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Capitalizing Adolescence: Juvenile Offenders on Death Row

MARY BERKHEISER*

"[A]dolescents commit crimes, as they live their lives, in groups."

—Franklin E. Zimring¹

In October of its 2004-05 Term, the United States Supreme Court heard the State of Missouri's challenge to the ruling of that state's high court that the Eighth Amendment of the United States Constitution prohibits the execution of individuals who were only sixteen or seventeen at the time of their capital crimes.² In August 2003, the Missouri Supreme Court set aside the death sentence imposed against Christopher Simmons in 1994, and re-sentenced him to life imprisonment without the possibility of parole for a crime he committed when he was seventeen years old.³ The basis for the Missouri court's decision was its conclusion that executing our young is inherently cruel and unusual, and therefore forbidden by the Eighth Amendment of the United States Constitution.⁴

Like the majority of the seventy-two adolescents serving death sentences across the country, Simmons was convicted of a murder he did not commit alone.⁵ The night Christopher Simmons and his friend, Charles Benjamin, set out to rob and kill the man the boys in the neigh-

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1. Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 867 (1981).

2. *Roper v. Simmons*, 540 U.S. 1160 (2004). See *infra* notes 158-68 and accompanying text for a brief history of the juvenile death penalty.

3. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 400 (Mo. 2003) (en banc).

4. *Roper*, 112 S.W.2d at 399.

5. *State v. Simmons*, 944 S.W.2d 165, 169-70 (Mo. 1997) (en banc), *cert. denied*, 522 U.S. 953 (1997).

borhood called the "voodoo man," they were not prepared for what they encountered.⁶ Instead of finding the target of their mischief, Simmons and Benjamin were startled by his wife, who was home alone.⁷ It all went downhill from there.⁸ After nearly ten years on death row, Simmons got a reprieve, at least for a time.⁹ The same cannot be said, however, for Napoleon Beazley, Scott Allen Hain, T.J. Jones, or Toronto Patterson. These young offenders were executed between May and November of 2002¹⁰ for participating in homicides which, like Simmons, they neither intended to commit nor committed alone. All four started as robberies with friends, and all four ended with the unanticipated death of the robbery victims.¹¹ So too for Kevin Stanford and Heath Wilkins, the teenagers whose death sentences led the United States Supreme Court to conclude in 1989 that the Constitution does not prohibit the execution of those convicted of crimes committed at ages sixteen and seventeen.¹² In each case, the juvenile offender who

6. *Id.* at 169-70.

7. *Id.* at 170.

8. Simmons was convicted of first-degree murder and sentenced to death, *id.*, while his co-defendant was spared the death penalty because he was fifteen at the time of the burglary. *Id.* at 169. See *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (holding that the Eighth and Fourteenth Amendments prohibit the execution of one who was fifteen at the time of the offense).

9. Reaction to the Supreme Court's decision to review the Missouri Supreme Court's conclusion that execution of individuals below the age of eighteen violates the Eighth Amendment prohibition against cruel and unusual punishment has been mixed. Some court watchers optimistically view the Court's decision to re-examine its 1989 ruling in *Stanford v. Kentucky*, 492 U.S. 361 (1989), as a sign that the Court is ready to extend to sixteen- and seventeen-year-olds the death penalty exemption the Court recognized for fifteen-year-olds in *Thompson v. Oklahoma*, 487 U.S. 815 (1988). See Press Release, National Mental Health Association, Supreme Court to Consider Ban on Juvenile Executions (Jan. 26, 2004), <http://www.nmha.org/newsroom/system/news.vw.cfm?do=vw&rid=582>; see also Stephen Henderson, *Court to Weigh Executing Young Killers*, PHILADELPHIA INQUIRER, Jan. 27, 2004, at A03. Others are concerned that the Court does not yet have the five votes necessary to reach that conclusion and fear that *Simmons* will be the vehicle for the Court to reject arguments for extending to juveniles the Court's 2002 rationale in *Atkins v. Virginia*, 536 U.S. 304 (2002) (exempting mentally retarded persons from the death penalty). *Id.*; see also Tony Mauro, *Court Opens Execution Issue*, 27 LEGAL TIMES, Feb. 2, 2004, available at <http://www.law.com/jsp/article.jsp?id=1074819338880>.

10. Napoleon Beazley was executed May 28, 2002; T.J. Jones, August 8, 2002; Toronto Patterson, August 28, 2002; and Scott Allen Hain, April 3, 2003. See VICTOR L. STREIB, THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY 1, 1973 – DECEMBER 31, 2004, ISSUE #76 (2005), available at <http://www.law.onu.edu/faculty/streib/documents/JuvDeathDec2004.pdf> (last modified Jan. 31, 2005).

11. Beazley v. Johnson, 242 F.3d 248 (5th Cir. 2001) (two co-defendants; incident began as driveway carjacking); Hain v. State, 852 P.2d 744 (Okla. Crim. App. 1993) (one co-defendant; incident began as robbery of couple sitting in car outside bar); Jones v. State, 944 S.W.2d 642 (Tex. Crim. App. 1996) (three co-defendants; incident began as carjacking); Patterson v. Johnson, No. 3:99cv808-G, 2001 U.S. Dist. LEXIS 14159 (N.D. Tex. May 14, 2001) (Patterson claimed he learned of murders from two Jamaican men, who forced him to commit robbery out of which murders arose, but no one else was arrested or tried).

12. *Stanford*, 492 U.S. at 365, 366 (seventeen-year-old Stanford; sixteen-year-old Heath Wilkins). Wilkins' capital murder conviction and death sentence were reversed in 1996. Wilkins

received the death penalty was with at least one of his friends when a robbery went bad.¹³

These cases illustrate what Zimring calls the "well-known secret" of youth crime: "adolescents commit crimes, as they live their lives, in groups."¹⁴ Not one to mince words, Zimring goes even further, stating: "No fact of adolescent criminality is more important than what sociologists call its group context."¹⁵ Yet one can search the law, both criminal and juvenile, for some recognition of this fact, and will come up empty. Zimring explains this anomaly:

It is sometimes possible both to know something important and to ignore that knowledge. To do this is to generate the phenomenon of the well-known secret, an obvious fact that we ignore. When Edgar Allen Poe suggested [in *The Purloined Letter*] that the best location to hide something is the most obvious place, he was teaching applied law and social science.¹⁶

Would Napoleon Beazley, Scott Allen Hain, T.J. Jones, or Toronto Patterson have committed the crimes for which they were executed if they had been alone? We will never know, not just because they cannot tell us what happened, but because there are no clear answers to questions so complex as what causes one to kill. However, understanding the role in juvenile homicide of peer group influence and its offshoot, group offending, is essential to understanding youth violence and how best to address it in our legal system.

This article attempts to aid that understanding. Taking as its sample group the present population of seventy-two juvenile offenders on death row,¹⁷ the article examines the roles of peer influence and group offend-

v. Bowersox, 933 F. Supp. 1496 (W.D. Mo. 1996) (invalidating waiver of counsel and guilty plea), *aff'd*, 145 F.3d 1006 (8th Cir. 1998), *cert. denied*, 525 U.S. 1094 (1999). The Governor of Kentucky announced his plans to commute Stanford's sentence to life without the possibility of parole on June 18, 2003. Andrew Wolfson, *Patton Pardons Four in Election Case and Will Commute Death Sentence*, THE COURIER-JOURNAL (Louisville), June 19, 2003, at 1A. Governor Patton did commute the sentence to life without parole on December 8, 2003. See American Bar Association, *Juvenile Death Penalty Cases*, at <http://www.abanet.org/crimjust/juvjus/juvvcases.html#watch> (last visited Jan. 22, 2005).

13. *Stanford*, 492 U.S. at 365 (Stanford was with one other teenager); *Wilkins*, 933 F. Supp. at 1501 (Wilkins was with three other teens). William Wayne Thompson, a fifteen-year-old whose death sentence was reversed by the Supreme Court in 1988, had three accomplices, all adults. *Thompson*, 487 U.S. at 819, 838.

14. Zimring, *supra* note 1, at 867.

15. FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* 80 (1998).

16. Zimring, *supra* note 1, at 867.

17. I decided to study death row inmates not because their status on death row might be of special analytical significance or because they are different in some legally or factually relevant fashion from their counterparts serving life sentences or terms of years, but for the simple pragmatic reason that it was a more manageable group to study. Studying those who have received death sentences also presented a greater likelihood of finding the factual details necessary

ing in the murders committed by those now awaiting execution. Based on that examination, the article suggests certain reforms in the capital trials of juveniles. To set the stage, the article first marshals the evidence supporting the "group crime" theory of youth violence and then discusses the critical role of peers in adolescent development and group offending of a violent nature.

I. GROUP OFFENDING

A. *Group Offending in General*

The most consistently reported feature of teenage criminality is its group nature. "The cold criminological facts are these: The teen years are characterized by what has long been called group offending."¹⁸ The high rate of group involvement in violence during adolescence sets teenagers apart from adults and provides a distinctly adolescent developmental context for examining youth violence. Over the years, popular culture has presented countless images of teenagers acting out in groups of their peers—in the feature films *West Side Story*¹⁹ and *Boyz N the Hood*,²⁰ to name just a couple, and in popular novels like William Golding's *Lord of the Flies*²¹ and S.E. Hinton's *The Outsiders*²² and *Rumble Fish*.²³

As with popular images of rowdy teens, social scientists studying delinquent and criminal behavior present differing views of what a "group" is.²⁴ Criminologists like Reiss traditionally consider the fact of multiple offenders sufficient to constitute an offending "group,"²⁵ whereas sociologists and social psychologists would require additional elements, including an established role structure and shared identity, norms, and goals.²⁶ These varying understandings of what constitutes a

for this work because of the additional legal procedures, including presentation of aggravating and mitigating circumstances at sentencing, applicable in capital cases.

18. ZIMRING, *supra* note 15, at 79. But see Delbert S. Elliott & Scott Menard, *Delinquent Friends and Delinquent Behavior: Temporal and Developmental Patterns*, in DELINQUENCY AND CRIME: CURRENT THEORIES 28, 31 (J. David Hawkins ed., 1996) (calling "assertions that delinquency is group behavior 'overstated' and finding the age, race, and gender of the offender and the nature of the offense better predictors of group offending). Elliott and Menard's critique of group offending theory is itself a bit overstated; even their own work supports the role of peer influence in delinquency. See *infra* notes 46, 47 and accompanying text.

19. WEST SIDE STORY (MGM/UA 1961).

20. BOYZ N THE HOOD (Columbia/Tristar 1991).

21. WILLIAM GOLDING, LORD OF THE FLIES (1954).

22. S.E. HINTON, THE OUTSIDERS (Penguin Putnam Inc. 2003) (1967).

23. S.E. HINTON, RUMBLE FISH (1975).

24. Albert J. Reiss, Jr., *Co-Offender Influences on Criminal Careers*, in 2 CRIMINAL CAREERS AND "CAREER CRIMINALS" 121, 122 (Alfred Blumstein et al. eds., 1986).

25. *Id.* at 123.

26. MARK WARR, COMPANIONS IN CRIME: THE SOCIAL ASPECTS OF CRIMINAL CONDUCT 5

group may account for much of the literature that treats delinquent groups as synonymous with gangs.²⁷ The two are quite different, however. Gangs are typically characterized by their territorial organization, well-defined and powerful leadership, and involvement in a wide array of activities, and are best understood as a highly-organized subset of the larger category of "groups."²⁸ In fact, most juveniles who engage in group offending are not members of gangs.²⁹ As early as 1929, research studies conducted by Shaw and his colleagues revealed that most delinquent acts were not committed by such highly-structured and well-organized groups as gangs.³⁰ Instead, juveniles tended to participate in social networks made up of two to four individuals with little structure and no clear leadership.³¹

Studies dating back more than eighty years document the fact of group offending among juveniles.³² Breckinridge and Abbott concluded in their 1917 study that most juveniles commit delinquent offenses with at least one other person and that "even most youths regarded as lone offenders occasionally engage in delinquency with a companion."³³ In 1931, Shaw and McKay conducted a study for the first National Crime

(2002) (citing GEORGE A. THEODORSON & ACHILLES G. THEODORSON, *A MODERN DICTIONARY OF CRIMINOLOGY* (1979)).

27. See, e.g., W.B. MILLER, *VIOLENCE BY YOUTH GANGS AND YOUTH GROUPS AS A CRIME PROBLEM IN MAJOR AMERICAN CITIES* 9 (1975).

28. *Id.*

29. Merry Morash, *Gangs, Groups and Delinquency*, 23 *BRIT. J. CRIMINOLOGY* 309 (1983); Malcolm W. Klein & Lois Y. Crawford, *Groups, Gangs and Cohesiveness*, 4 *J. RESEARCH CRIME & DELINQUENCY* 142 (1967); WARR, *supra* note 26, at 5. Sociologist Mark Warr recently noted that the point at which a group becomes a gang "has been debated for decades in the gang literature with no sign of imminent closure. Still, there is general agreement, supported by empirical evidence, that gangs constitute only a small fraction of delinquent groups." *Id.* (citations omitted).

30. Clifford R. Shaw & Henry D. McKay, *Male Juvenile Delinquency as Group Behavior*, in *REPORT ON THE CAUSES OF CRIME* 191 (II Wickersham Comm'n Rep. No. 13, 1931), reprinted as Chapter 17 in *THE SOCIAL FABRIC OF THE METROPOLIS* 252 (James Short ed., 1971) [hereinafter *Male Juvenile*]; Clifford R. Shaw & E.D. Meyer, *The Juvenile Delinquent*, in *THE ILLINOIS CRIME SURVEY* (1929) [hereinafter *Juvenile Delinquent*].

31. Reiss, *supra* note 24, at 123 (treating group offending "from the perspective of social networks made up of pairs, triads, and constellations of four or more persons"), citing Paul Lerman, *Gangs, Networks, and Subcultural Delinquency*, 73 *AMER. J. SOCIOLOGY* 63, 63 (1967); Lewis Yablonsky, *The Delinquent Gang As a Near-Group*, 7 *SOC. PROBLEMS* 108 (1959) (referring to more loosely formed aggregations of delinquent youth as "near-groups," in which leadership is unclear and turnover is fairly high). Studies in 1929 and 1931 estimated from court samples a modal size of two or three participants. *Male Juvenile*, *supra* note 30, at 259; *Juvenile Delinquent*, *supra* note 30. A 1970 study found two to be the modal size and groups of four or larger relatively uncommon after age fifteen. ROGER HOOD & RICHARD SPARKS, *KEY ISSUES IN CRIMINOLOGY* 87-88 (1970).

32. See *infra* notes 33-36 and accompanying text.

33. Reiss, *supra* note 24, at 126 (citing SOPHONISBA P. BRECKINRIDGE & EDITH ABBOTT, *THE DELINQUENT CHILD AND THE HOME* (1917)).

Commission entitled *Male Juvenile Delinquency as Group Behavior*, in which eighty percent of boys accused of delinquent acts were alleged to have had at least one co-participant.³⁴ Shaw and McKay's results confirmed a 1923 study that found group involvement by ninety percent of juvenile offenders charged with theft³⁵ and a 1929 study by Shaw that found, based on estimates in juvenile court samples, fewer than twenty percent of juvenile offenders acted alone.³⁶ As powerful as the early studies were, they did not significantly influence juvenile justice policy, causing Zimring to note in 1981 "a tendency to revert to individualistic models when discussing serious [juvenile] crime."³⁷

Even so, studies in the 1970s and early 1980s revealed that, like their less violent predecessors, juveniles were committing even the most serious offenses in groups.³⁸ Data from the National Crime Panel in 1973 showed a striking difference between robberies committed by those under and over the age of twenty-one: two-thirds of those under twenty-one acted with others, compared with only slightly over one-third of those twenty-one and older.³⁹ A 1979 Rand Corporation study of a sample of armed robbery arrests, which were referred to the juvenile court in Los Angeles, found more than eighty percent of the incidents attributable to group offenders in the under-eighteen population.⁴⁰ Similarly, a 1981 Vera Institute of Justice analysis of a sample of delinquency referrals to New York's Family Court⁴¹ reported that juveniles acted with others in nearly ninety percent of all robberies and burglaries, and in nearly eighty percent of sodomies and homicides.⁴² Studies as recent as 1996 report consistently high "group violation rates" among juveniles; in one study only two of twelve offenses had group violation rates below fifty percent.⁴³ Because most data are derived from reports

34. *Male Juvenile*, *supra* note 30, at 255. Shaw and McKay's study group was the entire population of boys who appeared in the juvenile court of Cook County (Chicago), Illinois on charges of delinquency in 1928. *Id.* at 253-54.

