINN. STAT. ANN. § 609.685 (West Supp. 1985). The minimum age is usually the age of majority, though some states set it at 15 or 16. See THE LEGAL STATUS OF ADOLESCENTS, *supra* note 110, at 117-18.

120. The sale of alcohol to persons below a certain age is restricted in every state, with the minimum age varying from 18 to 21. See F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENTS 3-6 (1982). A key provision of the Highway Safety Amendments Act, Pub. L. No. 98-363, 98 Stat. 435 (1984) (codified at 23 U.S.C.A. § 158 (West Supp. 1984)), mandates that all states receiving federal highway funds raise their minimum legal age for the purchase of alcoholic beverages to 21. Any state that does not comply will lose five percent of the highway funds allocated to that state, beginning in October, 1986. Ten percent of allocated federal highway funds will be withheld in 1987, if the state still has not raised the minimum age.

121. See, e.g., FLA. STAT. ANN. § 562.48 (West Supp. 1985); MICH. COMP. LAWS ANN. § 750.141 (West Supp. 1985); N.Y. PENAL LAW § 260.20(1) (McKinney 1967).

122. See, e.g., MD. ANN. CODE art. 27, § 419(a)(1) (Supp. 1985); MO. ANN. STAT. § 573.040(1) (Vernon 1979). See generally THE LEGAL STATUS OF ADOLESCENTS, *supra* note 110, at 269-71.

123. *Ginsberg v. New York*, 390 U.S. 629 (1968).

124. *Id.* at 642; see also *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983) (upholding ordinance prohibiting sale of material to minors that was not obscene for adults, because such material would be harmful to minors); *State v. Siegel*, 139 N.J. Super. 373, 354 A.2d 103 (1975) (because of strong and abiding interest in its youth, state has authority to protect youth from objectionable material and to establish two standards of obscenity); *Calderon v. Buffalo*, 61 App. Div. 2d 323, 402 N.Y.S.2d 685 (1978) (interest in healthy emotional development of young persons permits state to intervene in support of parental role by preventing adverse effect on young minds of sexually explicit material with respect to which they lack mature judgment).

125. *Ginsberg v. New York*, 390 U.S. at 649-50 (Stewart, J., concurring) ("a child is not possessed of that full capacity for individual choice which is the presupposition of first amendment guarantees"); see also Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 939 (1963):

The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules. Without attempting here to formulate the principles relevant to freedom of expression for children, it suffices to say that regulation of communication addressed to them need not conform to the requirements of the first amendment in the same way as those applicable to adults.

to minors of specified goods or services otherwise available to adults, that the state has greater power to control the conduct of children.¹²⁶

The special place of minors in the law will be illustrated through three final examples: the rights of minors to contract, to hold property and to file a lawsuit.

Although minors are not prohibited from executing contracts, the basic rule is that all contracts by minors are voidable, allowing minors to disaffirm their contracts, executive or executory, during their minority or within a reasonable time after emancipation.¹²⁷ The purpose of this rule is to protect minors "from foolishly squandering their wealth through improvident contracts with crafty adults who could take advantage of them in the market-

126. See Hafen, *supra* note 106. Some recent Supreme Court opinions have expanded the rights of minors to make their own choices, most notably in the area of a minor female's right to obtain an abortion without parental consent. See, e.g., *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (independent parental interest in abortion decision was outweighed by privacy interest of minor old enough to become pregnant). Some commentators have seen in such opinions a general recognition of adult decision-making capacity for minors, and have called for an end to age-based restrictions. See, e.g., Batey, *supra* note 107. The Court, however, has consistently held to the basic principle that minors generally need special guidance and care. See, e.g., *Bellotti v. Baird*, 443 U.S. at 643 n.23 ("the fact that a minor may be very much an adult in some respects does not mean that his or her need and opportunity for growth under parental guidance and discipline have ended"). The Court's decisions tend to be carefully limited to the circumstances presented, and are not sweeping condemnations of age-based restrictions in the law. See *id.* ("the peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors"). The limited expansions of minors' rights and decision-making powers are motivated by the same desire to protect young people that underlies age-based restrictions. For example, in *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1978), the Court struck down a state statute prohibiting the sale or distribution of contraceptives to minors under the age of 16. One commentator has called this case an effort to "avoid harming kids in the name of helping them"—i.e., although the state might rationally decide that sexual intercourse between minors should be abolished, such a law would be unenforceable, so that limiting access to contraception in the name of youth welfare would actually be cruel. F. ZIMRING, *supra* note 120, at 62-63.

The argument that adolescent maturity should be equated with that of adults has been based on Supreme Court cases granting procedural due process rights to minors. See *In re Gault*, 387 U.S. 1 (1967) (addressing legal procedures constitutionally required in delinquency hearings); *Goss v. Lopez*, 419 U.S. 565 (1975) (due process clause requires notice of charges and a hearing as precondition to suspension from public school). See generally F. ZIMRING, *supra* note 120, at 77-87; Wald, *supra* note 106. A careful reading of the decisions indicates that, in considering the constitutional dimensions of procedures concerning minors, the Court has not abandoned traditional assumptions about the competence of minors to exercise adult rights. See Hafen, *supra* note 106, at 641. As one commentator has argued: "[t]he capacity of children has nothing to do with their right to be treated fairly, decently and humanely by the government. They are entitled to such treatment not because they are competent but because they are persons." Letwin, *After Goss v. Lopez: Student Status as Suspect Classification?*, 29 STAN. L. REV. 627, 642 (1977); see also G. MELTON, *CHILD ADVOCACY: PSYCHOLOGICAL ISSUES AND INTERVENTIONS* 2-4 (1983) (movement to secure basic human rights for children is not an attempt to secure adult treatment for children). Thus, the Court has not changed its views about the maturity and capacity of minors simply because it has granted certain procedural rights to minors and has expanded their decision-making powers in limited contexts for their own welfare.