35. *Id.* at 256, n.2.

36. *Juvenile Delinquent*, *supra* note 30.

37. Zimring, *supra* note 1, at 869.

38. *Id.* at 869-72.

39. *Id.* at 870 (citing National Crime Panel data, provided by Wesley Skogan, Northwestern University (64% for under-twenty-one group; 39% for twenty-one and over)).

40. *Id.* at 872 (citing Rand Corporation, *Juvenile Record Study* (1979) (only 18% acted alone)).

41. *Id.* at 870-71. In the New York system, offenders under age sixteen (not eighteen, as in most jurisdictions) are eligible for family court processing and disposition. *Id.* at 870, 872.

42. *Id.* at 871 (citing Vera Institute of Justice, *Family Court Disposition Study* (1981) (unpublished draft) (gun robbery, 90%; other robbery, 87%; burglary, 86%; sodomy, 77%; homicide, 78%)). Only rape (50%) and assault (60%) had percentages inconsistent with the 80% group offender norm. *Id.*

43. Mark Warr, *Organization and Instigation in Delinquent Groups*, 34 *CRIMINOLOGY* 11, 20-21 (1996).

of incidents, not total numbers of offenders, even the reported high percentages of group offending are likely understated.⁴⁴ For example, one study found that about one-half of all burglaries in a particular city over a period of eight years were committed by juveniles in groups, but those burglaries involved two-thirds of all juvenile offenders.⁴⁵

Data on age progression in group offending vary marginally from study to study, but the general trend is for the proportion of juvenile offending in peer groups to increase up to age fifteen or sixteen, hold steady until the late teens or early twenties, and then decline.⁴⁶ Moreover, as youths move from age seventeen or eighteen onward, their ties to peers lessen,⁴⁷ and those who were involved in only group offending in their teenage years tend not to offend as adults.⁴⁸ Thus, the criminal behavior of group-only teens appears to be dominated more by group solidarity than by individual motivation to offend.⁴⁹

Jeffrey Fagan, Professor of Law at Columbia Law School, observes that a number of mechanisms underlie juveniles' desistance from crime as they enter adulthood: "The assumption of adult social roles, with their accompanying increase both in social control and stakes in conformity, provides one explanation for desistance. Changes in the daily routines of adult life decrease the influence of peers while substituting the informal control of adult social networks."⁵⁰ In addition, improvements in decision-making abilities and judgment as a result of changing

44. WARR, *supra* note 26, at 33.

45. Reiss, *supra* note 24, at 123.

46. Elliott & Menard, *supra* note 18, at 45 (basing their statistics on the National Youth Survey, conducted 1976-80 and 1983, of self-reporting youth, and finding delinquent peer group membership increasing up to age fifteen, remaining stable until age eighteen, and declining from age nineteen on); HOOD & SPARKS, *supra* note 31, at 87-88 (finding that a majority of offenders have accomplices until their early twenties, after which majority commit offenses alone).

47. Elliott & Menard, *supra* note 18, at 45.

48. Reiss, *supra* note 24, at 148. Studies of desistance from criminal 'careers' show that delinquents who continued their course of crime after their teens were more likely to commit their offenses alone, while those labeled as 'temporary delinquents' (having no criminal activity after age seventeen) were involved only in group offending. *Id.* (citing B. J. Knight & D. J. West, *Temporary and Continuing Delinquency*, 15 BRIT. J. CRIMINOLOGY 43, 45 (1975)); see also Elliott & Menard, *supra* note 18, at 48 (explaining that by age twenty-two to twenty-four, two-thirds of the sample from the National Youth Survey were nonoffenders of crimes that would be criminal if committed by an adult and, thus, could not be accounted for by changes associated with status offenses).

49. Knight & West, *supra* note 48, at 45.

50. Jeffrey Fagan, *This Will Hurt Me More Than It Hurts You: Social and Legal Consequences of Criminalizing Delinquency*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 31 (2002) (citing Jeffrey Fagan & Deanna L. Wilkinson, *Guns, Youth and Social Identity*, in YOUTH VIOLENCE 373 (Michael Tonry & Mark H. Moore eds., 1998)) [hereinafter *Criminalizing Delinquency*]; Jeffrey Fagan & Deanna L. Wilkinson, *Social Contexts and Functions of Adolescent Violence*, in VIOLENCE IN AMERICAN SCHOOLS 55 (Beatrix Hamburg et al. eds., 1998) [hereinafter *Adolescent Violence*].

perceptions of risk and of the temporal dimensions of decision-making reduce the need to go along with offending peers.⁵¹ The shift from group offending to lone offending or to no offending at all in adulthood underscores the group nature of juvenile offending for crimes in general.

B. *Group Homicide*

Like criminality in general, homicide data reveal several distinct patterns that set juveniles apart from adults. Those discussed briefly here are age, gender, and the relationship between the offender and the victim.

First, although adult homicide is generally a lone-offender crime,⁵² juvenile homicide is at least as likely to be committed by a group as by solo actors. For example, between 1980 and 1999, multiple offenders committed a full fifty percent of all juvenile homicides,⁵³ more than twice the proportion of adults who acted with others.⁵⁴ Zimring concluded in his 1984 analysis of youth homicide in New York City that "[p]atterns of homicide in New York differ from killings by adults: the younger the offender, the greater the difference."⁵⁵ Even though homicide is rare among young offenders, the younger the homicide offender, the more likely he is to have killed with others and to have done so while engaged in another crime, such as burglary.⁵⁶ Zimring's study also reported that between the ages of fourteen and sixteen, groups commit nearly fifty percent of homicides; thereafter, the proportion of group offenses declines—to thirty percent for seventeen-year-olds and twenty-five percent for eighteen-year-olds.⁵⁷ A similar report of all juvenile homicides in New York State revealed that, in the few murders committed by children under twelve, the child acted alone; but among thirteen- to fifteen-year-olds, sixty percent of the murders were by multiple offenders, and among those sixteen to nineteen, fifty percent were group

51. *Criminalizing Delinquency*, *supra* note 50, at 31.

52. Franklin E. Zimring, *Youth Homicide in New York: A Preliminary Analysis*, 13 J. LEGAL STUD. 81, 91 (1984).

53. Howard N. Snyder, *Law Enforcement and Juvenile Crime*, JUVENILE OFFENDERS AND VICTIMS NATIONAL REPORT SERIES BULLETIN 1, at 8 (U.S. Dep't of Justice Office of Juvenile Justice & Delinquency Prevention, 2001). The Bulletin is published in the intervening years between the quadrennial publication of the Juvenile Offenders and Victims National Report Series by the U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention.

54. ZIMRING, *supra* note 15, at 152.

55. Zimring, *supra* note 1, at 89.

56. *Id.* at 91; see also John S. Rowley et al., *Juvenile Homicide: The Need for an Interdisciplinary Approach*, 5 BEHAV. SCI. & L. 3, 7 (1987) ("Intrafamilial homicides in this sample [of 787 juvenile homicides] were almost never incidental to theft offenses. Yet 6% of the acquaintance homicides and 58% of the stranger homicides were incidental to theft offenses.").

57. Zimring, *supra* note 1, at 91-92.

crimes.⁵⁸

Among the age-related findings, perhaps the most remarkable is the finding that, for homicide in the 1980s and 1990s, more than half—sixty percent—of the juveniles' co-offenders were adults.⁵⁹ This statistic supports the suggestion by one writer of a pattern of homicidal violence in which:

[O]ne actor, probably the older and/or more violent one, initiates the violence against the victim and then induces the other actor, the younger and/or less violent one, to join in the violence against the victim. The atrocious nature of these crimes further suggests that the joint involvement of the perpetrators works to create a situation in which the juveniles are unable to stop with simply killing the victim, but instead go on to inflict gratuitous and especially heinous violence. Specifically, it may be that the violence of one perpetrator feeds upon—or is somehow stimulated by—that of the other and thereby escalates to the point of atrocity.⁶⁰

The latter point is also consistent with reports of the particularly heinous nature of juvenile killing, which other researchers have attributed to the lack of impulse control prevalent during adolescence.⁶¹ Violence feeding upon violence may also explain what others have described as the "involuntary" repetition of acts such as stabbing or pulling the trigger, which accounts for murders that appear to be, but in actuality are not, motivated by a person's particularly cruel and depraved nature.⁶²

Second, homicide by multiple offenders is both gender and victim specific. Most girls kill alone, while boys acting together account for more than half of all juvenile murders.⁶³ Multiple offenders kill more than two-thirds of the strangers killed by juveniles and more than forty percent of acquaintances, but less than twenty percent of family members.⁶⁴ It is not surprising, therefore, that when the victim of a multiple-offender homicide is a family member, girls are the offenders over ninety percent of the time.⁶⁵

58. CHARLES PATRICK EWING, *WHEN CHILDREN KILL: THE DYNAMICS OF JUVENILE HOMICIDE* 11 (1990) (citing NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, OFFICE OF JUSTICE SYSTEM ANALYSIS, *NEW YORK STATE HOMICIDE 1987* (1988)).

59. Snyder, *supra* note 53, at 18.

60. Ewing, *supra* note 58, at 55.

61. See *infra* notes 78-80 and accompanying text.

62. See, e.g., Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26, 27 (2000), available at <http://www.abanet.org/crimjust/juvjus/cjmimmculcom.html>.

63. See *supra* notes 53, 58 and accompanying text.

64. Rowley et al., *supra* note 56, at 8 (68.6% strangers; 42.1% acquaintances); see also EWING, *supra* note 58, at 10.

65. Rowley et al., *supra* note 56, at 7-8 (finding girls the offenders in twenty of the twenty-one intrafamilial homicides committed by multiple offenders).

Third, a significant correlation exists between the gender of the offender and the relationship of the offender to the victim. Most girls rarely kill a stranger, but family members and acquaintances are nearly equal targets.⁶⁶ Like girls, boys kill acquaintances nearly half of the time, but they kill family members less than a quarter as often as girls do, and their rate of killing strangers is over five times that of girls.⁶⁷ Overall, the vast majority of juvenile boys kill acquaintances or strangers, not family members. Rowley and his colleagues found, in a study of 787 juvenile boys, that only eight percent had killed parents or step-parents, and less than ten percent had killed other family members.⁶⁸

These data have their roots in adolescent development and the characteristics that set adolescence apart from childhood and adulthood. The following section explores the most salient of those characteristics.

II. ADOLESCENCE AND THE PRIMACY OF PEERS

Adolescents, by definition, are works in progress. For decades, social scientists have studied and documented the distinct period of life called "adolescence." Students of developmental psychology have long known that adolescents' thought processes undergo a maturation process that begins in childhood and continues into adulthood. In recent years, the "hard" sciences have joined their "softer" colleagues, reporting for the first time scientific evidence of the long maturation process of the brain⁶⁹ that buttresses the work of developmental psychologists. Neurophysiological research reveals that some parts of the brain, notably those that govern the "executive functions" of the brain, such as risk assessment, judgment, and decision-making, continue to develop into the late teens and early twenties.⁷⁰ Those findings may explain the fact

66. *Id.* at 9 (7%, strangers; 44%, family members; 49%, acquaintances).

67. *Id.* (49.20%, acquaintances; 13.83%, family members; and 36.97%, strangers).

68. *Id.* at 7.

69. See Sarah Durston et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?*, 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1012, 1012 (2001) (reviewing results of MRI studies of brain development from childhood through adolescence); MICHAEL S. GAZZANIGA ET AL., *COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND* 20-21 (2d ed. 2002); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROCEEDINGS NAT'L ACAD. SCIENCE 8174, 8177 (2004) (asserting that adolescent behavioral immaturity mirrors the anatomical immaturity of their brains); Elizabeth R. Sowell et al., *Development of Cortical and Subcortical Brain Structures in Childhood and Adolescence: A Structural MRI Study*, 44 DEVELOPMENTAL MED. & CHILD NEUROLOGY 4 (2002) (demonstrating that MRI studies show how a particular brain operates over time); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819, 8826 (2001).

70. E.g., DANIEL J. SIEGEL, *THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL RESPONSE* 10-11 (1999) (discussing the general processes of the developing mind); Elizabeth R. Sowell et al., *In-Vivo Evidence for Post-Adolescent Brain Maturation in*

that, for the most part, the intellectual and social development of today's sixteen-year-old are no greater than for his ancestor in 1900, even though the sixteen-year-old of today typically has achieved more in terms of formal education than his counterpart at the turn of the twentieth century. It is no doubt true, as Zimring has commented, that "[k]ids have come further, but they have further to go."⁷¹

A number of attributes continue to set even older adolescents apart from adults.⁷² For example, a critical life skill that undergoes intensive development throughout adolescence is the ability to make good decisions. Like most other activities in life, decision-making is a learned skill that improves with use, and compared to adults, adolescents have less knowledge and experience to draw on in making decisions.⁷³ Moreover, adolescents do not think ahead⁷⁴ and are prone to make decisions based on their preference for short-term results,⁷⁵ rather than to look ahead to long-term consequences.⁷⁶ Adolescents tend to focus on the present and to discount risks given great weight by adults, especially when they are under emotional stress or when there is no obvious solution to a problem.⁷⁷ Thus, "[i]n situations where adults see several choices, adolescents may see only one."⁷⁸ Similarly, lack of impulse control is normal in adolescence. Like other traits common to adolescents, however, teenage impulsivity does not predict poor judgment or psychopathy in adulthood.⁷⁹ In fact, adolescent offenses that appear to the casual observer to be calculated acts of revenge are often impulsive and moralistic in origin.⁸⁰ In one study, not a single adolescent who was involved in a shooting could remember deciding to shoot and pulling the

Frontal and Striatal Regions, 2 NATURE NEUROSCIENCE 859, 860 (1999); see also GAZZANIGA ET AL., *supra* note 69, at 75, 547.

71. FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* 19 (1982).

72. E.g., Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decisionmaking*, 20 LAW & HUM. BEHAV. 249, 267 (1996).

73. Elizabeth Scott, *Criminal Responsibility in Adolescence: Lessons from Developmental Psychology*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 294 (Thomas Grisso & Robert G. Schwartz eds., 2000).

74. Beyer, *supra* note 62, at 33.

75. *Id.* at 33; see also Gerald P. Koocher, *Different Lenses: Psycho-Legal Perspectives on Children's Rights*, 16 NOVA L. REV. 711, 716 (1995).

76. Beyer, *supra* note 62, at 27.

77. Daniel Seagrave & Thomas Grisso, *Adolescent Development and the Measurement of Juvenile Psychopathy*, 26 LAW & HUM. BEHAV. 219, 229 (2002) (citing S. Small et al., *Adolescents' Perceptions of the Costs and Benefits of Engaging in Health-Compromising Behaviors*, 22 J. YOUTH & ADOLESCENCE 73-87 (1993)); Steinberg & Cauffman, *supra* note 72, at 258-61.

78. Beyer, *supra* note 62, at 27.

79. *Id.*

80. *Id.* at 33 (maintaining that juveniles have a high moral sense and are intolerant of "anything that seems unfair").

trigger; instead, they all said that the gun just "went off."⁸¹

The effects of another adolescent attribute, susceptibility to peer influence, however, overshadow other distinguishing characteristics of adolescence.⁸² The intensity with which adolescents feel pressure to conform with their peers exacerbates well-documented features of youth such as poor decision-making and impulsivity, and often leads adolescents to engage in behaviors they can resist when alone and will normally desist from as they reach adulthood. As significant as poor decision-making and youthful impulsivity are on their own, when accompanied by the powerful peer pressure characteristic of youth, they can turn a purely innocent event into a newspaper headline in a heartbeat.⁸³

Adolescence, and male adolescence in particular, is characterized by the increasing substitution of peer relationships and control for parental and other familial and organizational influences.⁸⁴ Peers dominate the daily social interaction among adolescents, and teens report that they "feel most happy, alert, and intrinsically motivated" when in the company of their peers.⁸⁵ It is not surprising, then, that "[p]eers are the most critical audience with whom behaviors are learned, scripted, practiced, and refined, while peers confer status and identity by serving as arbiters

81. *Id.* at 27.