127. WILLISTON ON CONTRACTS § 239 (3d ed. 1939); see also *In re Bierman*, 271 F. Supp. 774 (S.D. Ohio 1967); *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981).

place."¹²⁸ Courts have generally agreed that upon disaffirmance, the minor is responsible only to the extent that he or she still possesses the consideration for the contract, regardless of its condition, since any other rule would violate the goal of protecting minors from their own indiscretion and immaturity.¹²⁹

In the realm of property law, minors have the right to acquire and own property, but the law presumes they are incapable of property management. Guardians have traditionally been appointed by courts to manage the property.¹³⁰ The minor is presumed to be incompetent, and is therefore in need of a guardian to manage the property for the minor's benefit.¹³¹

Minors cannot initiate or defend against lawsuits without adult assistance.¹³² Rules of procedure identify the child's representative, or provide for the appointment of a guardian ad litem or next friend.¹³³ The fundamental purpose of this requirement is the protection of the minor's best interests.¹³⁴

This brief overview, while not exhaustive, illustrates that minors do, indeed, enjoy a "very special place" in the law. The various limitations placed upon minors for their own protection and guidance indicate a societal attitude at odds with the retributive and punitive philosophies behind the death penalty. The execution of minors suggests an abrogation of society's obligation to protect children.¹³⁵ In the next section, the Note demonstrates that society's obligation to protect children is owed even to juveniles accused of a capital crime.

128. WILLISTON ON CONTRACTS § 234 (3d ed. 1939). Many statutory exceptions to this rule exist, but the "lack [of] any coherent pattern or philosophy" across the states makes it impossible to speculate as to why the exceptions exist. H. CLARK, LAW OF DOMESTIC RELATIONS 236 (1968). See generally 42 AM. JUR. 2D *Infants* (1969).

129. See, e.g., *Nelson v. Browning*, 391 S.W.2d 873 (Mo. 1965); *Hamrick v. Hospital Serv. Corp.*, 110 R.I. 634, 296 A.2d 15 (1972); *Halbman v. Lemke*, 99 Wis. 2d 241, 298 N.W.2d 562 (1980); see also RESTATEMENT OF RESTITUTION § 62 comment b (1937).

130. See, e.g., *Baker v. United States*, 137 F. Supp. 651 (M.D.N.C. 1955); *Bach v. Long Island Jewish Hosp.*, 49 Misc. 2d 207, 267 N.Y.S.2d 289 (Sup. Ct. 1966).

131. See *Baker v. United States*, 137 F. Supp. 651 (M.D.N.C. 1955). See generally 39 C.J.S. *Guardian and Ward* § 3 (1976).

132. See generally 42 AM. JUR. 2D *Infants* §§ 155-58 (1969).

133. See FED. R. CIV. P. 17(c). Most states model their applicable rule on the Federal Rule. See, e.g., MASS. R. CIV. P. 17(b); D.C. CT. R. 17(c). Under such rules, the court is required to consider the necessity of appointing a guardian ad litem, and to either appoint one, or to make a finding that the minor's best interests can be protected without one. See *Noe v. True*, 507 F.2d 9, 11-12 (6th Cir. 1974).

134. See *Roberts v. Ohio Cas. Ins. Co.*, 256 F.2d 35 (5th Cir. 1958).

135. See, e.g., Streib, *supra* note 67, at 637 ("The spectacle of our society seeking legal vengeance through execution of a child raises fundamental questions about the nature of children's moral responsibility for their actions and about society's moral responsibility to protect and nurture children.").

C. Standards of Decency and the Juvenile Murderer

This Note has not yet considered whether the commission of a capital crime works a change in society's standards of decency regarding the care and protection of a juvenile. Some commentators have argued that the juvenile murderer forfeits the special place in life he enjoyed before his crime, so that society's benign attitude toward minors in general does not extend far enough to embrace him.¹³⁶ Society appears to be developing a "get tough" attitude toward juvenile offenders generally;¹³⁷ perhaps society cannot satisfy its moral outrage at serious juvenile crime except by treating juvenile criminals more harshly.¹³⁸

Society's evolving standards of decency, however, have not embraced the idea of a juvenile death penalty. Despite the development of a "get tough" attitude, the objective indicators upon which the Supreme Court traditionally relies to gauge societal support for a punishment are ambivalent on the question of the juvenile death penalty.¹³⁹

Moreover, society experiences less moral outrage at a murder committed by a juvenile than at a murder committed by an adult.¹⁴⁰ Since society generally regards minors as less responsible individuals, who are worthy of special protection,¹⁴¹ one would expect society to be angered less by a juvenile's offense than by an adult's.¹⁴² In fact, strong evidence exists which indicates that juries and some courts are reluctant to impose capital punishment on convicted juvenile murderers.¹⁴³

Although capital sentencing of minors involves the transfer of juveniles to the adult system,¹⁴⁴ nothing indicates that society ceases to hold its presumptions about youthful immaturity toward minors tried in the criminal courts. Transferred minors are still subject to all the laws which society has

136. See, e.g., Note, *supra* note 3.

137. See, e.g., P. STRASBURG, *VIOLENT DELINQUENTS* (1978); TWENTIETH CENTURY FUND TASK FORCE, *supra* note 76.

138. Retribution is a permissible penological goal for punishments, and satisfies society's need to express moral outrage at crime. See text accompanying notes 39-42.

139. See *supra* notes 67-99 and accompanying text.

140. See, e.g., Jolly & Sagarin, *supra* note 86, at 612 (teenagers convicted of murder are likely to arouse sympathy of public, even as public sympathy for murderers facing death penalty generally wanes); see also *id.* at 618 (predicts that there is little likelihood of youths in their late teens receiving death penalty in large numbers, due to societal distaste for putting youths to death).

141. See *supra* notes 100-35 and accompanying text.

142. See Hertz & Weisberg, *supra* note 39, at 388 (a person who is less culpable for a crime is likely to invoke less moral outrage than the person who is more culpable for a crime). That minors are always less responsible for their crimes is discussed *infra* notes 169-81 and accompanying text.