82. Social scientists have studied the role of peer influence in adolescent behavior since the early twentieth century. The most famous theory of peer influence, Sutherland's theory of differential association, posited that, like all human behavior, criminal behavior is learned from others. See EDWIN H. SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* (4th ed. 1947). In the 1960s, Robert Burgess and Ronald Akers restated Sutherland's theory in the terminology of behavioral psychology, applying B.F. Skinner's concept of operant conditioning and its reinforcement system of perceived rewards and punishments to develop their social learning theory. See Robert Burgess & Ronald Akers, *A Differential Association-Reinforcement Theory of Criminal Behavior*, 14 *Soc. PROBLEMS* 128 (1966). Other theories, however, have tended to dominate discussions of adolescent criminality in the succeeding decades. See *infra* notes 88-96.

83. These observations are not the domain of social scientists alone. Justice Sandra Day O'Connor, writing for the majority in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), acknowledged the power of peer influence: "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by emotion or peer pressure than is an adult." *Id.* at 835 (ruling that the Constitution prohibits the execution of anyone under the age of sixteen).

84. Reiss, *supra* note 24, at 150. Although in large part adolescents are attracted to groups of their peers for social and emotional support, peer relationships may perform totally different functions. For example, among Latino youth, the almost constant threat of violence and criminal victimization drives individuals into group membership for protection, even more than for purely social reasons. Edward Pabon et al., *Clarifying Peer Relations and Delinquency*, 24 *YOUTH & SOC'Y* 149, 160 (1992).

85. WARR, *supra* note 26, at 13 (citing MIHALY CSIKSZENTMIHALYI & REED LARSON, *BEING ADOLESCENT: CONFLICT AND GROWTH IN THE TEENAGE YEARS* 71 (1984) (accounting in detail how adolescents in a community outside Chicago spend their waking hours, reporting that teens spend a full half of the week with peers and that the major competitor for their time was not time with adults, but time alone)).

of social behavior.”⁸⁶ The compulsion to gain acceptance by peers compounds the already diminished ability of adolescents to make good decisions and to resist negative impulses, and thus creates fertile ground for group crime. As Zimring notes, “[m]ost adolescent decisions to break the law or not take place on a social stage, where the immediate pressure of peers is the real motive for most teenage crime.”⁸⁷

Peer influence over such moral judgments as whether to break the law may be particularly compelling because adolescence is such a critical time for moral development.⁸⁸ Warr comments that as their life experience increases, young people ordinarily come to be aware of the intergroup relativism of moral codes. They recognize that what is permissible in one group (with their cousins, classmates, church friends, or Saturday night friends) may not be appropriate in another. The result is an expanding appreciation of the relativity of standards of conduct.⁸⁹

A teen may well understand the difference between right and wrong and may even have developed the ability to keep his impulses in check, “but resisting temptation while alone is a different task from resisting the pressure to commit an offense when among adolescent peers who wish to misbehave.”⁹⁰ Thus, “a necessary condition for an adolescent to stay law-abiding is the ability to deflect or resist peer pressure. Many youths lack this critical skill for a long time.”⁹¹ Peer conformity plays such a powerful role in adolescent decision-making that it renders teens much less able than adults to make decisions that are the product of their own independent thinking.⁹²

Moreover, the intensity of teenagers’ desire for peer approval, coupled with their short-term orientation, causes them to take risks which adults would anticipate and avoid. For example, teens who carry guns often do not expect ever to use the gun or to injure anyone. Instead, the typical gun-toting sixteen-year-old just wants to scare someone or “look

86. *Criminalizing Delinquency*, *supra* note 50, at 31 n.145; *see also* WARR, *supra* note 26, at 23-26. Although popular culture generally focuses on peer influence as a negative behavioral force, peers can also have beneficial effects on adolescent behavior. *Id.*

87. *See* ZIMRING, *supra* note 15, at 78.

88. WARR, *supra* note 26, at 66.

89. *Id.* at 66-67 (citation omitted). As youths “realize the moral relativism of the world, [they] may view it as license to engage in any conduct, and may revel in the opportunity to create, together with their friends, their own moral universe, one free from the strictures of parents, school, and other authorities.” *Id.* at 67 (emphasis in original).

90. ZIMRING, *supra* note 15, at 78.

91. *Id.*

92. Beyer, *supra* note 62, at 33; *see also* Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 9, 23 (Thomas Grisso & Robert G. Schwartz eds., 2000) (describing adolescence as a “period of tremendous malleability, during which experiences in the family, peer group, school, and other settings have a great deal of influence over the course of development”).

bigger.”⁹³ Working with teens and preteens can drive home the reality of such youthful thinking. When a slight, underdeveloped twelve-year-old client of the Juvenile Justice Clinic in which I teach was arrested and charged with unlawful possession of a gun, he was convincing in his explanation that he needed the gun to get some “respect” in his neighborhood. Without the gun, he was just a kid, and a small one at that. With it, at least in his mind, he was a force to be reckoned with.

Even when adolescents offend alone, peer influence can play a significant role in the commission of the offense. Many who act alone are heavily influenced by the attitudes of their peers and the status they stand to gain (or lose) by engaging in a lone criminal act. Evidence of this phenomenon can be found in the common recounting of the criminal behavior, in all its details and perhaps more, to one’s friends.⁹⁴ Indeed, certain behaviors commonly engaged in by adolescents to impress their peers either before or after the crime, if exhibited by adults, would present a textbook profile of a psychopath.⁹⁵

Steinberg describes psychopathy as:

actually composed of two related, but independent components. Factor I reflects a cluster of affective and interpersonal features best described as callous emotional detachment (e.g., glibness, egocentricity, superficial charm, and shallow affect), whereas Factor II repre-

93. Beyer, *supra* note 62, at 27.

94. See MARTIN GOLD, *DELINQUENT BEHAVIOR IN AN AMERICAN CITY* (1970) (reporting that a sizable proportion of adolescent perpetrators of solo offenses quickly recounted the incident to their friends).

95. It is important here to distinguish between two similar words with very different meanings: psychopathy and psychopathology. “Psychopathology refers to any sort of psychological disorder that causes distress either for the individual or those in the individual’s life.” Laurence Steinberg, *The Juvenile Psychopath: Fads, Fiction, and Facts*, Invited Lecture at the National Institute for Justice, Perspectives on Crime and Justice, Washington, D.C. 2 (Mar. 20, 2001), at <http://www.ncjrs.org/pdffiles1/nij/187100.pdf>. Common forms of psychopathology include depression, schizophrenia, attention deficit hyperactivity disorder, and alcohol dependency. *Id.* Psychopathy, in contrast, refers to a very specific and distinctive type of psychopathology. It is “a type of personality disorder defined chiefly by a combination of antisocial behavior and callousness and emotional detachment.” *Id.* at 3. It includes a pervasive pattern of disregard for and violation of the rights of others, as indicated by three (or more) of the following: 1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest; 2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure; 3) impulsivity or failure to plan ahead; 4) irritability and aggressiveness, as indicated by repeated physical fights or assaults; 5) reckless disregard for safety of self or others; 6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations; 7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another; 8) an individual at least eighteen years old; 9) evidence of conduct disorder with onset before age fifteen years; and 10) occurrence of antisocial behavior not exclusively during the course of schizophrenia or a manic episode. See AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 702 (4th ed. 2000) (referring to psychopathy as “antisocial personality disorder”).

sents the chronic unstable and antisocial lifestyle (e.g., irresponsibility, proneness to boredom, impulsivity, and criminality) associated with psychopathic individuals.⁹⁶

Steinberg's Factor I could as aptly describe adolescence as psychopathy. Parallels between adult psychopathy and transient adolescent developmental characteristics include such behaviors as grandiosity, a lack of empathy, a lack of guilt or remorse, and a denial of or a refusal to accept responsibility for one's misdeeds.⁹⁷ The potential conflation of adult psychopathy and normative adolescence is complicated further by the fact that, as adolescents work toward becoming autonomous individuals and establishing their own unique identities, they may "try on" different personalities or adopt an oppositional stance toward authority.⁹⁸ "As a consequence, an adolescent may present an insincere and seemingly choreographed social façade . . . which can be misinterpreted as the manipulative, false, and shallow features of the psychopathic offender."⁹⁹

Because such behaviors are so common in adolescence, Seagrave and Grisso sound a caution against misidentifying adolescents as "psychopaths in the making." They warn of the risk of misdiagnosing as psychopathic "a transient feature of a developmental process that will

96. Steinberg, *supra* note 95, at 3.

97. Seagrave & Grisso, *supra* note 77, at 226. The case of Napoleon Beazley is instructive. Although there was no evidence that Napoleon suffered from any mental disturbance, a psychologist who testified for the prosecution suggested that he was grandiose, self-indulgent, and preoccupied with death, all of which can be normal for adolescents. The error in interpreting Napoleon's adolescent behavior was compounded by the jury's use of that same evidence to find the aggravating circumstance of future dangerousness. The psychologist had neither interviewed Napoleon nor reviewed his life history, and he admitted that he based his opinion on statements made about Napoleon by his co-defendants, the Coleman brothers, statements that they have since recanted. Texas Execution Information Center, Execution Reports, Napoleon Beazley, at <http://www.txexecutions.org/reports/270.asp> (last visited Jan. 22, 2005).

98. Seagrave & Grisso, *supra* note 77, at 226.

99. *Id.* But see Paul J. Frick, *Juvenile Psychopathy from a Developmental Perspective: Implications for Construct Development and Use in Forensic Assessments*, 26 LAW & HUM. BEHAV. 247, 248-49 (2002) (questioning Seagrave and Grisso's isolation of psychopathy as uniquely problematic because of overlap between normative features of adolescence and psychopathy and arguing that such similarities exist in adolescent psychopathology in general, and the key is determining what went awry); Stephen D. Hart et al., *Commentary on Seagrave and Grisso: Impressions of the State of the Art*, 26 LAW & HUM. BEHAV. 241, 242 (2002) (criticizing Seagrave and Grisso for not going far enough; because psychopathy is a personality disorder and personality does not crystallize until late adolescence or early adulthood, juvenile psychopathy may not even exist—citing DSM-IV's requirement that a person be eighteen or older before a diagnosis of "antisocial personality disorder" is made). Although these critiques may be accurate, they miss the point. The power of Seagrave and Grisso's observations is that certain behaviors, while abnormal to the point of psychopathy for adults, are quite normal during the adolescent years, and that both clinicians and theorists must take great care in distinguishing between the two so as not to label and treat as abnormal adolescents who are simply acting their age.

not be characteristic of the youth as he or she reaches adult maturity.”¹⁰⁰ The seminal work of Cleckley, which provides the basis for the modern concept of psychopathy, supports Seagrave and Grisso’s concern:

Confused manifestations of revolt or self-expression are, as everyone knows, more likely to produce unacceptable behavior during childhood and adolescence than in adult life. Sometimes persistent traits and tendencies of this sort and inadequate emotional responses indicate the picture of the psychopath early in his career. Sometimes, however, the child or the adolescent will for a while behave in a way that would seem scarcely possible to anyone but the true psychopath and later will change, becoming a normal and useful member of society.¹⁰¹

Similarly, although the behavior of many violent juvenile offenders may appear to be “psychotic,” most youths are not.¹⁰² Instead, they are simply acting, though badly and even criminally, in the impulsive, peer-driven ways of youth.

Understanding the primacy of peers does not, however, explain the connection between peer influence and youth violence. It is to that subject that we now turn.

100. Seagrave & Grisso, *supra* note 77, at 224; *see also* John F. Edens et al., *Assessment of “Juvenile Psychopathy” and Its Association with Violence: A Critical Overview*, 19 BEHAV. SCI. & L. 53, 74-76 (2001). Edens and his colleagues state that:

[t]he chief concern raised by using measures of psychopathy to make weighty decisions about juveniles is that we fundamentally do not know whether these measures identify a small subgroup of adolescents who, based on *stable* personality traits, will engage persistently in antisocial and violent behavior throughout the course of their lives.

Id. at 74 (emphasis in original). They cite problems with current assessment instruments, particularly the possibility that adolescents’ scores “may be inflated by normative developmental characteristics,” *id.* at 75, and the ethical issues which arise with the use of those instruments in assessing, for example, an individual adolescent’s amenability to treatment and future dangerousness for purposes of making the decision whether to transfer him for trial in adult criminal court. *Id.* at 76.

101. Seagrave & Grisso, *supra* note 77, at 224 (citing HARVEY CLECKLEY, *THE MASK OF SANITY* 270 (5th ed. 1976)); *see also* Gina M. Vincent et al., *Subtypes of Adolescent Offenders: Affective Traits and Antisocial Behavior Patterns*, 21 BEHAV. SCI. & L. 695 (2003). The extension of the adult construct of psychopathy to adolescents is complicated by the questionable validity of measures used to identify psychopathy in youth. *See* Jennifer L. Skeem & Elizabeth Cauffman, *Views of the Downward Extension: Comparing the Youth Version of the Psychopathy Checklist with the Youth Psychopathic Traits Inventory*, 21 BEHAV. SCI. & L. 737 (2003).

102. EWING, *supra* note 58, at 15. *But see* Dorothy Otnow Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584, 587 (1988) (reporting results of an in-depth study of fourteen of the thirty-seven juvenile offenders then on death row, finding serious brain injuries, psychotic symptoms first appearing in early childhood, and physical and sexual abuse).

III. PEER INFLUENCE AND YOUTH VIOLENCE

Criminologists and other social scientists have advanced numerous theories to explain youth violence.¹⁰³ Since 1980, however, a psychiatric-psychopathological approach to youth violence has predominated, and the anecdotal observations of psychiatrists and psychologists working in a clinical setting comprise the bulk of empirical research on juvenile homicide.¹⁰⁴ The literature, not surprisingly, routinely describes juveniles who kill as “emotionally disturbed youths from psychologically troubled families.”¹⁰⁵ Other prominent theories, though differently labeled, likewise stress family dynamics and the effects of such factors as absent father figures, alcohol or drug abuse in the home, and the child’s early experiences with violence, both violence between parents and violence against the child by a parent or other adult in the household.¹⁰⁶ Even the work of “ecological psychologists,” who view social

103. Theories abound, and anthologies that purport to survey the field differ, although they overlap to some degree. Treatment of the issue here does not pretend to be all-inclusive. Rather, the inclusion of a section on the etiology of youth violence here attempts only to provide the backdrop for later, more in-depth treatment of issues of group offending among teenagers. See, e.g., RONALD AKERS, *CRIMINOLOGICAL THEORIES* (1999) (describing different theories including deterrence and rational choice, biological and psychological theories, social learning theory, social bonding and control theories, labeling theory, social disorganization, anomie, and strain theories, conflict theory, Marxist and critical theories, feminist theories, and integrative theories); DONALD E. SHOEMAKER, *THEORIES OF DELINQUENCY* (4th ed. 2000) (describing theories including the classical school, biological and biosocial explanations, psychological theories, social organization and anomie, lower-class based theories, interpersonal and situational explanations, control theories, labeling theory, radical theory, and integrative theories); *DELINQUENCY AND CRIME: CURRENT THEORIES* (J. David Hawkins ed., 1996) (describing theories such as sequential development theory, peer group bonding as a part of social learning theory, “antisocial personality” development, social development model of antisocial behavior theory, interactional theory; contextual analysis, and adaptive strategy theory).

104. Rowley et al., *supra* note 56, at 4.

105. *Id.*

Nearly all the juvenile killers described in the literature to date have been diagnosed as suffering from psychiatric conditions, including neuroses, psychoses, personality disorders, and organic brain syndromes. Their parents have been characterized as psychologically impaired or inadequate individuals whose marital relationship is either broken or disintegrating. Family situations have been described as oppressive, violent, neglectful and/or otherwise lacking in nurturance and support. *Id.*; see also Lewis et al., *supra* note 102, at 587.

106. See, e.g., Tony D. Crespi & Sandra A. Rigazio-DiGillo, *Adolescent Homicide and Family Pathology: Implications for Research and Treatment with Adolescents*, 31 *ADOLESCENCE* 353 (1996) (reporting a variety of factors shared by many extremely violent children, including those who kill: history of abuse in childhood; absent, non-nurturing, or passive father figures; dominant, overprotective, or seductive mothers; violence in the home; experience by child of deep sense of abandonment and distrust; unstable and tumultuous family environment; and possible fear by mother of her children); Robert Zagar et al., *Homicidal Adolescents: A Replication*, 67 *PSYCHOL. REP.* 1235 (1991) (reporting on research findings that a boy’s chances of committing murder are twice as high if he has any of four risk factors: history of family violence, history of being abused, gang membership, and alcohol or drug abuse; the odds triple with the presence of any of four

context, including both familial and extra-familial environments, as the most significant influence on human development,¹⁰⁷ bears a marked similarity, in application, to the psychiatric-psychopathological approach to youth violence. For example, in his work with violent youth incarcerated in an upstate New York juvenile facility, ecological psychologist James Garbarino concluded that the principal progenitors of teenage violence were abandonment by the boys' parents and the shame associated with it.¹⁰⁸

While each of these theories has certain descriptive and predictive utility, none has a solid grounding in empirical data.¹⁰⁹ In contrast, solid empirical research, conducted over nearly a century, demonstrates that teen violence is peer group behavior.¹¹⁰ Why the fact of adolescent group criminality, well known to all criminologists,¹¹¹ has failed to cap-

additional factors: weapon use, previous arrest, neurological problems impairing thinking and feeling, and difficulties at school; in assessing risk, the odds increase in direct proportion to the number of factors present).