143. See *supra* notes 83-89 and accompanying text.

144. See *supra* notes 4-5.

enacted to protect them from their own inability to understand the consequences of their acts.¹⁴⁵ In addition, sentencers recognize youth as a mitigating factor of great weight,¹⁴⁶ particularly in capital cases,¹⁴⁷ because courts presume that youth evidences a lack of maturity and an inability to control one's actions.¹⁴⁸

The decision to transfer a minor to criminal court typically does not involve a determination that the minor is as mature as an adult. Under legislative waiver, the transfer decision is based solely on the offender's age and crime, while under judicial waiver courts will transfer minors found to be unsuitable candidates for treatment or because disposition within the juvenile system would pose a threat to society.¹⁴⁹ In short, the decision to try a juvenile offender as an adult has no bearing on societal attitudes about the maturity of minors and their need for care.¹⁵⁰ Since society's evolving standards of decency have not embraced a juvenile death penalty but continue to show a protective attitude toward juvenile offenders, juvenile crime clearly does not serve to remove minors from that special place in life which is reflected in our laws.

D. Summary

The foregoing presentation reveals that society's evolving standards of decency do not support a juvenile death penalty.¹⁵¹ Society assumes that minors are immature and unable to appreciate the consequences of their

145. See Comment, *supra* note 99, at 433.

146. See, e.g., *People v. Goss*, 10 Ill. App. 3d 543, 294 N.E.2d 744 (1973) (sentence of 50-100 years for robbery and murder reduced to 25-100 years because defendant was 18 years old); *People v. Adams*, 8 Ill. App. 3d 8, 288 N.E.2d 724 (1972) (75-100 year sentence for felony murder reduced to 40-100 years because defendant was only 18); *State v. Kiser*, 194 Neb. 513, 233 N.W.2d 571 (1975) ("Ordinarily a defendant's youth indicates that a sentence should be something less than the statutory maximum.").

147. See cases cited *supra* note 89.

148. See, e.g., *State v. Maloney*, 105 Ariz. 348, 360, 464 P.2d 793, 805, *cert. denied*, 400 U.S. 841 (1970) ("The defendant has committed a heinous crime, the sheer brutality of which unquestionably shocked the jury. . . . Because of his immaturity we are persuaded that he should not die.").

149. See *supra* notes 4 & 78; see also Comment, *supra* note 4, at 1500 nn.166-67 (court determination that minor is mature is rarely made as part of waiver decision).

150. One commentator has written:

The traditional distinction between "treatment" as a juvenile and "punishment" as an adult is based on an arbitrarily drawn line that has no criminological significance other than its legal consequences. The inconsistencies between the juvenile and the adult systems often make futile any attempt to rationalize social control and the response to serious youthful deviance. These inconsistencies arise from the legislature's failure to recognize that children are constantly maturing; they are not irresponsible children one day and responsible adults the next, except as a matter of law.

Feld, *Juvenile Court Legislative Reform*, *supra* note 2, at 230-31 (footnote omitted).

151. See *supra* notes 67-98 and accompanying text.

actions, and therefore restricts their rights and freedoms in many ways.¹⁵² The societal attitudes reflected in these restrictions are not changed when minors commit serious crimes; even juvenile murderers do not forfeit that special place in society that all juveniles enjoy.¹⁵³ Thus, society's view that all minors should enjoy special protection and care cannot be reconciled with the retributive and punitive philosophies behind the death penalty. The execution of persons for crimes committed while minors therefore violates contemporary standards of decency regarding juveniles.

Society's standards, reflected in the presumption that minors are less responsible for their actions than adults, are also relevant to an analysis of the juvenile death penalty under the dignity of man principle of the eighth amendment.¹⁵⁴ This principle focuses primarily on the personal responsibility and maturity of the offender.¹⁵⁵ Society's assumptions about the irresponsibility of minors are corroborated by criminological assumptions regarding the reduced responsibility of minors for their crimes, leading to the conclusion that the death penalty always violates the dignity of man principle when applied to a minor.

III. THE DIGNITY OF MAN AND THE JUVENILE DEATH PENALTY

A punishment violates the eighth amendment's cruel and unusual punishment clause if it is excessive.¹⁵⁶ A punishment is excessive if it is disproportionate to the offense or if it fails to make a measurable contribution to the penological goals of retribution and the deterrence of prospective offenders.¹⁵⁷ The death penalty per se has passed both tests.¹⁵⁸

Each instance of capital punishment, however, must be examined for disproportionality and for its contribution to the goals of retribution and deterrence. Currently, the sentencing authority must consider youth as a mitigating factor, if proffered by the defendant.¹⁵⁹ As a mitigating factor, youth could weigh against imposition of the death penalty on the grounds that death is a disproportionate punishment for a youthful offender or that valid penological goals would not be served by executing a youthful offender. Some minors would still be executed, however, since sentencers are free to impose the death penalty in spite of mitigating factors proffered by the defendant.¹⁶⁰ The following sections will demonstrate that the death penalty

152. *See supra* notes 99-135 and accompanying text.

153. *See supra* notes 136-50 and accompanying text.

154. *See supra* note 57 and accompanying text.

155. *See supra* notes 39-52 and accompanying text.

156. *See supra* notes 33-35 and accompanying text.

157. *See supra* notes 37-52 and accompanying text.

158. *Gregg v. Georgia*, 428 U.S. 153, 176-87 (1976).

159. *See supra* note 13 and accompanying text.

160. *See supra* notes 15-17 and accompanying text.

is unconstitutional in *all* instances in which a juvenile has committed a murder. Since the eighth amendment requires absolute certainty regarding the validity of each death sentence, even a substantial doubt regarding the legitimacy of the death penalty in a particular case is enough to render the punishment unconstitutional.¹⁶¹ If the requisite certainty is lacking whenever a juvenile is convicted of a capital crime, than a death penalty for minors must be *per se* unconstitutional.

The Supreme Court's disproportionality analysis requires that in every capital case, courts examine not only the magnitude of the harm, but also the personal responsibility of the offender for the harm.¹⁶² The punishment must be proportionate in light of "relevant facets of the character and record of the individual offender," which indicate whether the person to be put to death is as culpable as others receiving a similar punishment for having caused a similar harm.¹⁶³ Thus, if minors who kill are always less responsible than their adult counterparts, then minors must never be subjected to the maximum penalty to which adults are subject for the same crime.