107. *E.g.*, URIE BRONFENBRENNER, *THE ECOLOGY OF HUMAN DEVELOPMENT: EXPERIMENTS BY NATURE AND DESIGN* 6-8 (1979). Bronfenbrenner is widely regarded as the father of "ecological psychology," a branch of social context theory which posits that interactions with others and the various environments in which individuals live (such as home, school, work, peer group) are central to individual human development. See *Fractal Domains, Developmental Psychology: An Introduction*, Urie Bronfenbrenner, at <http://www.fractaldomains.com/devpsych/bronfenbrenner.html> (last visited Jan. 22, 2005). All things being equal, the more compatible the relationship between the different environments, the more smoothly the development from childhood to adolescence, adolescence to adulthood, and so on, is likely to occur. Thus, adolescents whose parents' expectations differ markedly from their peers or co-workers can be expected to engage in more destructive and antisocial behaviors than their counterparts with highly compatible cross-environmental expectations. BRONFENBRENNER, *supra* note 107, at 6-8.

108. JAMES GARBARINO, *LOST BOYS: WHY OUR SONS TURN VIOLENT AND HOW WE CAN SAVE THEM* 49 (1999) ("Deliberate abandonment evokes in boys a deep shame. . . . The shame of abandonment appears over and over again in the lives of kids who kill. Boys feel the shame of rejection."). "To these boys and their peers, their acts often do make moral sense. Or perhaps they don't see their acts as either moral or immoral at all but, rather, as necessary for survival, or as simple entitlements." *Id.* at 121.

Much more common than truly amoral boys are boys within whom a stunted or otherwise troubled emotional life combines with a narrow and intense personal need for justice. These impulses come to dominate a boy's moral thinking to the exclusion of all other considerations, such as social conventions about right and wrong, consequences, empathy, and even personal survival. . . . When boys kill, they are seeking justice – *as they see it, through their eyes*. What makes these acts appear senseless to us is often the fact that we either don't see the connection between the original injustice and the eventual lethal act or don't understand why the boy perceived injustice in the first place.

Id. at 128 (emphasis in original). "Many of the acts of lethal violence committed by boys are deliberate and sometimes even meticulously planned, rather than spur-or-the-moment explosions of rage. I think this is significant, because it highlights the importance of understanding that boys think about violence as a solution to their problems." *Id.* at 132.

109. Rowley et al., *supra* note 56, at 3-10.

110. See *supra* notes 37-57 and accompanying text.

111. WARR, *supra* note 26, at 3. Warr notes, too, that the general public, seems to be well

ture their attention is, as Zimring intimated, a mystery.¹¹² That aside, it remains true that, as Warr observed in 2002, "the single strongest predictor of criminal behavior known to criminologists is the number of delinquent friends an individual has."¹¹³ Precisely how peer group influence operates to encourage antisocial and criminal conduct is not well understood; however, sociologists have offered several explanations of the distinct mechanisms that work, independently or together, to encourage criminal behavior,¹¹⁴ particularly fear of ridicule, loyalty, and status.¹¹⁵

Fear of ridicule among adolescents, for whom ridicule is such a commonplace form of communication, is particularly potent.

To risk ridicule is to risk expulsion from or abandonment by the group, or to place in danger one's legitimate claim to be a member of the group. To lose the group is to lose the identity and sometimes the prestige that it creates, as well as the sense of belonging it affords.¹¹⁶

Empirical studies reveal the power of ridicule as a mechanism for promoting antisocial behavior. In one study, the reaction of one's peers was by far the most frequently cited consequence of rejecting an invitation to engage in risky behaviors such as smoking marijuana and driving under the influence.¹¹⁷ This and other studies demonstrate the additional phenomenon that avoiding ridicule is generally a much stronger motivator among teens than gaining approval: Adolescents do not necessarily con-

aware of the social nature of crime. One of the most powerful signals prompting fear of crime in everyday life is the sight of a *group* of young males, and the idea of peer influence as a cause of crime seems to be well entrenched in the folklore of crime. *Id.* (emphasis in original) (citation omitted).

112. The authors of one of the most influential recent treatises on criminology reject out of hand the peer influence theory and instead attribute teenage criminality to the inability to exercise self-control. See MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, *A GENERAL THEORY OF CRIME* (1990). Warr notes how odd Gottfredson and Hirschi's reaction is considering that "one of the principal ways by which groups seem to affect individuals is precisely by *dissolving their self-control*." WARR, *supra* note 26, at 119 (emphasis in original). However, Warr does suggest that an explanation for the persistent contentiousness concerning peer explanations of delinquency may be the indirect nature of most evidence supporting them. *Id.* at 120 ("[E]xisting evidence on peer influence is largely correlational and often highly inferential, facts that leave room for legitimate questions about causal direction, selection effects, and other alternative explanations."). But see Rowley et al., *supra* note 56, at 7, 9.

113. WARR, *supra* note 26, at 3.

114. See generally *id.* at 46-58.

115. *Id.* at 55.

116. *Id.* at 46; see also Ruth Beyth-Marom et al., *Perceived Consequences of Risky Behaviors: Adults and Adolescents*, 29 DEVELOPMENTAL PSYCHOL. 549 (1993).

117. Beyth-Marom et al., *supra* note 116, at 560. Across situations, reaction of peers was the most frequently cited consequence of rejecting a risky behavior for eighty to one hundred percent of the respondents ("they'll call me a nerd; they'll get mad at me"). *Id.* at 560.

form so as to be liked more; they conform to avoid rejection.¹¹⁸ Particularly among adolescent males, ridicule is the single most common method of dominance, far outpacing threats, physical contact, and direct commands.¹¹⁹ Warr concludes that "if maintaining [one's] identity entails an occasional foray onto the other side of the law to avoid rejection, it may seem a small price to pay to maintain such a valuable possession."¹²⁰

Loyalty to friends also figures significantly in adolescent criminal behavior. Because teenage friendships are the first efforts to establish an identity outside the family core, they typically require greater formality and clarity than relationships formed later in life.¹²¹ Thus, when adolescents describe what they mean by "friendship," they typically place great importance on loyalty and trustworthiness; a friend is someone who will not talk about you or betray you behind your back.¹²² To teens who engage in illegal behavior, "loyalty means much more than not ratting on your friend(s). It often means engaging in risky or illegal behavior in which one would not otherwise participate in order to preserve or solidify a friendship."¹²³ It is not surprising, then, that adolescents are much more likely to lie to the police to protect a friend than are older or younger suspects.¹²⁴ Indeed, loyalty often acts as a sort of "moral cover" for criminal conduct by "impart[ing] legitimacy to otherwise illegitimate acts and confer[ring] honor on the dishonorable."¹²⁵

Closely related to loyalty and fear of ridicule is status within one's group.¹²⁶ Status hierarchies form rapidly, as demonstrated by a study of a group of teenage boys randomly assigned to cabins at a summer camp; within hours, contests over status had ceased and a stable hierarchy was in place.¹²⁷ The alpha male was in charge, and even such minor contests

118. CHARLES A. KIESLER & SARA B. KIESLER, CONFORMITY 43 (1969); see also Beyth Marom, *supra* note 116, at 560.

119. RITCH C. SAVIN-WILLIAMS, ADOLESCENCE: AN ETHOLOGICAL PERSPECTIVE (1987); see also Donna Eder & Stephanie Sanford, *The Development and Maintenance of Interactional Norms Among Early Adolescents*, in 1 SOCIOLOGICAL STUDIES OF CHILD DEVELOPMENT 283 (Patricia A. Adler & Peter Adler eds., 1986).

120. WARR, *supra* note 26, at 49.

121. *Id.* at 50.

122. Ritch C. Savin-Williams & Thomas J. Berndt, *Friendship and Peer Relations*, in AT THE THRESHOLD: THE DEVELOPING ADOLESCENT 277 (S. Shirley Feldman & Glen R. Elliott eds., 1990); see also John C. Coleman, *Friendship and Peer Group in Adolescence*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY (Joseph Adelson ed., 1980).

123. WARR, *supra* note 26, at 50.

124. Mark Warr, *Age, Peers, and Delinquency*, 72 SOC. FORCES 247 (1993).

125. WARR, *supra* note 26, at 51.

126. *Id.*

127. SAVIN-WILLIAMS, *supra* note 119, at 51-79 (studying four cabins the first night to see who would become the cabin "leader"); see also John M. Levine & Richard L. Moreland, *Progress in Small Group Research*, 41 ANN. REV. PSYCHOL. 585 (1990).

as who would get to sleep closest to him were resolved.¹²⁸ Once one is in a group with an established status, avoiding loss of status becomes a primary objective.¹²⁹ In the inner city world of many minority youth, status may be the only "possession" an individual owns.¹³⁰ Because respect and status are of such profound importance, "something extremely valuable is at stake in every interaction,"¹³¹ and even unintended or merely perceived slights can provoke immediate violence and death.¹³²

There is a generalized sense that very little respect is to be had, and therefore everyone competes to get what affirmation he can of the little that is available. . . . Many inner-city young men in particular crave respect to such a degree that they will risk their lives to attain and maintain it.¹³³

The interplay of ridicule avoidance, loyalty, and status among peers illustrates the social utility of "bad" behavior.¹³⁴ Loyalty and fear of ridicule are sufficiently potent compliance mechanisms to coerce otherwise law-abiding teens to participate in risky, dangerous, and even criminal conduct that they would otherwise not engage in alone.¹³⁵ Moreover, attaining status or averting a threat to an already high status go beyond engendering conformity to engaging in bad behavior, and often are themselves the direct provocation for violence to "save face," particularly when disputes occur in the presence of others.¹³⁶ As Zimring has observed, "[t]he immediate motive for criminal involvement is group standing. The participant is showing off, living up to group expectations, pressing to avoid being ridiculed"¹³⁷ by his peers, whose opinion he values above all else.

Thus, even a teenager who offends alone does not necessarily act

128. SAVIN-WILLIAMS, *supra* note 119, at 51-79.

129. Bernard P. Cohen & Steven D. Silver, *Group Structure and Information Exchange: Introduction to a Theory*, in *SOCIOLOGICAL THEORIES OF PROGRESS: NEW FORMULATIONS* 160 (Berger et al. eds., 1989); Lisa Troyer & C. Wesley Younts, *Whose Expectations Matter? The Relative Power of First- and Second-Order Expectations in Determining Social Influence*, 103 *AM. J. SOC.* 692 (1997).

130. WARR, *supra* note 26, at 53 (citing Elijah Anderson, *The Code of the Streets*, 273 *ATLANTIC MONTHLY* 81, 82, 89 (1994) (Anderson's study focused on social relations among African-American young men)); *see also* ELIJAH ANDERSON, *CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY* (1999).

131. Anderson, *supra* note 130, at 92.

132. WARR, *supra* note 26, at 53.

133. Anderson, *supra* note 130, at 89.

134. *Criminalizing Delinquency*, *supra* note 50, at 31.

135. WARR, *supra* note 26, at 55; *see also* Warr, *supra* note 43.

136. WARR, *supra* note 26, at 56; *see also* Richard B. Felson, *Predatory and Dispute-Related Violence: A Social Interactionist Perspective*, in *ROUTINE ACTIVITY AND RATIONAL CHOICE: ADVANCES IN CRIMINOLOGICAL THEORY* 103 (Ronald V. Clarke & Marcus Felson eds., 1993).

137. ZIMRING, *supra* note 15, at 30.

independently of his peers. Though alone, he is not free of the potential for ridicule or a change in status as a result of his conduct, which his peers will learn of whether he wishes them to or not.¹³⁸ More than any other factors, a teenage boy's group status and individual standing among his peers stand out as the principal motivations for teenage involvement in criminal behavior.¹³⁹

Empirical research underscores this point. In their study of the relationship between engaging in delinquent behavior and having delinquent friends, Elliott and Menard found that, in a majority of cases of minor acts of delinquency, exposure to delinquent peers preceded the onset of delinquent behavior.¹⁴⁰ For more serious forms of delinquency, they found the developmental sequence of "friends first, behavior later" in *nearly all* cases where they could determine which came first.¹⁴¹ Based on those findings, Elliott and Menard concluded that "[h]aving delinquent friends and being involved in delinquent behavior may influence one another, but the influence is not symmetric."¹⁴² Instead, "the influence of exposure [to delinquent friends] on delinquency begins earlier in the sequence, and remains stronger throughout the sequence, than the influence of delinquency on exposure."¹⁴³ In an earlier study of delinquent and non-delinquent peer groups, Morash reached similar conclusions.¹⁴⁴ She found that each boy's own rate of delinquency was directly related to the delinquency rate of his peers.¹⁴⁵ Boys who belonged to peer groups that engaged in little or no delinquency exhibited little or no delinquency, while boys with peers who had high individual rates of delinquency also demonstrated high rates of delinquency.¹⁴⁶

The influence of one's peers on delinquent and criminal conduct

138. See WARR, *supra* note 26, at 7. Warr thus comments that peer influence and group delinquency "are not necessarily analogous concepts . . . [although] the sets of associates specified by these two concepts are far from mutually exclusive." *Id.* at 7-8.

139. See *id.* at 40-44. After surveying the literature in support of the peer influence theory, Warr comments that, despite the absence of any study failing to show a significant effect of peers on current or subsequent delinquency, "the question of causal direction remains a contentious issue in criminology today." *Id.* at 42. Warr explains that the reason for this continuing debate is that the question places two major theoretical traditions in criminology (control theory and differential association theory) head-to-head. *Id.*

140. Elliott & Menard, *supra* note 18, at 61; see also Ross L. Matsueda & Kathleen Anderson, *The Dynamics of Delinquent Peers and Delinquent Behavior*, 36 CRIMINOLOGY 269 (1998); Ross L. Matsueda, *The Current State of Differential Association Theory*, 34 CRIME & DELINQ. 277 (1988).

141. Elliott & Menard, *supra* note 18, at 61.

142. *Id.* at 63.

143. *Id.*

144. Morash, *supra* note 29, at 309.

145. *Id.* at 319-21.

146. *Id.*

may explain the increasing acceptance of a relatively new theory of violent youth crime, the theory that the high rates of such crime among teens are purely "transitory phenomena associated with a transitional status and life period."¹⁴⁷ Under this theory, interventions to minimize antisocial teen behavior and to rehabilitate juvenile offenders are unnecessary because the conduct to be corrected naturally tapers off as adolescents mature and become adults assuming the roles and status appropriate to adults in our society.¹⁴⁸

[W]hereas the early juvenile court assumed that some correction was needed to redirect adolescents away from criminality and into pro-social adult behaviors, modern developmental theory suggests that the cessation of delinquency itself is a normative process, regardless of the actions taken by a juvenile court or any other social institution.¹⁴⁹

Hard data support this "aging out of delinquency" theory. Federal Bureau of Investigation statistics reveal that rates of participation in violence are much higher among adolescent males than for males of any other age, that sixteen- to nineteen-year-olds engage in the highest rates of violence, and that a high percentage of males participate in violence at some time during their youth.¹⁵⁰ "If a male will ever be involved in violence, adolescence is when it will happen. A corollary is that the majority of those who do participate in violence during adolescence do not report violent behavior later on in adulthood."¹⁵¹ Zimring concludes from the FBI and other data that the "social settings and pressures of adolescence thus create the high-water mark for the involvement of otherwise normal boys in violent conflict."¹⁵²

Chief among those adolescent pressures is the influence of peers. In a study that pooled data from five consecutive annual waves of the National Youth Survey, Warr concluded that "*the age distribution of*

147. Delbert Elliott, *Serious Violent Offenders: Onset, Developmental Course, and Termination*, *The American Society of Criminology 1993 Presidential Address*, 32 *CRIMINOLOGY* 1 (1994); see also Terrie E. Moffitt, *Adolescent-Limited and Life-Course Persistent Behavior: A Developmental Taxonomy*, 100 *PSYCHOL. REV.* 674 (1993).