The personal characteristics of each defendant are also examined in determining whether each instance of capital punishment promotes valid penological goals.¹⁶⁴ The retributive goal of the death penalty is to assuage society's moral outrage at criminal acts and desire that offenders be given the punishments they deserve.¹⁶⁵ If society feels less moral outrage when a juvenile kills, and juveniles always deserve less than adult punishment due to a lower level of culpability for their crimes, then the juvenile death penalty will never further the retributive purpose of capital punishment.

The death penalty serves the deterrence goal if an execution will send a message to potential offenders contemplating a similar act that they might suffer a similar fate.¹⁶⁶ If some inherent characteristics of youth would prevent this message from being sent or received, the juvenile death penalty will fail to serve the deterrence goal in all instances.

In the following sections, the Note will demonstrate that the juvenile death penalty is disproportionate and fails to promote valid penological goals in every case, due to the immaturity of juveniles. Society's conclusive presumptions regarding juvenile incapacity, reflected in legislative and judicial attitudes toward minors, apply to all minors, even those convicted of violent crimes. Thus, the inherent irresponsibility and immaturity of juveniles suggests a reduced degree of culpability for their crimes. Criminological evidence

161. See *supra* notes 53-54 and accompanying text.

162. See *supra* note 39 and accompanying text.

163. *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting *Woodson v. North Carolina*, 428 U.S. 208, 304 (1976)). See *supra* note 40.

164. See *supra* notes 48-52 and accompanying text.

165. See *supra* note 44 and accompanying text.

166. See *supra* notes 50-52 and accompanying text.

provides direct support for the proposition that juveniles are never as culpable as adult criminals, tending to show that juveniles are not fully responsible for their crimes. Although no single factor can be identified as the cause of juvenile crime,¹⁶⁷ enough causal factors beyond the control of the individual have been identified to raise at least a presumption that the juvenile criminal is less responsible than his or her adult counterpart.¹⁶⁸ Coupled with society's presumptions regarding juvenile crime, the criminological evidence is sufficient to raise at least a substantial doubt that death is an appropriate penalty for the juvenile murderer, which fails to satisfy the very high standards of reliability which apply to capital sentencing.

A. *Disproportionality and the Responsibility of Minors Who Kill*

In general, society assumes that minors are less responsible than adults due to their inherent immaturity. The Supreme Court has accepted the premise that minors are less mature in their ability to make sound judgments or to appreciate the consequences of their actions.¹⁶⁹ That society has also conclusively adopted this premise is illustrated by the many special laws designed to protect minors from their own irresponsibility and inability to make reasoned choices, laws which do not apply to adults.¹⁷⁰

These ideas carry over into the realm of juvenile criminology. The existence of a separate juvenile justice system is based on the theory that minors are less responsible than adults, and therefore deserve to be treated less harshly than adult offenders.¹⁷¹ Even serious crimes by minors do not alter the presumptions that minors are less responsible than adults and deserve less punishment.¹⁷²

167. See, e.g., D. GIBBONS, *DELINQUENT BEHAVIOR* 96-100 (3d ed. 1981) (no single factor causing juvenile delinquency exists in all cases, but a large set of factors has been identified which interact in particular ways to produce delinquency).

168. See *infra* notes 161-99 and accompanying text.

169. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions."); *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) ("during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them"); *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) ("a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees") (citation omitted).

170. See *supra* notes 100-35 and accompanying text.

171. See *supra* note 5; see also Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 515-16; Paulsen, *Kent v. U.S.: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 169.

172. See TWENTIETH CENTURY FUND TASK FORCE, *supra* note 76, at 7 ("Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.") The principle of diminished responsibility has been explicitly applied to the crime of murder. See, e.g., *id.* at 17 ("The principle of diminished responsibility makes life imprisonment and death penalties inappropriate in such cases.")

Youth is a turbulent phase of life during which one is more inclined to participate in anti-social activities and criminal conduct.¹⁷³ Research indicates that as people get older, their propensities to commit crime decrease, so that by the time they reach their early twenties they commit fewer offenses.¹⁷⁴ But during the "crisis of adolescence,"¹⁷⁵ when minors are thought to be "most susceptible to influence and to psychological damage,"¹⁷⁶ minors are exposed to many forces which encourage crime, including violent crime. The Supreme Court has recognized, for example, that evidence of a "turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant" in determining the proper punishment for a minor.¹⁷⁷ Youth crime is widely believed to be caused by a failure of family, school and other social systems that share responsibility for the proper development of minors.¹⁷⁸ In other words, juvenile offenders are not wholly responsible for their crimes.

The conclusion that minors are less responsible for their crimes than adults is not changed by the fact that many juvenile offenders are tried in the criminal courts. It has already been shown that the transfer of juveniles to the adult courts does not involve a determination that minors are as mature and responsible as adults.¹⁷⁹ Although the transfer of minors may be justified by their dangerousness or non-amenability to treatment in the juvenile system,¹⁸⁰ the fact that transfer does not mean a minor is mature enough to control or understand his actions indicates that minors tried in criminal court are still less responsible for their crimes than their adult counterparts.

Under the disproportionality analysis described above, which focuses on the responsibility of the individual in relation to others facing the same

173. See TWENTIETH CENTURY FUND TASK FORCE, *supra* note 76, at 3; Comment, *supra* note 104, at 437.

174. See Zimring, *American Youth Violence: Issues and Trends*, in 1 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 67 (N. Morris & M. Tonry eds. 1979); Simpson, *Rehabilitation as the Justification of a Separate Juvenile Justice System*, 64 CALIF. L. REV. 984, 1011-12 (1976); see also Feld, *Legislative Policies*, *supra* note 5, at 509-10 (youthful offenders likely to desist from serious crime after one offense).

175. *Haley v. Ohio*, 332 U.S. 596, 599 (1948).

176. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

177. *Id.*

178. See *supra* notes 76 & 82 and accompanying text; see also Sorrells, *What Can Be Done About Juvenile Homicide?* 26 CRIME & DELINQ. 152, 153-55 (1980) (concluding that minors who kill come from violent and chaotic family backgrounds); Pink, *Schools, Youth and Justice*, 30 CRIME & DELINQ. 439, 444 (1984) (schools contribute to delinquency by placing some students in "low trajectory" programs, providing them with poor education in societal values and skills, with the result that they are more likely to engage in delinquent activity); Hanson, Henggeler, Haeefele & Rodick, *Demographic, Individual, and Family Relationship Correlates of Serious and Repeated Crime Among Adolescents and Their Siblings*, 52 J. CONSULTING & CLINICAL PSYCHOLOGY 528, 529 (1984) ("during the past 15 years, there has been increased recognition that the behavior problems of children and adolescents are often related to inoptimal family relationship patterns"); Comment, *supra* note 5, at 1495-98.

179. See *supra* note 81 and accompanying text.

180. See Feld, *Juvenile Court Legislative Reform*, *supra* note 3.

actions, and therefore restricts their rights and freedoms in many ways.¹⁵² The societal attitudes reflected in these restrictions are not changed when minors commit serious crimes; even juvenile murderers do not forfeit that special place in society that all juveniles enjoy.¹⁵³ Thus, society's view that all minors should enjoy special protection and care cannot be reconciled with the retributive and punitive philosophies behind the death penalty. The execution of persons for crimes committed while minors therefore violates contemporary standards of decency regarding juveniles.

Society's standards, reflected in the presumption that minors are less responsible for their actions than adults, are also relevant to an analysis of the juvenile death penalty under the dignity of man principle of the eighth amendment.¹⁵⁴ This principle focuses primarily on the personal responsibility and maturity of the offender.¹⁵⁵ Society's assumptions about the irresponsibility of minors are corroborated by criminological assumptions regarding the reduced responsibility of minors for their crimes, leading to the conclusion that the death penalty always violates the dignity of man principle when applied to a minor.

III. THE DIGNITY OF MAN AND THE JUVENILE DEATH PENALTY

A punishment violates the eighth amendment's cruel and unusual punishment clause if it is excessive.¹⁵⁶ A punishment is excessive if it is disproportionate to the offense or if it fails to make a measurable contribution to the penological goals of retribution and the deterrence of prospective offenders.¹⁵⁷ The death penalty per se has passed both tests.¹⁵⁸

Each instance of capital punishment, however, must be examined for disproportionality and for its contribution to the goals of retribution and deterrence. Currently, the sentencing authority must consider youth as a mitigating factor, if proffered by the defendant.¹⁵⁹ As a mitigating factor, youth could weigh against imposition of the death penalty on the grounds that death is a disproportionate punishment for a youthful offender or that valid penological goals would not be served by executing a youthful offender. Some minors would still be executed, however, since sentencers are free to impose the death penalty in spite of mitigating factors proffered by the defendant.¹⁶⁰ The following sections will demonstrate that the death penalty

152. See *supra* notes 99-135 and accompanying text.

153. See *supra* notes 136-50 and accompanying text.

154. See *supra* note 57 and accompanying text.

155. See *supra* notes 39-52 and accompanying text.

156. See *supra* notes 33-35 and accompanying text.

157. See *supra* notes 37-52 and accompanying text.

158. *Gregg v. Georgia*, 428 U.S. 153, 176-87 (1976).

159. See *supra* note 13 and accompanying text.

160. See *supra* notes 15-17 and accompanying text.

is unconstitutional in *all* instances in which a juvenile has committed a murder. Since the eighth amendment requires absolute certainty regarding the validity of each death sentence, even a substantial doubt regarding the legitimacy of the death penalty in a particular case is enough to render the punishment unconstitutional.¹⁶¹ If the requisite certainty is lacking whenever a juvenile is convicted of a capital crime, than a death penalty for minors must be *per se* unconstitutional.

The Supreme Court's disproportionality analysis requires that in every capital case, courts examine not only the magnitude of the harm, but also the personal responsibility of the offender for the harm.¹⁶² The punishment must be proportionate in light of "relevant facets of the character and record of the individual offender," which indicate whether the person to be put to death is as culpable as others receiving a similar punishment for having caused a similar harm.¹⁶³ Thus, if minors who kill are always less responsible than their adult counterparts, then minors must never be subjected to the maximum penalty to which adults are subject for the same crime.

The personal characteristics of each defendant are also examined in determining whether each instance of capital punishment promotes valid penological goals.¹⁶⁴ The retributive goal of the death penalty is to assuage society's moral outrage at criminal acts and desire that offenders be given the punishments they deserve.¹⁶⁵ If society feels less moral outrage when a juvenile kills, and juveniles always deserve less than adult punishment due to a lower level of culpability for their crimes, then the juvenile death penalty will never further the retributive purpose of capital punishment.

The death penalty serves the deterrence goal if an execution will send a message to potential offenders contemplating a similar act that they might suffer a similar fate.¹⁶⁶ If some inherent characteristics of youth would prevent this message from being sent or received, the juvenile death penalty will fail to serve the deterrence goal in all instances.

In the following sections, the Note will demonstrate that the juvenile death penalty is disproportionate and fails to promote valid penological goals in every case, due to the immaturity of juveniles. Society's conclusive presumptions regarding juvenile incapacity, reflected in legislative and judicial attitudes toward minors, apply to all minors, even those convicted of violent crimes. Thus, the inherent irresponsibility and immaturity of juveniles suggests a reduced degree of culpability for their crimes. Criminological evidence

161. See *supra* notes 53-54 and accompanying text.

162. See *supra* note 39 and accompanying text.

163. *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting *Woodson v. North Carolina*, 428 U.S. 208, 304 (1976)). See *supra* note 40.

164. See *supra* notes 48-52 and accompanying text.

165. See *supra* note 44 and accompanying text.

166. See *supra* notes 50-52 and accompanying text.

provides direct support for the proposition that juveniles are never as culpable as adult criminals, tending to show that juveniles are not fully responsible for their crimes. Although no single factor can be identified as the cause of juvenile crime,¹⁶⁷ enough causal factors beyond the control of the individual have been identified to raise at least a presumption that the juvenile criminal is less responsible than his or her adult counterpart.¹⁶⁸ Coupled with society's presumptions regarding juvenile crime, the criminological evidence is sufficient to raise at least a substantial doubt that death is an appropriate penalty for the juvenile murderer, which fails to satisfy the very high standards of reliability which apply to capital sentencing.