148. ZIMRING, *supra* note 15, at 82; see also MARVIN E. WOLFGANG ET AL., *DELINQUENCY IN A BIRTH COHORT* (1972) (recognizing that while a sizeable number of juveniles engage in delinquent activities, many stop fairly early in their teens, without any intervention to deter them).

149. *Criminalizing Delinquency*, *supra* note 50, at 30 (citing Moffitt, *supra* note 147); Daniel Nagin et al., *Life Course Trajectories of Different Types of Offenders*, 33 *CRIMINOLOGY* 111 (1995); John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 *CRIME & JUSTICE* 1 (2001) (discussing the processes and factors underlying desistance from criminal behavior).

150. ZIMRING, *supra* note 15, at 27. See *id.* at 18-30 (presenting charts and description of Federal Bureau of Investigations statistics for juvenile crime in 1995).

151. *Id.*

152. *Id.*

crime stems primarily from age-related changes in peer relations, changes that are part of the ordinary developmental process that takes place during adolescence."¹⁵³ To be sure, peer influence is not the sole cause of adolescent crime. The evidence, however, supports the conclusion that peer influence is its "principal proximate cause."¹⁵⁴

As adolescents become adults, the peer groups of their youth are supplanted by marriage, full-time work, and the other activities of adulthood. At the same time, given the increasing psychological and emotional autonomy that comes with age, older adolescents are more able to detach from their peers and resist the once overriding pressure to follow them.¹⁵⁵ The remarks of one nineteen-year-old research subject are illustrative:

Two years ago if they had bothered me I wouldn't have told them to leave me alone; now if they bug me I tell them to go somewhere. . . . I'd rather be alone than with my friends, cause they always want you to do things and I'd rather do what I want to do.¹⁵⁶

Rarely will "doing what I want to do" alone as a young adult entail engaging in the risky and criminal behaviors of youth. As reported above, evidence that most teenage offenders never offend after gaining adult status is beyond dispute.

The "aging out of delinquency" theory is not necessarily good news for those caught up in youth crime, however. Many of those teens will never have the opportunity to "age out" of their youthful involvement in crime because of the vast gulf between the social sciences and the criminal justice system in its understanding of and responses to adolescent crime. The following sections of this article attempt a bridge across that gap. Curious about the effect of peer influence and group dynamics on violent juvenile crime, I set out to study juvenile offenders on death row, a group that now numbers seventy-two.¹⁵⁷ The following presents, first, a short history of the juvenile death penalty, and then, specific findings concerning the juvenile offenders now on death row.

153. WARR, *supra* note 26, at 99 (emphasis in original); see also *id.* at 93-99 (describing the findings from Warr's 1993 study); see Mark Warr, *Age, Peers, and Delinquency*, 31 CRIMINOLOGY 17 (1993). In a later study, Warr further concluded that marriage, by disrupting and even dissolving peer relationships, was a life course change critical to desistance from crime. Mark Warr, *Life Course Transitions and Desistance from Crime*, 36 CRIMINOLOGY 183 (1998). See also generally ROBERT SAMPSON & JOHN LAUB, *CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS IN LIFE* (1993) (adopting and advocating use of a life-course perspective in analyzing age and its relationship to crime).

154. WARR, *supra* note 26, at 136.

155. MIHALY CSIKSZENTMIHALYI & REED LARSON, *BEING ADOLESCENT: CONFLICT AND GROWTH IN THE TEENAGE YEARS* 275 (1984).

156. *Id.*

157. See STRIEB, *supra* note 10, at 3.

IV. THE JUVENILE DEATH PENALTY

A. *A Brief History of the Juvenile Death Penalty*

The practice of executing youthful offenders in the United States dates back to 1647, when sixteen-year-old Thomas Graunger of Plymouth Colony was hanged for bestiality with a cow and a horse.¹⁵⁸ Although the preferred method of dealing with children's crimes was for their parents to "beat the devil" out of them, the colonial courts could require parents to publicly execute or even banish children found criminally liable.¹⁵⁹ From the colonial era to the late nineteenth and early twentieth centuries, the law treated juveniles over the age of fourteen who were criminally accused the same as adults,¹⁶⁰ including eligibility for the death penalty.¹⁶¹ Trials and executions of juveniles continued throughout the eighteenth and nineteenth centuries in much the same fashion as for adults.¹⁶² Since Graunger's public hanging, another 366 juvenile offenders have been executed,¹⁶³ 174 of them before 1930.¹⁶⁴

The creation of the first juvenile court in Chicago in 1899, followed in short order by every state,¹⁶⁵ commenced a new era in which a juvenile justice system would exist alongside, but separate from, the criminal justice system. In the juvenile justice system, minors accused of criminal conduct were to be treated differently from adults because of their youth, so as to achieve the juvenile court's therapeutic aims of rehabilitation and treatment.¹⁶⁶ From the beginning, however, procedures were

158. VICTOR L. STREIB, *DEATH PENALTY FOR JUVENILES* 73 (1987). Capital punishment was a part of American culture even before the country was founded. James R. Acker et al., *Introduction: America's Experiment with Capital Punishment*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT* 5 (James R. Acker et al. eds., 1998). The earliest confirmed execution was carried out in 1608 in colonial Virginia. *CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS* 2 (R. Coyne & L. Entzeroth eds., 1994).

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

160. See Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 586 (2002) (citing 1 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 463-64 (George Sharswood ed., 1871)).

161. Warren Kato, *The Juvenile Death Penalty*, 18 J. JUV. L. 112, 113-14 (1997).

162. David Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in *A CENTURY OF JUVENILE JUSTICE* 42 (Margaret K. Rosenheim et al. eds., 2002).

163. STREIB, *supra* note 10, at 3.

164. Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 493 (2002).

165. Tanenhaus, *supra* note 162, at 45. By 1925, all states, except Maine and Wyoming, had established juvenile courts. By 1945, every jurisdiction in the nation, including the federal government, had some type of juvenile court. Charles W. Thomas & Shay Bilchik, *Criminal Law: Prosecuting Juveniles in Criminal Court: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439, 451 (1985).

166. See Berkheiser, *supra* note 160, at 582-87.

put in place for juveniles who committed certain crimes to be "tried as adults" in criminal court, where therapeutic considerations have little or no impact on adjudicative and sentencing determinations.¹⁶⁷ As a consequence, juveniles have continued to be sentenced to death and, as recently as 1944, to be executed as young as fourteen years of age.¹⁶⁸

B. *The Juvenile Death Penalty Today*

During the current death penalty era, which began in 1972 with *Furman v. Georgia*,¹⁶⁹ a total of 227 juveniles have received death sentences.¹⁷⁰ Over half of those are in the states of Alabama, Florida, and Texas.¹⁷¹ Seventy-two remain on death row today.¹⁷² Twenty-two have been executed, thirteen in Texas alone.¹⁷³ In the remaining 133 cases, the courts have either reversed the conviction and death sentence or commuted the death penalty to a life sentence.¹⁷⁴ Since the inception of the research and compilation of the database for this article, four juvenile offenders have been executed.¹⁷⁵ During that same time, sixteen cases were reversed on appeal—of those, one juvenile offender was

167. See ZIMRING, *supra* note 15, at 132.

The transfer of juveniles is often described as a decision to "try this defendant as an adult." But if the defendant is 15 years old and of slightly subnormal intelligence, to try and punish him as if he were adult in all respects is a dangerously counterfactual enterprise.

... [T]o try an accused as an adult in a criminal court changes only the location of the hearing; it does not change the characteristics of the defendant.

Id.

168. Lyn Riddle, *Five Inmates on Death Row Committed Their Crimes at 16 or 17*, THE GREENVILLE NEWS (Greenville, S.C.), April 2, 2001, at 1A (reporting that the youngest person ever executed in the United States was fourteen at the time of his execution, and his feet did not even reach the floor from the electric chair in which he sat).

169. *Furman v. Georgia*, 408 U.S. 238 (1972). *Furman* invalidated the death penalty statutes in thirty-eight states and under federal law because the unlimited jury discretion found in those laws violated the cruel and unusual punishment clause of the Eighth Amendment. *Id.* at 240. Four years later, the Court upheld the revised death penalty statutes of the states of Georgia, Texas, and Florida based on their specific procedural protections. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). During the same term, the Court rejected as unconstitutional the death penalty statutes of North Carolina and Louisiana. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

170. STREIB, *supra* note 10, at 3.

171. STREIB, *supra* note 10, at 10 (fifty-seven in Texas, thirty-two in Florida, and twenty-five in Alabama).

172. STREIB, *supra* note 10, at 11. There are twenty-eight in Texas; fourteen in Alabama; five each in Mississippi and North Carolina; four each in Arizona and Louisiana; three each in Florida and South Carolina; two each in Pennsylvania and Georgia; and one each in Nevada and Virginia. *Id.* at 24-29.

173. STREIB, *supra* note 10, at 4.

174. *Id.* at 3.

175. *Id.* at 4 (Napoleon Beazley, executed May 28, 2002; T.J. Jones, executed August 8, 2002; Toronto Patterson, executed August 28, 2002; and Scott Allen Hain, executed April 3, 2003).

acquitted at a new trial—¹⁷⁶ and the remaining fifteen have received life sentences through new sentencing hearings or commutations or are awaiting resentencing.¹⁷⁷

The Supreme Court's decision in early 2004 to review the death sentence of Christopher Simmons may signal the beginning of the end of the juvenile death penalty. After the Court's spring 2002 rulings in *Atkins v. Virginia*¹⁷⁸ and *Ring v. Arizona*,¹⁷⁹ juvenile death penalty expert Victor Streib suggested, "these may be the last days of the juvenile death penalty in America."¹⁸⁰ With four Justices on the United States Supreme Court calling for reconsideration of the conclusion in *Stanford*, that executing sixteen- and seventeen-year-olds is not proscribed by the Constitution,¹⁸¹ the Court may be poised to take that step.¹⁸² But such action, though long overdue, does not yet bear the mark of inevitability.

Nineteen of the forty jurisdictions in the United States that permit

176. Larry Osborne, of Kentucky, was acquitted on August 1, 2002, at his second trial. Canadian Coalition Against the Death Penalty, *Larry Has Been Exonerated and is Now a Free Man*, at <http://www.ccadp.org/larryosborne.htm> (last visited Jan. 22, 2005).

177. See STREIB, *supra* note 10, at 18-32 (Ronald Lee Bell, Jr., Florida, resented to life in 2002; David Blue, Mississippi, resented to life in 2003; Taurus Carroll, Alabama, resented to life in 2002; Adam Comeaux, Louisiana, resented to life in 2003; James Edward Davolt, Arizona, resented to life in 2004; Derrick Harvey, Pennsylvania, resented to life in 2002; Christopher "Bo" Huerstel, Arizona, resented to life in 2003; Ryan Matthews, Louisiana, reversed in 2004; Antonio Richardson, Missouri, resented to life in 2003; Rossiny St. Clair, Florida, resented to life in 2002; Simmons, Missouri, reversed in 2003; Kevin Stanford, Kentucky, granted clemency in 2003; Francisco Edgar Tirado, reversed in 2004, awaiting resentencing; Alexander Williams, Georgia, commuted in 2002; Corey Williams, Louisiana, reversed in 2004).

178. *Atkins v. Virginia*, 536 U.S. 304 (2002) (ruling that the Eighth Amendment prohibition against cruel and unusual punishment prohibits execution of the mentally retarded).

179. *Ring v. Arizona*, 536 U.S. 584 (2002) (ruling that the Sixth Amendment requires jurors, not judges, to decide facts related to capital sentencing).

180. STREIB, *supra* note 10, at 14; see also Victor L. Streib, *Executing Juvenile Offenders: The Ultimate Denial of Justice*, 13 STAN. L. & POL'Y REV. 121, 134-35 (2003) (calling for abolition of juvenile death penalty in light of *Atkins*).

181. See *Patterson v. Texas*, 536 U.S. 984 (2002) (denial of stay of execution) (Stevens, J., dissenting) (reiterating his agreement with Justice Brennan's dissent in *Stanford v. Kentucky*, 492 U.S. 361, 382 (1989), that the juvenile death penalty violates the Eighth and Fourteenth Amendments); *id.* (Ginsberg and Breyer, JJ., dissenting) (calling for re-examination of the juvenile death penalty in light of *Atkins*, 536 U.S. 304 (2002), which held unconstitutional the execution of the mentally retarded); see also *In re Stanford*, 537 U.S. 968, 971 (2002) (Stevens, J., dissenting) (Ginsberg, Breyer, and Souter, JJ. joining) (calling the juvenile death penalty "a relic of the past" and "inconsistent with evolving standards of decency in a civilized society").

182. Justice O'Connor appears the most likely fifth vote for abolition, given her outspokenness against executing the innocent, her call for minimum standards for capital defense counsel and the resources necessary for an adequate defense, and her remark to women lawyers in Minnesota, a non-death penalty state, when she said, "[y]ou must breathe a sigh of relief every day." FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 172, 178 (2003).

the death penalty still allow execution of those under eighteen.¹⁸³ Over the last decade, the United States has executed more juveniles than all the combined nations in the world.¹⁸⁴ In continuing to execute youthful offenders, the United States joins the company of China, Democratic Republic of Congo, Iran, and Pakistan.¹⁸⁵ Why we as a society remain ready to execute those who are not even old enough to see an R-rated movie, sign a lease, or buy a car is a question far beyond the scope of this paper, but it is one we must not abandon. The stark reality of applying the death penalty to juveniles is that we are needlessly killing our young. Most of the juveniles on death row (or already executed) never would have offended again; even among the most serious violent juvenile offenders, fewer than twenty percent are rearrested for a second violent offense.¹⁸⁶ Such high levels of desistance would seem to provide a justification for sanctions far less drastic than the death penalty,¹⁸⁷ but fear has overwhelmed reason in the formation of policy concerning violent youthful offenders.

This country has a long history of ambivalence toward adolescence. Our public policy and laws continue to vacillate between protecting and condemning our youth and are, at times, schizophrenic.¹⁸⁸ But, perhaps it is by "diving into the wreck"¹⁸⁹ of our youth policy that we can begin to find understanding. What we can learn from the young men awaiting execution for the crimes of their youth may yet guide us out of the wreck. It is to those young men that we now turn.

V. JUVENILE OFFENDERS ON DEATH ROW

A. Introduction

Post-*Furman*, a central tenet of death penalty jurisdiction is that death, the harshest of all penalties, should be reserved for the "worst of

183. STREIB, *supra* note 10, at 7 (fourteen states set sixteen as the minimum age; the remaining five set the minimum at seventeen). There is a growing trend in state legislatures to raise the minimum age to eighteen. *Id.* at 7. In 1999, Montana raised its minimum age to eighteen, and Indiana followed in 2002. *Id.* In March 2004, both South Dakota and Wyoming raised their minimum age to eighteen. Several other states have bills pending in their legislatures. *Id.*

184. The International Justice Project, Juveniles, Introduction, at <http://www.internationaljusticeproject.org/juveniles> (last visited Jan. 22, 2005).

185. *Id.*

186. Howard N. Snyder, *Serious, Violent, and Chronic Juvenile Offenders: An Assessment of the Extent and Trends in Officially-Recognized Serious Criminal Behavior in a Delinquent Population*, in *SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS* (Rolf Loeber & David Farrington eds., 1998).

187. ZIMRING, *supra* note 15, at 166.

188. CHARLES SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 313 (1978).

189. ADRIENNE RICH, *DIVING INTO THE WRECK: POEMS 1971-72*, at 23 (1973) ("I came to see the damage that was done/and the treasures that prevailed/ . . . the thing I came for:/the wreck and not the story of the wreck/the thing itself and not the myth.").

the worst" among those convicted of violent crimes.¹⁹⁰ Applying the phrase "worst of the worst" to even the most violent juvenile offenders is oxymoronic, even though it is true that the crimes underlying the seventy-two current juvenile death sentences were horrible. Each one resulted in the death of at least one person. Often, these were brutal murders of children, elderly people, and other hapless victims of random and senseless acts of violence. That said, executing the seventy-two youthful offenders on death row will not protect society from "the worst of the worst." All murder is horrible, but we do not execute all those convicted of murder. Indeed, review of the seventy-two juveniles on death row leaves one with the disquieting conclusion that many of the worst offenders remain on the streets or will return there again soon, after they are paroled from life sentences or lesser terms of years.

If what the social scientists tell us about adolescents is true for those sentenced to death as juveniles, we would expect to find among them certain characteristics. First, we would expect them to be male and to have been convicted of crimes committed with their friends, though generally not in organized gangs. Second, we would expect that peer influence, manifested as loyalty, status seeking, or fear of ridicule, featured prominently in the commission of the crimes underlying the death sentences. Third, we would expect to find that few of the victims were family members, and that the vast majority were either acquaintances or strangers. Finally, we would expect to learn that the murders were unanticipated, more often than not the outcome of a robbery or other property crime gone bad. As the following discussion demonstrates, the cases, for the most part, confirm those expectations.

B. Gender and Group Offending

All seventy-two juvenile offenders on death row are male.¹⁹¹ During the current death penalty era, only five female juveniles have received death sentences,¹⁹² and none have been executed.¹⁹³

190. *Furman v. Georgia*, 408 U.S. 238 (1972). See Carol M. Steiker & Jordan Steiker, *Judicial Developments in Capital Punishment Law*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT* 57 (James R. Acker et al. eds., 1998). See generally *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980) (reversing death penalty in case in which defendant's murder of his wife and mother in law could not "be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder. . . . There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.").

191. STREIB, *supra* note 10, at 11.

192. *Id.* (two in Alabama and one each in Georgia, Indiana, and Mississippi).

193. *Id.* at 16-18. Four of the death sentences were reversed (Debra Bracewell, Alabama, 1981, *id.* at 16; Attina Cannaday, Mississippi, 1984, *id.* at 17; Paula R. Cooper, Indiana, 1989, *id.* at 31; and Janice Buttrum, Georgia, 1989, *id.* at 16), and one was commuted to life in prison (Judith Neelley, Alabama, 1999, *id.* at 17).

Of the seventy-two juvenile offenders on death row, forty-six, or nearly two-thirds, were convicted of crimes involving multiple offenders.¹⁹⁴ This proportion mirrors that reported in the 1973 National Crime Panel and is comparable to other studies in the 1970s through the 1990s, as discussed above.¹⁹⁵ As in those earlier studies, most of the juvenile offenders on death row were not convicted of participating in gang or large group criminal activities. Nearly seventy percent (thirty-one of forty-six) were arrested with one (eighteen) or two (thirteen) of their friends.¹⁹⁶ Less than twenty-five percent (eleven of forty-six) were involved in gang-related incidents, and although gangs account for two of the three largest multiple offender groups (seven and nine participants in addition to the defendant), even gang-related crimes generally involved a smaller two or three person group.¹⁹⁷

Even among the twenty-six who acted alone,¹⁹⁸ the nature of the crimes indicates that, in more than one-third of the cases (ten), others were involved in instigating or otherwise affecting the conduct of the sole actor.¹⁹⁹ One such case involved a local drug dealer who coyly led Justin Wiley Dickens into committing a robbery to pay off a debt.²⁰⁰ The drug dealer, Dallas Moore, had accused Dickens, whom others called a coward and appropriately nicknamed "Chicken Dickens,"²⁰¹ of stealing Moore's cocaine. Moore first told Dickens that he should recover some of the money by performing "some act" and then proceeded to tell Dickens about a burglary Moore had committed.²⁰² The next day Dickens told his friends he was going to rob a store in order to "make it right" with Moore.²⁰³ During the burglary of a jewelry store, Dickens shot and killed a customer.²⁰⁴

Another instance of likely peer influence occurred as Geno

194. App. A. This article assumes neither guilt nor innocence, but bases its analysis on information obtained through extensive research derived from sources, including interviews with attorneys, newspaper articles, the Internet, published cases, and court records.

195. See *supra* notes 39-46 and accompanying text.

196. App. A (six had three accomplices; four had four; two each had five and seven; and one had nine).

197. App. A. Two defendants were involved with seven additional gang members, for a total of eight (Efrian Perez and Raul Omar Villareal); one involved ten (Cedric D'Wayne Howard); one, six (Michael Anthony Lopez, Jr.); six, three (Steven Brian Alvarado, Randy Arroyo, Levi Jaimes Jackson, Eddie C. Johnson, and Son Vuk-Hai Tran); and one, two (Leo Gordon Little).

198. App. A.

199. App. A (those identified as "Alone, but" include: Justin Wiley Dickens, Anthony Jerome Dixon, Ronald Chris Foster, Patrick Horn, Larry L. Jenkins, Jr., Anzel Keon Jones, William Thomas Knotts, Kenneth Jeremy Laird, Geno Capoletti Wilson, and Gregory Wynn).

200. *State v. Justin Wiley Dickens*, No. 72,129 (Tex. Crim. App. 1997).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

Capoletti Wilson was driving some friends home from school.²⁰⁵ After stopping to talk with a girl on the street, they spotted a door-to-door salesman.²⁰⁶ Wilson got out of the car and approached the salesman, first asking him for change for a fifty dollar bill, and then demanding all his money.²⁰⁷ When the salesman said he had none, Wilson shot him while his friends watched.²⁰⁸

The cases, even those ostensibly involving a lone offender, confirm that group offending, generally with no more than three friends and no gang affiliation, is as prevalent among those who received the death penalty as for those convicted of less serious crimes. As disturbing as these conclusions may be, even more unsettling is the small number of juvenile offenders on death row who appear to have been the leaders or "alpha males" in their offending groups.

C. Peer Influence

Contrary to popular belief, most of those under a sentence of death were not the principal perpetrators of the crimes for which they received that penalty. Instead, they were guilty of going along with their friends or mentors at an age when that is the norm. The criminal behavior of these juveniles who "went along" demonstrates the immense power of peer pressure and the solidarity adolescents feel within their group of "brothers." Although the mechanisms and powers of peer influence are not well understood, the circumstances of the crimes among the juvenile death row population studied here confirm Warr's research.²⁰⁹ The cases demonstrate that the loyalty, fear of ridicule, and status seeking identified by Warr and others²¹⁰ play powerful roles in the criminal behavior of youth.

Loyalty to a dominating and controlling group leader acting as an "alpha male" is evident in many of the death row cases. A number of the youths appear to have been nothing short of pawns of their friends or relatives. In two instances, the murders were committed to eliminate a witness against a co-defendant in unrelated criminal proceedings.²¹¹ In

205. *Wilson v. State*, 715 S.W.3d 346 (Tex. Crim. App. 2002).

206. Steve Brewer, *Jury Finds Man Guilty in '98 Slaying of Salesman*, HOUSTON CHRONICLE, Dec. 9, 1999, at A39.

207. *Id.*

208. *Id.*

209. WARR, *supra* note 26.

210. *See supra* notes 114-39 and accompanying text.

211. App. A. *See Hyde v. State*, 778 So. 2d 199, 208 (Ala. Crim. App. 1998), *aff'd*, *Ex parte Hyde*, 778 So. 2d 237 (Ala. 2000) (convicting James Matthew Hyde for murdering the investigator who testified in grand jury proceedings against Hyde's friend and co-worker for defrauding the company by having Hyde clock him in and out of work); Texas Department of Criminal Justice, Death Row Home Page, Offender Information, Whitney Reeves, at http://www.tdcj.state.tx.us/death_row/home_page/offender_information.asp.

another particularly disturbing case, the juvenile's older cousin ordered him to kill the supervisor who had fired the cousin.²¹² When the boy returned without having been able to carry out his cousin's instructions, the cousin "got on [him] about not killing the clerk."²¹³ The following night the boy returned to the store, and this time, he shot and killed the clerk.²¹⁴

In several other cases, older or more experienced co-defendants called the shots, and their younger colleagues complied, although in most of the cases it is unclear whether their compliance was borne of loyalty, status seeking, fear of ridicule, or just plain fear of the alpha male.²¹⁵ For example, Cedric D'Wayne Howard was sixteen years old and one of ten youths involved in a gang-related robbery of an elderly woman thought to have a lot of money.²¹⁶ A neighbor who overheard gang members planning the robbery testified that Howard did not say much and simply seemed willing to assist his friends in breaking into the woman's home.²¹⁷ In another case involving two juveniles and two teenage "adults," the court even noted, regarding Trace Duncan, one of the juveniles awaiting execution, that his "participation was relatively minor."²¹⁸

Although the motivators in the Howard and Duncan cases were not clear, the case of Scott Allen Hain exemplifies youthful loyalty inspired not of admiration or a desire to attain status, but as the product of pure fear and domination by an older and more experienced co-defendant. Hain had a history of domination by abusive, alcoholic parents and a father who coerced him into assisting with burglaries as a child.²¹⁹ Before trial, doctors submitted a diagnosis that, at the time of the precipitating event, Hain had a "fear reaction to finding himself in a fugitive/

tdcj.state.tx.us/stat/reeveswhitney.htm (last updated July 22, 2004) (Whitney Reeves was convicted for murdering the fourteen-year-old girl who had testified in grand jury proceedings against Reeves's co-defendant on sexual molestation charges).

212. *Bonifay v. State*, 626 So. 2d 1310, 1311 (Fla. 1993).

213. *Id.*

214. *Id.*

215. See, e.g., *Duncan v. State*, 827 So. 2d 838 (Ala. Crim. App. 1999); *State v. Howard*, 751 So. 2d 783 (La. 1999), *cert. denied*, 528 U.S. 974 (1999); see Lyn Riddle, *Legislature Considers Ending Execution of Underage Killers*, GREENVILLE NEWS, April 2, 2001 at 1A (neither of the juvenile offender's co-defendants, ages eighteen and twenty-three, was convicted of murder; one of them was not even incarcerated); *State v. Soto-Fong*, 928 P.2d 610 (Ariz. 1996) (co-defendants were older than Soto-Fong, had longer criminal records, and were involved in an earlier botched robbery/shooting); see also App. A (where juvenile Son Vuk-Hai Tran killed the lover of a senior gang member's girlfriend and then killed others to protect identities of killers).

216. *State v. Howard*, 751 So. 2d 783, 791 (La. 1999), *cert. denied*, 528 U.S. 975 (1999).

217. *Id.* at 790.

218. *Duncan*, 827 So. 2d at 850. Even so, he was sentenced to death, along with two of his co-defendants, for the kidnapping and murder of a female hitchhiker. *Id.*

219. *Hain v. State*, 919 P.2d 1130, 1151 (Okla. Crim. App. 1996).

captive state” by his adult co-defendant, Robert Wayne Lambert, and therefore lacked the ability to think or act on his own volition.²²⁰ Hain maintained his loyalty to Lambert to the end and gave police a statement incriminating Lambert only after Lambert had fingered Hain as the principal.²²¹ Despite calls for clemency from all quarters, Hain was executed by the State of Oklahoma on April 3, 2003.²²²

In the subset of juvenile offenders serving death sentences for group sexual assaults we see a classic example of peer-driven teen behavior gone awry. Seven of those on death row, including two pairs of co-defendants, were convicted of crimes involving group sexual assault and murder of the assault victim.²²³ In Baker’s study of motivation and demographics in rape-murder cases, she concludes that “[r]apists are young.”²²⁴ Baker suggests that age is a factor central to understanding what motivates rapists and states that “youthful predisposition for irresponsible behavior and criminal activity coincides with male coming of age.”²²⁵ Given the powerful influence of peers and the importance to young men of uniting with each other,²²⁶ Baker concludes that men often rape women “to demonstrate their prowess, strength, virulence, and masculinity to other men. [H]aving an audience is critical.”²²⁷ We have only to notice the sheer brutality of the beating and sexual assault of a hitchhiker by Trace Duncan and Kenny Loggins and two of their peers,²²⁸ and of the two teenage girls who happened across the path of Efrian Perez and Raul Omar Villareal and seven of their fellow gang members at a gang initiation,²²⁹ to know that powerful group dynamics were at work.²³⁰

220. *Id.* at 1148.

221. *Id.* at 1143.

222. STREIB, *supra* note 10, at 4.

223. Trace Duncan and Kenny Loggins, Percy Lee, Jose Ignacio Monterrubio, Efrian Perez and Raul Oman Villareal, and Aaron Wilson.

224. Katherine A. Baker, *Once a Rapist: Motivational Evidence and Relevancy in Rape Law*, 110 Harv. L. Rev. 563, 600 (1997) (citing National Inst. of Law Enforcement and Criminal Justice & Law Enforcement Assistance Admin., Dep’t of Justice, *Forcible Rape: Final Project Report 8-9* (1978), which reported that the majority of sex offenders in law enforcement data are between the ages of eighteen and twenty-five).

225. Baker, *supra* note 224, at 600.

226. *Id.* at 606.

227. *Id.*

228. *See* Duncan v. State, 827 So. 2d 838 (Ala. Crim. App. 1999).

229. *See* Cantu v. State, 939 S.W.2d 627 (Tex. Crim. App. 1996).

230. Baker’s “unity” theory of male relationships cannot explain the majority of the sexual assaults among the juvenile offenders on death row, which involved lone actors, however. For two of those, an opposite “dividing” theory, in which rape is used to establish power over, or to denigrate other men, may have been at work. Baker, *supra* note 224 at 607-08. *See* Adams v. State, No. CR-98-0496, 2003 WL 22026043 (Ala. Crim. App. Aug. 29, 2003) (Renaldo Adams raped and murdered wife after sending husband to ATM to get money); *see also* Dallas Morning News, Rick Halperin, *Death Penalty News-Texas*, Feb. 18, 1999, at <http://venus.soci.niu.edu/>

Not all juveniles on death row were followers, however. Several appear to have been the leaders,²³¹ at least to the point of setting in motion the criminal activity that eventuated in murder. According to their co-defendants, Roderick Eskridge and Eddie Johnson “masterminded” the robberies, respectively, of two women who had just received their monthly support checks.²³² Similarly, the two brothers who were the co-defendants of Napoleon Beazley accused him of leading the charge against a man stepping out of his Mercedes in the driveway of his home.²³³ Christopher Simmons, whose case is now before the United States Supreme Court,²³⁴ also appears to have been behind the robbery at the home of a neighborhood resident the teenagers called the “voodoo man.”²³⁵ Simmons had been bragging to several friends that he was going to rob and kill the “voodoo man” and that he and those who helped him would get away with it because they were juveniles.²³⁶

For at least two others, the control exercised by the juveniles now on death row extended beyond their intended property crimes to the planned murder of their families. After Mark Anthony Duke’s father refused to loan Duke his truck to go see his girlfriend, Duke convinced three of his friends to go with him to his father’s house and kill him and three other family members.²³⁷ Similarly, Stephen Virgil McGilberry decided to carjack his sister’s car and to kill her and the rest of his family, after having the family Bronco taken away from him and being

~archives/ABOLISH/rick-halperin/jan99/0559.html (Bruce Lee Williams raped and murdered wife in husband’s presence after carjacking). For others, it is more likely that some other motivator, such as power, sadism/anger, or a combination, was the driving force, perhaps particularly for those offenders with mental illness or retardation who were convicted of committing sex crimes. Baker, *supra* note 224, at 609-11; see App. A (Kevin Hughes (mentally retarded and schizophrenic); Nathan Slaton (mentally ill with rare explosive disorder and temporal lobe epilepsy, extreme emotional disturbance at time of crime); Mauro Barraza (mentally ill, undefined); Timothy Davis (mentally ill and emotionally disturbed); and Anzel Keon Jones (mentally ill, undefined)).

231. But note a caveat to this section: In most of these cases, it was the co-defendants, who testified against those now on death row in exchange for a life sentence or less, who labeled them as the “leader” or “mastermind.” See App. A (Randy Arroyo, Lamorris Chapman, Dale Dwayne Craig, Ronald Chris Foster, James Matthew Hyde, Levi Jamies Jackson, and Raul Omar Villareal).

232. Eskridge v. State, 765 So. 2d 508 (Miss. 2000), *cert. denied*, No. 19990DP-00769-SCT, 2001 U.S. LEXIS 1279 (Feb. 20, 2001).

233. Beazley v. Johnson, 242 F.3d 248 (5th Cir. 2001).

234. Roper v. Simmons, 540 U.S. 1160 (2004); see *State ex rel. Simmons v. Roper*, 112 S.W.2d 397 (Mo. 2003).

235. *State v. Simmons*, 944 S.W.2d 165 (Mo. 1997). But for the unexpected presence of the wife of the “voodoo man” and her recognition of Simmons from a recent traffic incident, the break-in might have ended with the robbery.

236. *Id.* at 169.