A. *Disproportionality and the Responsibility of Minors Who Kill*

In general, society assumes that minors are less responsible than adults due to their inherent immaturity. The Supreme Court has accepted the premise that minors are less mature in their ability to make sound judgments or to appreciate the consequences of their actions.¹⁶⁹ That society has also conclusively adopted this premise is illustrated by the many special laws designed to protect minors from their own irresponsibility and inability to make reasoned choices, laws which do not apply to adults.¹⁷⁰

These ideas carry over into the realm of juvenile criminology. The existence of a separate juvenile justice system is based on the theory that minors are less responsible than adults, and therefore deserve to be treated less harshly than adult offenders.¹⁷¹ Even serious crimes by minors do not alter the presumptions that minors are less responsible than adults and deserve less punishment.¹⁷²

167. See, e.g., D. GIBBONS, *DELINQUENT BEHAVIOR* 96-100 (3d ed. 1981) (no single factor causing juvenile delinquency exists in all cases, but a large set of factors has been identified which interact in particular ways to produce delinquency).

168. See *infra* notes 161-99 and accompanying text.

169. See, e.g., *Parham v. J.R.*, 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions."); *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) ("during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them"); *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) ("a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees") (citation omitted).

170. See *supra* notes 100-35 and accompanying text.

171. See *supra* note 5; see also Feld, *Reference of Juvenile Offenders*, *supra* note 5, at 515-16; Paulsen, Kent v. U.S.: *The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 169.

172. See TWENTIETH CENTURY FUND TASK FORCE, *supra* note 76, at 7 ("Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.") The principle of diminished responsibility has been explicitly applied to the crime of murder. See, e.g., *id.* at 17 ("The principle of diminished responsibility makes life imprisonment and death penalties inappropriate in such cases.")

Youth is a turbulent phase of life during which one is more inclined to participate in anti-social activities and criminal conduct.¹⁷³ Research indicates that as people get older, their propensities to commit crime decrease, so that by the time they reach their early twenties they commit fewer offenses.¹⁷⁴ But during the "crisis of adolescence,"¹⁷⁵ when minors are thought to be "most susceptible to influence and to psychological damage,"¹⁷⁶ minors are exposed to many forces which encourage crime, including violent crime. The Supreme Court has recognized, for example, that evidence of a "turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant" in determining the proper punishment for a minor.¹⁷⁷ Youth crime is widely believed to be caused by a failure of family, school and other social systems that share responsibility for the proper development of minors.¹⁷⁸ In other words, juvenile offenders are not wholly responsible for their crimes.

The conclusion that minors are less responsible for their crimes than adults is not changed by the fact that many juvenile offenders are tried in the criminal courts. It has already been shown that the transfer of juveniles to the adult courts does not involve a determination that minors are as mature and responsible as adults.¹⁷⁹ Although the transfer of minors may be justified by their dangerousness or non-amenability to treatment in the juvenile system,¹⁸⁰ the fact that transfer does not mean a minor is mature enough to control or understand his actions indicates that minors tried in criminal court are still less responsible for their crimes than their adult counterparts.

Under the disproportionality analysis described above, which focuses on the responsibility of the individual in relation to others facing the same

173. See TWENTIETH CENTURY FUND TASK FORCE, *supra* note 76, at 3; Comment, *supra* note 104, at 437.

174. See Zimring, *American Youth Violence: Issues and Trends*, in 1 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 67 (N. Morris & M. Tonry eds. 1979); Simpson, *Rehabilitation as the Justification of a Separate Juvenile Justice System*, 64 CALIF. L. REV. 984, 1011-12 (1976); see also Feld, *Legislative Policies*, *supra* note 5, at 509-10 (youthful offenders likely to desist from serious crime after one offense).

175. *Haley v. Ohio*, 332 U.S. 596, 599 (1948).

176. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

177. *Id.*

178. See *supra* notes 76 & 82 and accompanying text; see also Sorrells, *What Can Be Done About Juvenile Homicide?* 26 CRIME & DELINQ. 152, 153-55 (1980) (concluding that minors who kill come from violent and chaotic family backgrounds); Pink, *Schools, Youth and Justice*, 30 CRIME & DELINQ. 439, 444 (1984) (schools contribute to delinquency by placing some students in "low trajectory" programs, providing them with poor education in societal values and skills, with the result that they are more likely to engage in delinquent activity); Hanson, Henggeler, Haefele & Rodick, *Demographic, Individual, and Family Relationship Correlates of Serious and Repeated Crime Among Adolescents and Their Siblings*, 52 J. CONSULTING & CLINICAL PSYCHOLOGY 528, 529 (1984) ("during the past 15 years, there has been increased recognition that the behavior problems of children and adolescents are often related to inoptimal family relationship patterns"); Comment, *supra* note 5, at 1495-98.

179. See *supra* note 81 and accompanying text.

180. See Feld, *Juvenile Court Legislative Reform*, *supra* note 3.

punishment for a similar crime, the death penalty is always disproportionate for minors,¹⁸¹ since minors are always less responsible for their crimes than adults.

B. *The Lack of Penological Justification for a Juvenile Death Penalty*

1. Retribution

Capital punishment for minors is not justified as a means for society to express its moral outrage at juvenile crime, or as an alternative to citizens taking the law into their own hands to satisfy their desire for vengeance.¹⁸² The danger of vigilantism is less acute in the case of juvenile murderers, since society should experience less moral outrage at juvenile crime than at adult crime.¹⁸³ One commentator has argued that "the best thing that can be said for [retribution] is that it restores balance on an imaginary tote board of social rights and wrongs."¹⁸⁴ Since society presumes that minors are less responsible for their crimes, partly because society must share the blame,¹⁸⁵ punishing juveniles does less to redress the social imbalance created by their crimes. The imposition of a criminal penalty short of execution upon a minor accused of murder should be sufficient to soothe the anger of society.¹⁸⁶

Retribution also satisfies society's desire that criminals suffer the punishments they deserve.¹⁸⁷ This theory of retribution is based on personal culp-

181. See *supra* note 40.

182. See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (discussing the retributive goals of capital punishment).

183. That society experiences less moral outrage at juvenile capital crime is illustrated by the reluctance of courts and juries to impose the death penalty on juveniles. See *supra* notes 80-83 and accompanying text; see also Jolly & Sagarin, *supra* note 86, at 612 (teenagers and female murderers will arouse sympathy of general public, even though support for death penalty generally has grown); Streib, *supra* note 67, at 637 ("[e]ven if the execution of an adult solely for revenge is constitutionally permissible, this justification of capital punishment is less appealing when the object of righteous vengeance is a child").

184. Little, *The Law of Sentencing as Public Ceremony*, 35 U. FLA. L. REV. 1, 3 (1983).

185. See *supra* notes 76 & 82 and accompanying text.

186. In this regard, the reluctance of juries to impose the death penalty on minors, see *supra* notes 83-87 and accompanying text, is again relevant, indicating that society's moral outrage is satisfied by lesser punishments than death. See Jolly & Sagarin, *supra* note 86, at 618 (juries will seek to find juvenile murderers guilty of lesser charges rather than impose the death penalty); see also *Leatherwood v. State*, 435 So. 2d 645, 660 (Miss. 1983) (Hawkins, J., dissenting) (in arguing against the necessity of capital punishment for a minor: "From whence comes the notion that sentence to life imprisonment is not in itself a terrible punishment? Are we required in *this* case to impose that *very worst* sentence society is empowered to impose in *any* case?") (original emphasis).

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

ability, or moral blameworthiness,¹⁸⁸ and therefore requires an investigation of the personal responsibility of each defendant.¹⁸⁹ As this Note has shown, juvenile murderers are always less responsible for their actions, and are less morally blameworthy, than adult murderers.¹⁹⁰ Therefore, they will never deserve as great a punishment as their adult counterparts.

2. Deterrence

Deterrence is a justification for the death penalty because it sends a message to potential murderers that they might suffer a similar punishment if they commit the contemplated crime.¹⁹¹ The requirement that each execution serve as a deterrent requires an examination of the personal characteristics of the person to be executed, since the deterrence message is likely to be received only by persons who can readily identify with the condemned.¹⁹² The execution of minors would not send the deterrence message to potential adult murderers, who would be unlikely to identify with a minor who is executed, due to the difference in ages.¹⁹³

Moreover, the execution of minors would not likely deter other minors, since few minors would receive the deterrence message. The Supreme Court has recognized that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation."¹⁹⁴ For deterrence to work, potential offenders must comprehend the threat of punishment and adjust their conduct accordingly.¹⁹⁵ It is unlikely, however, that free will and rational calculation are involved when juveniles commit crimes.¹⁹⁶ Society

188. See Gardiner, *The Renaissance of Retribution—An Examination of Doing Justice*, 1976 Wis. L. REV. 781, 798; Gibbs, *The Death Penalty, Retribution and Penal Policy*, 69 J. CRIM. L. & CRIMINOLOGY 291, 293 (1978) (retributive doctrine emphasizes prosecuting individuals charged with crime as morally responsible beings).

189. See *supra* note 49 and accompanying text.

190. See *supra* notes 169-81 and accompanying text.

191. See *supra* note 50 and accompanying text.

192. See *supra* note 51 and accompanying text.

193. See Comment, *supra* note 5, at 1510-11; see also A. GOLDSTEIN, *THE INSANITY DEFENSE* 13 (1967) (indicating punishment of persons with different characteristics has little impact on potential offenders). Commentators have also argued that the failure to execute an offender who is noticeably different from the rest of the population, such as a minor or an insane person, will not detract from the deterrent effect of the punishment, so long as the punishment is still imposed upon ordinary members of the population. See, e.g., Comment, *supra* note 5, at 1511 & n.226.

194. *Fisher v. United States*, 328 U.S. 463, 484 (1946).

195. See Andenaes, *supra* note 50, at 958; Gardiner, *The Purpose of Criminal Punishment*, 21 MOD. L. REV. 117, 122 (1958); see also *Furman v. Georgia*, 408 U.S. 238, 301 (1972) (Brennan, J., concurring) (deterrence is possible only if a criminal rationally weighs consequences of his intended crime).

196.

In sum, although some youths' involvement in delinquency may be related to cost-benefit decisions and to a rational process, other explanations better explain

clearly assumes that minors who commit crimes are less able to appreciate the consequences of their actions than adults.¹⁹⁷ Moreover, the execution of juveniles would do little to deter the societal and environmental factors that lead to juvenile crime.¹⁹⁸ Youth crime is not wholly deliberative or based on a consideration of possible consequences. Rather, it is caused at least in part by societal factors beyond the offender's control.¹⁹⁹ Thus, the deterrent message of punishment cannot be expected to cause minors to modify their actions rationally so as to avoid crime and punishment.²⁰⁰

Potential juvenile murderers would also fail to identify with others put to death for crimes committed while juveniles. Most juveniles view death as a remote possibility, and are therefore likely to engage in death-defying behavior. Thus, the threat of capital punishment can actually encourage the commission of capital crimes by juveniles.²⁰¹

Even minors who have the capacity to understand the threat of punishment may not have developed sufficient control over their behavior to modify

the delinquent behavior of most youths. With the vast majority of youngsters, delinquent behavior arises without much forethought as they interact with their environment. With still other youths, compulsive behavior, the influence of alcohol or drugs, or intense emotional reaction to a situation seem to lead them to bypass any rational process.

C. BARTOLLAS, *JUVENILE DELINQUENCY* 102 (1985); see also P. HAHN, *THE JUVENILE OFFENDER AND THE LAW* 40-57 (2d ed. 1978) (free will and rational choice not among various behavioral theories explaining the causes of delinquency).

197. See *supra* notes 169-81 and accompanying text; see also Kastenbaum, *Time and Death in Adolescence*, in *THE MEANING OF DEATH* 99 (H. Feifel ed. 1959) (minors tend to live for today, with little thought for future implications of their actions); Kastenbaum, *Death and Development Through the Life Span*, in *NEW MEANINGS OF DEATH* 33 (H. Feifel ed. 1977) (young people are often encouraged to engage in risk-taking or death-defying behavior by cultural and societal influences).