237. Duke v. State, 889 So. 2d 1 (Ala. Crim. App. 2002).

driven to school by his mother.²³⁸

The primary motivation for Duke, as he told his friends before they set out to commit the murders, was that he was “tired of his father bossing him around.”²³⁹ McGilberry was not so much angry as embarrassed at being driven to school by his mother instead of driving the family Bronco himself, a privilege his parents had revoked after he skipped school and lost his job.²⁴⁰ Not surprisingly, both murders were as brutal as the motivations were immature.²⁴¹ While immaturity is, by definition, normative for adolescents, Duke and McGilberry exhibited signs of extreme immaturity and inability to control their frustration that place them outside the norm, for reasons apparently never explored by the courts that sentenced them. Duke’s behavior may have been due in part to psychological damage he suffered as a childhood victim of his father’s abuse.²⁴² For McGilberry, who confessed upon arrest and later was diagnosed as having a “sociopathic personality structure” that made him unable to distinguish right from wrong, the roots appear to lie in mental illness.²⁴³

Neither Duke nor McGilberry had a violent past. In fact, neither had any record of juvenile or criminal court involvement.²⁴⁴ Their crimes were horrendous, but they must be understood, at least in part, as the acts of youth whose parents’ conduct so threatened their status among their peers that they could not bear it.

Status concerns similarly motivated the conduct of some lone actors. These individuals’ comments and conduct before and after the crimes indicate that each felt compelled to improve his status in his peer group. Kenneth Jeremy Laird, who acted alone, bragged to his friends that he was going to get a blue Toyota 4 x 4.²⁴⁵ He located one, and as he lay in wait at the home of its owner, Laird called his buddies to tell them that he was moving to the owner’s upscale neighborhood on the north side of Phoenix, Arizona.²⁴⁶ In two other cases of teens acting alone, Larry L. Jenkins, Jr. and Gregory Wynn shared the proceeds of their robberies with their friends.²⁴⁷ Jenkins’ friends testified that on the night of the robbery of a local laundromat, they rode around with Jen-

238. *McGilberry v. State*, 741 So. 2d 894, 903 (Miss. 1999).

239. *Duke*, 889 So. 2d at 10.

240. *McGilberry*, 741 So. 2d at 903.

241. *See McGilberry*, 741 So. 2d at 894; *see also Duke*, 889 So. 2d at 1.

242. *Duke*, 889 So. 2d at 37.

243. *McGilberry*, 741 So. 2d at 903, 917.

244. *McGilberry*, 741 So. 2d 894; *Duke*, 2002 WL 1145829.

245. *State v. Laird*, 920 P.2d 769, 771 (Ariz. 1996).

246. *Id.*

247. *Jenkins v. State*, 498 S.E.2d 502 (Ga. 1988); *Wynn v. State*, 804 So. 2d 1122 (Ala. Crim. App. 2000), *cert. denied*, *Ex parte Wynn*, 804 So. 2d 1152 (Ala. 2001).

kins in the victim's van and went to a club in a nearby town, where they all spent the night together at another friend's home.²⁴⁸ After robbing a Hardee's restaurant, Wynn shared the proceeds with two friends and bragged about what he had done.²⁴⁹

Peers appear to have influenced nearly eighty percent (fifty-six of seventy-two) of the juvenile offenders who received the death penalty, either by their direct participation in the criminal acts themselves (forty-six) or by their involvement with the defendant immediately before or after the crime (ten).²⁵⁰ However, only four crime partners are on death row.²⁵¹ Few other co-defendants were sentenced to death,²⁵² and a large number entered into plea agreements for life imprisonment,²⁵³ terms of years,²⁵⁴ or even probation,²⁵⁵ in exchange for their testimony against their counterparts who are now on death row.²⁵⁶ A handful of co-defendants were acquitted.²⁵⁷

C. *Relationship to Victims*

Turning to an analysis of the relationship of the offenders to their victims, the cases show that more than one-half (forty-one) of the crimes were against strangers, including two police officers.²⁵⁸ Those acting alone were convicted of murdering strangers in thirteen of the cases,²⁵⁹ and the remaining twenty-nine cases, including the two police officer incidents, involved group offenders.²⁶⁰ These proportions are consistent with the two-thirds reported generally for multiple offender killing of strangers,²⁶¹ as is the fact that nearly all of the murders of strangers

248. *Jenkins*, 498 S.E.2d at 507.

249. *Wynn*, 804 So. 2d at 1127. Testimony that Wynn had killed to earn a teardrop tattoo (a gang symbol of proof that he had killed someone) was excluded from evidence. *Id.* at 1128.

250. *See* App. A (The latter group consists of those identified as "Alone, but.").

251. *See* App. A (Trace Duncan and Kenny Loggins; Efrian Perez and Raul Omar Villareal).

252. *See* App. A (Arroyo, Duke, Duncan and Loggins, Golphin, Howard, Lee, Perez, and Villareal).

253. *See* App. A (Arthur, Craig, Dewberry, Duncan, Loggins, Monterrubio, Ramirez, and Tran).

254. *See* App. A (Arroyo, Bonifay, Craig, Hyde, and Jackson).

255. *See* App. A (Arthur).

256. *See e.g.*, *Bonifay v. State*, 680 So. 2d 413, 415 (Fla. 1996); *State v. Craig*, 699 So. 2d 865 (La. 1997); *Dewberry v. State*, 4 S.W.3d 435 (Tex. Crim. App. 1999); *State v. Hughes*, 493 S.E.2d 821 (S.C. 1997); *Hyde v. State*, 778 So. 2d 199 (Ala. Crim. App. 1998); *State v. Jackson*, 918 P.2d 1038 (Ariz. 1996).

257. *See* App. A (H. Hughes [one co-defendant acquitted]; LeCroy [co-defendant brother acquitted]; Springsteen [three co-defendants acquitted]).

258. *See* App. A.

259. *See* App. A. Six of the thirteen are in the "Alone, but" category.

260. *See* App. A.

261. *See* Rowley et al., *supra* note 56, at 8.

began as burglaries or robberies.²⁶²

Less than forty percent (twenty-two) of the cases involved acquaintances, and some victims were neighbors.²⁶³ Unlike strangers, the acquaintance and neighbor murders are divided relatively equally between those who were convicted of acting alone and those who were with others: thirteen acquaintances and three neighbors, for multiple offenders; and eight acquaintances and five neighbors, for lone actors.²⁶⁴

Only two cases, far fewer even than the numbers reported by Rowley and his colleagues,²⁶⁵ involved victims who were family members. Whereas lone offenders are four times more likely than groups to be convicted of killing family members,²⁶⁶ the two family murders here were group crimes led by an aggrieved teenager, and their similarities are striking.²⁶⁷ Both boys were outraged that their parents had denied them use of the family vehicle, and both enlisted the help of others in murdering the offending parent and other family members who could be witnesses against them.²⁶⁸ These two cases, thus, are anomalous not only in their group character, but in the high degree of planning and the actual recruitment of accomplices that preceded the acts. Those who kill family members with such premeditation generally act alone or with another family member.²⁶⁹

In the eight "pure" sexual assault cases,²⁷⁰ one-half (four) of the

262. See App. A. Of the multiple offender murders of strangers, two incidents, each placing two juveniles on death row, started as kidnappings and sexual assaults (Trace Duncan and Kenny Loggins; Efrin Perez and Raul Omar Villareal). See also Steve Brewer, *Teen Gets Death in Slaying of Lawman; Defendant Again Lashes Out in Court*, HOUSTON CHRONICLE, May 26, 1999, at A27 (recounting a scared Michael Anthony Lopez, Jr.'s evasion of a police officer out of fear of re-incarceration for a probation violation); Bonifay v. State, 626 So. 2d 1310 (Fla. 1993) (James Patrick Bonifay's "revenge assault" on the person who had fired his cousin). For lone actors, the only non-robbery-induced murder of a stranger was a drive-by shooting (Tonatihu Aguilar). See App. A.

263. See App. A; Adam Liptak et al., *Ruling Is Awaited on Death Penalty for Young Killers*, N.Y. TIMES, Jan. 4, 2005, at A1 (Robert Acuna convicted and sentenced to death for killing two elderly neighbors and stealing their car); Jones v. State, No. 72,500, slip op. at 2 (Tex. Crim. App. June 23, 1999) (Anzel Keon Jones, who acted alone in killing the two women next door, was angry at them for interrupting a party he was having the night before to complain about the loud music); Slaton v. State, 680 So. 2d 879 (Ala. Crim. App. 1995), *aff'd*, 680 So. 2d 909 (Ala. 1996) (Nathan Slaton acted alone in raping and killing the woman who lived next door).

264. See App. A. Three of the acquaintances and one of the neighbors were victims of offenders in the "alone, but" category.

265. See Rowley et al., *supra* notes 56, 64-68 and accompanying text.

266. *Id.*

267. Duke v. State, 889 So. 2d 1 (Ala. Crim. App. 2002); McGilberry v. State, 741 So. 2d 894 (Miss. 1999).

268. Duke, 889 So. 2d at 1; McGilberry, 741 So. 2d at 903.

269. See Rowley et al., *supra* notes 56, 64-68 and accompanying text.

270. "Pure" sexual assaults are those that appear not to have escalated from robberies or revenge assaults. Five sexual assaults occurred incident to robberies and two as part of revenge killings. See App. A.

victims and assailants were strangers; three were acquaintances; and only one was a neighbor.²⁷¹ These numbers closely parallel the overall relationship distribution.²⁷² What is striking about relationships in sexual assault cases is the stark contrast between juvenile offenders acting alone and those with multiple offenders. None of the victims of solo offenders were strangers; instead, they were either acquaintances or neighbors.²⁷³ In contrast, four of the five victims of group offenses were strangers,²⁷⁴ and only one was an acquaintance.²⁷⁵ The larger four- and eight-member groups, not surprisingly, were responsible for all of the sexual assault murders of strangers committed by multiple offenders.²⁷⁶ Although these numbers are too few to have statistical significance, the multiple offender-stranger relationship validates the fear factor associated with rape-murder cases.²⁷⁷

In sum, and with the few exceptions noted above, the available information indicates that the relationship between the juveniles on death row and their alleged victims mirrors that of their counterparts elsewhere in prison and on the streets.

E. Escalation to Capital Murder²⁷⁸

Data on the nature of the crimes for which juvenile offenders

271. See App. A. The percentage of sexual assaults involving strangers among death row juvenile offenders also parallels nationwide data for sexual assault murders across the entire offender population. See Phyllis L. Crocker, *Crossing the Line: Rape-Murder and the Death Penalty*, 26 OHIO N.U.L. Rev. 689, 699 (2000).

272. See *supra* notes 258-64 and accompanying text.

273. See App. A.

274. See App. A. The number of victims among the multiple offender cases does not match the number of defendants because in two cases, two co-defendant juvenile offenders are on death row. See *Duncan v. State*, 827 So. 2d 838 (Ala. Crim. App. 1999) (sentencing to death Trace Duncan and Kenny Loggins for their participation in the kidnapping, sexual assault, and killing of a female hitchhiker); *Cantu v. State*, 939 S.W.2d 627 (Tex. Crim. App. 1996) (sentencing to death Efrain Perez and Raul Omar Villareal for their involvement in a gang initiation that led to the sexual assault and killing of two teenage girls). See App. A.

275. See App. A; see also *Monterrubio v. State*, No. 72,028 (Tex. Crim. App. Sept. 11, 1996) (the victim was a friend of the co-defendant, who was Monterrubio's cousin).

276. See App. A (*Duncan* [four], *Loggins* [four], *Perez* [eight], *Villareal* [eight]).

277. See Crocker, *supra* note 271, at 699. Crocker observes that this fear may be misplaced, as national data from the 1997 Sexual Assault Murder Study found that more than fifty percent of rape-murders were between acquaintances, another ten percent were among family members or intimates, and less than forty percent were among strangers. *Id.* These percentages contrasted with those among the population Crocker was studying, the twenty-two men convicted of rape-murder on Ohio's death row. Among that group, thirty-six percent were acquaintances; nine percent, family/intimates; and fifty-five percent, strangers. *Id.*

278. The unintended nature of homicide is not the exclusive domain of adolescents who have received the death penalty. See, e.g., *Enmund v. Florida*, 458 U.S. 782 (1982) (overturning death sentence where defendant stayed in the car when his co-defendants went into a farmhouse intending robbery); *Lockett v. Ohio*, 438 U.S. 586 (1978) (same; defendant stayed in the car while others went in to rob a pawn shop).

received the death penalty reflect the social science literature: nearly all of the homicides occurred during or incident to the commission of another crime. Most often the crime was property-related: twenty-nine cases started as burglaries; eight as carjackings; and eight as robberies.²⁷⁹ Thirteen were what are best characterized as "revenge assaults." Six of these appear to have been unintentional killings, five were planned hits induced by others, and two were planned by the defendants themselves.²⁸⁰ Another eight began and ended as sexual assaults,²⁸¹ three were drug-related,²⁸² one was an apparently random drive-by shooting,²⁸³ one was the shooting of a police officer in an attempt to evade arrest for a probation violation,²⁸⁴ and one began with the defendant shooting birds in his backyard.²⁸⁵

The property crimes break down significantly along individual and group lines only for robberies and carjackings. Individual actors were convicted of no robberies and only one carjacking,²⁸⁶ compared to seven robberies²⁸⁷ and seven carjackings²⁸⁸ for group actors. Burglaries of

279. See App. A.

280. See App. A (Arthur: at adult lover's insistence, killed her husband; Bonifay: on adult cousin's orders, killed supervisor who had fired cousin; Chapman: killed friend of cheating girlfriend; Dewberry: killed man who had made gay advances on adult brother co-defendant; Dominguez: killed woman who had "dissed" girlfriend; Duke: tired of father bossing him around, killed father and other family members; Hyde: co-defendant planned hit on witness against himself; A. Jones: killed neighbor who had interrupted his party with complaints about loud music; Knotts: killed woman who had taunted and forced his friend from a bridge into a creek during a rainstorm; Lee: killed woman who kicked him, girlfriend, and child out after they had lived there several months; McGilberry: killed father and other family members after father took family Bronco away from him; Reeves: killed girl who had testified against co-defendant; Tran: killed man and his compatriots for dating Tran's gang boss's girlfriend).

281. See App. A (Duncan and Loggins: kidnapped and brutalized female hitchhiker; K. Hughes: mentally retarded with schizoid personality, pattern of sexual assaults on young girls; S. Johnson: asked for drink of water, pattern of similar sexual assaults; Monterrubio: victim was a friend who spent time and smoked marijuana with him and his co-defendant cousin; Perez and Villareal: after gang initiation involving fighting and drinking, gang-raped and killed two girls taking a shortcut to visit another friend; Slaton: mentally ill, neighbor saw him shooting birds in his backyard and later leaving his elderly neighbor's home, where she was found dead).

282. See App. A (Alvarado, Horn, and N. Williams).

283. See App. A (Aguilar).

284. See App. A (Lopez).

285. See App. A (Slaton).

286. See App. A (B. Williams: carjacked couple, raped and killed woman, man survived).

287. See App. A (Bernal: drive-by robbery and shooting; Eskridge: shot woman to obtain support check she had just received; E. Johnson: attacked driver as he was getting out of car in driveway; LeCroy: robbed and killed couple who were camping in the same campground as LeCroy and his family; Little: robbed and killed accountant on his way from Jehovah's Witnesses office to bank; Solomon: robbed man in disabled vehicle; and Wilson: robbed and killed door-to-door-salesman).

288. See App. A (Arroyo: carjacked Mazda RX7 to steal parts; Craig: carjacked Bronco to get transportation to see his girlfriend; Golphin: carjacked finance office worker's car to make getaway; Holly: carjacked taxicab to get to Chicago; Jackson: carjacked and shot driver to gain

businesses and residences reveal no statistically significant distinction between individual and group actors.²⁸⁹ Whether in business or residential settings, a number of burglaries turned into murder after the victim surprised, challenged, or frightened the offenders.

For example, Thomas Mark Adams took a knife from his parents' kitchen with him to scare Mildred Foster when he broke into her home to steal money to buy drugs.²⁹⁰ Ms. Foster awoke and screamed, surprising Adams, who told her to be quiet.²⁹¹ When Adams put the knife down, Foster grabbed it, screamed again, and as Adams attempted to cover her mouth to quiet her, Foster bit him and tried to stab him.²⁹² During the struggle that ensued, Adams stabbed Foster in the chest.²⁹³ He immediately fled the house and turned himself into the police, crying hysterically.²⁹⁴

A similar struggle for control of a weapon resulted in the shooting or stabbing death of the victim in a number of other cases. Ronald Chris Foster set out to rob a local grocery store and was not even carrying a weapon when he entered the store.²⁹⁵ When the clerk at the market started to ring up Foster's purchase, Foster jumped over the counter, the clerk pulled out a gun, and the two struggled.²⁹⁶ The clerk was killed when the gun went off during the struggle.²⁹⁷ Similarly, Steven Brian Alvarado and his co-defendants struggled to gain control of a knife the victim pulled on them;²⁹⁸ Justin Wiley Dickens was pinned against a wall and trying to fend off his victim when his gun went off;²⁹⁹ Kevin Salvador Golphin and his co-defendant struggled with the state trooper who had stopped them in a stolen vehicle;³⁰⁰ Nathan Slaton and his

status with Crips; Salinas: carjacked man and infant daughter, no details available; A. Wilson: carjacked young woman, sexually assaulted and killed her, co-defendant said, because she had seen their faces).