198. See P. HAHN, *supra* note 189, at 342 (given environmental, social and emotional causes of youth crime, deterrent value of punishment of juveniles is questionable).

199. See *supra* notes 76, 82 & 178 and accompanying text.

200.

The chief reason why a repressive response to youth crime will not work is that the logic underlying this approach is fundamentally flawed. This neoclassical approach assumes that youth crime takes place only when youthful offenders have calculated rationally the costs and benefits of crime, but more commonly, youth crime takes place as the result of juveniles being impoverished, addicted to drugs, emotionally distraught, or influenced by peers. That is, most youthful offenders merely respond to the needs and emotions of a particular moment.

C. BARTOLLAS, *supra* note 196, at 104.

201. See Streib, *supra* note 67, at 638-39; Reinhold, *supra* note 68; see also Jones & Potter, *Deterrence, Retribution, Denunciation and the Death Penalty*, 49 *UMKC L. REV.* 158, 168-69 (1981) ("Unfortunately, there is a kind of excitement and allure surrounding death by violence; the daring risk of one's own death is enticing to some."). Some studies of the deterrent effect of capital punishment have concluded that the death penalty can actually increase homicide rates. See, e.g., Forst, *Capital Punishment and Deterrence: Conflicting Evidence?*, 74 *J. CRIM. L. & CRIMINOLOGY* 927, 938 (1983).

their actions accordingly.²⁰² For example, minors often succumb to peer pressure to commit crimes, despite, or even because of, the dangerous consequences.²⁰³

Even if one believes that minors would be aware of the death penalty and could include that possibility in their deliberations about a murder, the death penalty would still be an ineffective deterrent. The certainty of receiving a punishment, and not its severity, is the primary source of a punishment's deterrent effect,²⁰⁴ and it is very uncertain that even a convicted juvenile murderer will receive the death penalty. Juries are reluctant to impose the death penalty on minors, while courts of appeal will often overturn a death penalty due to the mitigating factor of youth.²⁰⁵ The resulting uncertainty that death will be the penalty limits the deterrent effect of capital punishment even on a minor contemplating both a murder and the possible consequences of that act.²⁰⁶

Since capital punishment for minors is unlikely to deter minors from crime, it fails to make a measurable contribution to the penological goal of deterrence. Since the retributive goal is also not served by the execution of persons for juvenile crimes, the juvenile death penalty is clearly excessive, in violation of the dignity of man principle.

CONCLUSION

This Note refutes the constitutionality, as well as the moral propriety, of the juvenile death penalty, by exploring contemporary standards of decency

202. In recent years, many jurisdictions have attempted to "scare juveniles straight" by allowing them to visit penitentiaries and be confronted by convicts, so that they can observe the possible consequences of delinquent behavior first-hand. See generally R. LUNDMAN, PREVENTION AND CONTROL OF JUVENILE DELINQUENCY 137-52 (1984). Efforts to scare juveniles straight are based on a deterrence rationale, and on the assumption that rational juveniles will choose to forego crime if they perceive that the costs of crime (punishment) will outweigh the benefits. *Id.* at 137-38. Unfortunately, most "scared straight" programs have not had an impact on juvenile crime rates, while involvement in delinquency has actually increased among the participants in some programs. *Id.* at 150-52. One implication of such results is that minors are unable to avoid crime, even after they have been informed of the probable consequences of criminal behavior.

203. See E. ERICKSON, CHILDHOOD AND SOCIETY 261-63 (2d ed. 1963); Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 876 (1981).

204. Little, *supra* note 184, at 14; Moffit, *Learning Theory Model of Punishment: Implications for Delinquency Deterrence*, 10 CRIM. JUST. & BEHAV. 131, 148 (1983) (classical criminology maintains it is certainty of punishment, not severity, that deters); Andenaes, *General Prevention Revisited: Research and Policy Implications*, 66 J. CRIM. L. & CRIMINOLOGY 338 (1975); see also Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908 (1982) (arguing that capital punishment does not serve deterrence function, because constitutional safeguards in capital sentencing system make death sentences uncertain and rare).

205. See *supra* notes 86-89 and accompanying text.

206. See generally Moffit, *supra* note 204, at 152-53 (increased severity of punishment has little effect on juveniles because punishment becomes uncertain and is delayed as severity increases); Note, *supra* note 63, at 369 (death penalty is inflicted so infrequently on minors, it fails to have a deterrent effect).

reflected in the law's protective attitude toward minors. The idea of executing a person for a crime committed during minority raises the "deepest questions about the demands of justice versus the special nature of childhood."²⁰⁷ Even if such questions raised only a doubt about the propriety of putting persons to death for juvenile crimes, such a doubt must be resolved against the death penalty. The law requires certainty in capital sentencing, in order that the death penalty be consistent in every case with "the fundamental respect for humanity underlying the Eighth Amendment."²⁰⁸

Under the eighth amendment dignity of man analysis, the juvenile death penalty again fails to withstand constitutional scrutiny. Society's assumptions about youthful irresponsibility and immaturity carry over even into the realm of violent crime, and render the juvenile death penalty excessive in every instance. As this Note makes clear, society must always regard juvenile offenders as less responsible for their crimes than adults, so that the death penalty is always disproportionate for minors. Since minors are less responsible for their crimes, and hence less morally blameworthy, the retributive goal of the death penalty is not served by putting minors to death, either as a means for society to express its moral outrage or as a means of meting out to juvenile murderers their just desserts. Finally, because the crimes of minors are typically not the result of premeditation and deliberation, and because the likelihood of a juvenile death penalty is remote even where permitted, the juvenile death penalty will not have a sufficient deterrent effect to pass constitutional muster.

The consideration of youth as a mitigating factor is clearly insufficient to guarantee the constitutional requirement of certainty in capital sentencing. Individualized consideration of juvenile murderers, with youth only as a mitigating factor, still allows minors to be sentenced to death in violation of eighth amendment principles. When the Supreme Court next considers the juvenile death penalty, it should find that the very special place in society occupied by minors does not include death row.

LAWRENCE A. VANORE

207. Streib, *supra* note 67, at 641.

208. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).