289. See App. A. Six individuals (R. Adams, T. Adams, Barraza, Cobb, Neal, and Powers) and seven groups (Bridgewater, Capetillo, Dycus, Guillen, Howard, Ramirez, and Wimberly) were involved in burglaries of residences. Three individuals (Davis, Gibson, Walters) and eight groups (Bonds, Hart, H. Hughes, Morgan, Pressley, Soriano, Soto-Fong, and Springsteen) were involved in burglaries of businesses. For residential burglaries, one individual (Laird) is in the "alone, but" category; for business burglaries, four (Dickens, Foster, Jenkins, and Wynn) occupy that category.

290. *State v. Adams*, 439 S.E.2d 760, 761 (N.C. 1992).

291. *Id.* at 762.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Foster v. State*, 639 So. 2d 1263, 1272 (Miss. 1994).

296. *Id.*

297. *Id.*

298. *Alvarado v. State*, 912 S.W.2d 199, 206 (Tex. Crim. App. 1995).

299. *State v. Justin Wiley Dickens*, No. 72,129 (Tex. Crim. App. 1997).

300. *State v. Golphin*, 533 S.E.2d 168, 184-85 (N.C. 2000).

neighbor scuffled;³⁰¹ and Bruce Lee Williams was struggling with his victim when his gun went off.³⁰²

In at least two cases, surprise at the presence of the victim appeared to cause the escalation of the crime from an intended burglary to capital murder. Raymond Levi Cobb, while high on marijuana, was surprised by the victims during his burglary attempt;³⁰³ and Gregory Wynn was surprised by a former co-worker when he entered and hid in a Hardee's to burglarize it after-hours in reaction to his earlier firing.³⁰⁴ In still other cases, death ensued from the young offenders' overreactions to the rebellious or other affirmative acts of their intended robbery victims. The owner of an RX7 that Randy Arroyo and his co-defendants were attempting to steal tried to flee;³⁰⁵ the intended victim of a robbery outside an ice house ran from Johnnie Bernal and his friends;³⁰⁶ a store owner lectured Exzavious Gibson about his profanity and triggered Gibson's intense anger;³⁰⁷ a young boy's resistance and his mother's scream set off Larry L. Jenkins during his burglary of a laundromat;³⁰⁸ the victim of a gang-related driveway carjacking hit Eddie C. Johnson in the face with a grocery bag;³⁰⁹ and one of the workers in the neighborhood market targeted for robbery by Martin Raul Soto-Fong and his friends rebelled against them.³¹⁰

In two non-property-related cases, the juvenile offenders appear to have disproportionately responded to threats to their status as men among peers. In one such case, a co-worker made a second unwelcome gay advance on John Dewberry in the presence of Dewberry's older brother,³¹¹ and in the other, a young woman in whose family's home Percy Lee had once lived, refused to let Percy and a friend enter the residence.³¹²

301. *Slaton v. State*, 680 So. 2d 879, 885 (Ala. Crim. App. 1995).

302. See Associated Press, *Juvenile Defendant Faces Potential Death Sentence*, DEATH PENALTY NEWS-TEXAS, Feb. 18, 1999, available at <http://venus.soci.niu.edu/~archives/ABOLISH/rick-halperin/jan99/0559.html>.

303. *Cobb v. State*, 85 S.W.3d 258, 261 (Tex. Crim. App. 2002).

304. *Wynn v. State*, 804 So. 2d 1122, 1127 (Ala. Crim. App. 2000).

305. See Lisa Sandberg, *Young Killers Await Dates with Death; Fresh Faces Belie Violent Histories*, SAN ANTONIO EXPRESS-NEWS, Jan. 23, 2000 at 14A.

306. See Roma Khanna, *Cases Cast Doubt on Ballistics Work at HPD Lab*, HOUSTON CHRON., Mar. 23, 2003, at A1, available at <http://www.prisonactivist.org/pipermail/prisonact-list/2003-March/006902.html>.

307. *Gibson v. State*, 404 S.E.2d 781, 784 (Ga. 1991).

308. *Jenkins v. State*, 498 S.E.2d 502, 507 (Ga. 1998).

309. Selwyn Crawford, *Fort Worth Jury Hears Testimony Supporting Death Penalty*, DALLAS MORNING NEWS, July 29, 1997 at 13A.

310. *State v. Soto-Fong*, 928 P.2d 610 (1996).

311. *Bexar Jury to Hear Capital Murder Case*, SAN ANTONIO EXPRESS-NEWS, July 29, 1997 at B2.

312. *Commonwealth v. Lee*, 662 A.2d 645, 648 (Pa. 1995).

Escalation from assault to murder in sexual assault cases is more difficult to pinpoint, perhaps because sexual assault itself has such complicated and misunderstood roots and the motivations of sexual offenders are so varied.³¹³ The theoretical challenges of these cases are not the only challenges, however. A review of the available information on the sexual assault cases studied here reveals little about the circumstances surrounding the escalation of the assault to the eventual murder of the assault victims, particularly for those acting alone.³¹⁴

Phyllis L. Crocker's work reveals that this information void is not unique to juvenile offenders on death row. Crocker observes that the underlying rapes in rape-murder prosecutions confound expectations by not receiving the heightened scrutiny the crimes would appear to demand, but less probing examination than rapes in which the victims survive.³¹⁵ Issues central to survivor rape cases, such as questions of victim consent, the use or threat of force, the relationship between victim and offender, and how that relationship might have affected what occurred, assume little significance in rape-murder cases.³¹⁶ Instead, the central question shifts from whether the state will prosecute at all, to whether the prosecution will seek the death penalty.³¹⁷ The upshot, Crocker contends, is that much less is needed to prove rape or attempted rape in rape-murder cases than in "pure" rape cases.³¹⁸ Moreover, because prosecutors accord little gravity to rape when it ends in murder, rape becomes just "a convenient means to trigger the death penalty."³¹⁹

Crocker's observations are particularly poignant when applied to the rape-murders for which juvenile offenders are now serving death sentences.³²⁰ We know that male adolescents, purely by virtue of their age and immaturity, are subject to youthful impulsivity, lack of control and poor judgment,³²¹ along with the combustive combination of peer influence and sexual drive noted by Baker.³²² Use of an unexamined incident of rape as "a convenient means to trigger the death penalty"³²³ in any case should disturb advocates for both victims and the accused.

313. See, e.g., Baker, *supra* note 224; see also Crocker, *supra* note 271.

314. See App. A.

315. Crocker, *supra* note 271, at 704.

316. *Id.*

317. *Id.*

318. *Id.* To Crocker, this differential treatment is a profoundly disturbing demonstration of the insignificance of women's stories. Victims who live to tell their stories are subjected to searing challenges to their credibility, leading Crocker to conclude that a woman's "silence, when dead, is more powerful than her voice when alive." *Id.*

319. *Id.* at 705.

320. See App. A.

321. See *supra* notes 74-80 and accompanying text.

322. See Baker, *supra* note 224, at 600-01.

323. Crocker, *supra* note 271, at 705.

In the case of a sixteen- or seventeen-year-old boy, however, allowing the state's outrage over a rape-murder to supplant the careful examination of the circumstances of the crime is an injustice perpetuated by the capital prosecution of adolescents.

The "revenge assaults" are another troubling subset of the juvenile population on death row. Only one of the thirteen youths convicted of such assaults was a solo actor,³²⁴ two were influenced by others prior to the incident,³²⁵ and the vast majority (ten) acted in groups.³²⁶ The one lone actor case bears the earmarks not so much of calculated revenge as of the moral outrage characteristic of youth,³²⁷ as Miguel Dominguez's actions escalated from "getting even" with his girlfriend's neighbor, another young woman, for "dissing" his girlfriend, to killing the neighbor.³²⁸ Similarly, William Thomas Knotts wanted to punish a woman who had taunted him and a friend and caused his friend to fall off a bridge into a creek during a rainstorm.³²⁹ Chivalrous or "savior" motivations propelled Ronald Lee Bell, Jr. to assist two young female friends in luring and then murdering an adult male who had made unwanted sexual advances toward them.³³⁰

Two-thirds (seven) of the group offenders who were involved in "revenge assaults," however, either planned or were induced by others' plans to murder their particular victims. In two cases, the murders were solicited by adults: Mark Sam Arthur's forty-one-year old lover, Carmen Fonseca, promised him a car for killing her abusive husband,³³¹ and James Patrick Bonifay's cousin, Robin Archer, convinced him to kill the person responsible for getting Archer fired from his job.³³² The other planned multiple offender "revenge assaults" ranged from gunning down the unwanted competitor in a love triangle,³³³ to eliminating witnesses against a friend in unrelated criminal matters (two cases),³³⁴ and killing

324. See App. A (Dominguez).

325. See App. A (A. Jones and Knotts).

326. See App. A (Arthur, Bonifay, Chapman, Dewberry, Duke, Hyde, Lee, McGilberry, Reeves, and Tran).

327. See *supra* notes 75, 79-80 and accompanying text.

328. Dominguez v. State, 917 P.2d 1364, 1369 (Nev. 1996).

329. Knotts v. State, 686 So. 2d 431, 442 (Ala. Crim. App. 1995).

330. Bell v. State, 841 So. 2d 329, 331-32. (Fla. 2002).

331. Steve Brewer, *Teen Gets Probation in Exchange for Testimony in Murder Case*, HOUSTON CHRON., May 28, 1998, at A19.

332. See Bonifay v. State, 626 So. 2d 1310, 1311 (Fla. 1993).

333. See S.K. Bardwell, *Suspects Tied to Four Killings, Police Say*, HOUSTON CHRON., Oct. 29, 1997, at 18, available at <http://www.chron.com/content/chronicle/aol-metropolitan/97/10/29/triple.2-0.html> (Son Vuk-Hai Tran).

334. See *Ex parte* Hyde, 778 So. 2d 237, 238 (Ala. 2000) (stating that after James Matthew Hyde's co-defendant/friend was caught and prosecuted for having Hyde clock him into and out of work, the two planned to kill the police investigator who testified at grand jury proceedings against Hyde's friend); see also Texas Department of Criminal Justice, Death Row Home Page,

parents (and other family members) for refusing use of the family vehicle (two cases, as described above).³³⁵

Setting aside the murders "for hire" and other targeted hits, the juvenile death row population appears to display the spontaneity and impulsivity that is the norm in adolescence. As with Beyer's study of seventeen juvenile offenders,³³⁶ evidence of the unanticipated nature of the murders is revealed in offenders' comments to the police at the time of their arrest or much later, from prison. Some said that the gun "just went off" during a struggle³³⁷ or the confusion of the moment,³³⁸ and one said he still was not sure why he pulled the trigger.³³⁹

Moreover, like Napoleon Beazley, more than one-half of the juvenile offenders presently on death row had no record of juvenile or criminal court involvement before the crimes for which they were sentenced to die.³⁴⁰ For others, like T.J. Jones and Toronto Patterson, their

Offender Information, Whitney Reeves, at <http://www.tdcj.state.tx.us/stat/reeveswhitney.htm> (last updated July 22, 2004) (discussing that the girl whom Whitney Reeves and his co-defendant killed had testified against the co-defendant in his trial for sexual molestation of minors).

335. See *supra* notes 237-44 and accompanying text (Mark Anthony Duke and Stephen Virgil McGilberry).

336. Beyer, *supra* note 62. All of the juveniles in Beyer's study who had used a gun said they never intended to shoot it; it "just went off." *Id.* at 27.

337. See App. A (Bruce Lee Williams: During abduction of an Asian couple in car, Williams said the "gun went off" during a struggle with the victim after she offered to perform a sex act; John Curtis Dewberry: When the victim made a homosexual advance at Dewberry, his head butted the gun, and "it just went off").

338. See App. A (Taurus Carroll: robbery of dry-cleaning and laundry business with one accomplice. Carroll was nervous, and the co-defendant was demanding more money; one victim was shouting, and the "gun just went off"); see also Carroll v. State, 852 So. 2d 801, 807 (Ala. Crim. App. 1999).

339. See App. A (Leo Gordon Little: abduction of church accountant to withdraw money from ATM machine. Little and his friend took the victim to the country, made him kneel along the roadside, and shot him in the head. From prison, Little said he still is not sure why he pulled the trigger.); see also Matt Flores, *Youth Sentenced to Die for Killing Jehovah's Witness*, SAN ANTONIO-EXPRESS NEWS, Mar. 6, 1999, at 1B.

340. See App. A. In addition to Beazley, Foster, Herman Hughes, Jr. and Soriano had no record, juvenile or criminal, before the murders for which they were convicted and sentenced to death. No prior juvenile or criminal conduct is mentioned in the available records for thirty other juvenile offenders on death row (Adams, Alvarado, Arthur, Barraza, Bernal, Dickens, Duke, Dycus, Eskridge, Gibson, Guillen, Hart, Holly, Jenkins, E. Johnson, Jones, Little, Lopez, McGilberry, Monterrubio, Morgan, Perez, Powers, Reeves, Solomon, Springsteen, Tran, Villareal, N. Williams, and Wilson). In three instances (Golphin, K. Hughes, S. Johnson), there were allegations, but no convictions, of other crimes committed near or after the crimes for which they were sentenced to death. Nine other cases, five from Alabama (Duncan, Hyde, Loggins, Pressley, and Wynn), and one each from Florida (LeCroy) and Pennsylvania (Lee), describe the defendant as having "no significant history of prior criminal acts." Whether this means "no history at all," "only minor juvenile history," or another of several possible interpretations is unclear, but in at least some of the cases, defense counsel argued against the use of the term because of the implication that their clients had offended, though in a merely minor or "insignificant" manner. Thus, it may be that further investigation into those cases would reveal no prior record at all, and thus further increase the total of those with no prior criminal conduct.

offenses reflect the failure of the juvenile justice system to effectively address problems of escalating criminal activity among troubled youth.³⁴¹ Even with the systemic failures, however, only one of the seventy-two had any prior record of violence toward others.³⁴² Yet all seventy-two received the punishment that is to be reserved for “the worst of the worst.”³⁴³

No part of the discussion here is intended to excuse the conduct of those who kill others, whatever the reason or lack of reason. For some of the juvenile offenders on death row, analysis of the group and peer issues surrounding the incidents described here suggests that they were the principal players in the murders for which they were sentenced to die. For the great majority, however, one can reach no such conclusion; and in nearly every case, the role of peers in creating a fertile environment for aggressive criminal conduct is indisputable. Nonetheless, neither the law nor our criminal justice system recognizes this simple fact of youth. In fact, in some critical instances described below, normative adolescent conduct becomes yet another strike against teenage offenders.

IV. CONSIDERING ADOLESCENCE IN CRIMINAL LAW AND PROCEDURE

A. Introduction

Developments in death penalty law and juvenile justice in recent years reveal an uncomfortable anomaly. While the late 1990s and early 2000s have seen unprecedented and growing recognition of the inhumanity of the death penalty,³⁴⁴ juvenile criminality has continued to be the target of increasingly severe, anti-therapeutic, and unforgiving sanctions.³⁴⁵ Beginning in the mid-1980s, legislatures nationwide enacted a number of “get tough” juvenile crime measures, the most significant of which removed certain classes of crimes, generally those resulting in death or other serious bodily injury, from the jurisdiction of the juvenile

341. See App. A. Eleven are identified as having had some involvement with the juvenile justice system during their youth (Craig, Davis, Dewberry, Dominguez, Howard, Jackson, Knotts, Slaton, Soto-Fong, B. Williams, and G. Wilson). One of those (Knotts), however, was merely a status offender, a runaway from an abusive home environment who had been locked up in a juvenile facility. *Knotts v. State*, 686 So. 2d 431, 444-45 (Ala. Crim. App. 1995).

342. See App. A. (Bridgewater).

343. See Steiker & Steiker, *supra* note 190, at 57.

344. See STREIB, *supra* note 158, at 5-6. But see Scripps Howard News Service, *Rise in Death Sentence for Juveniles Ignites Debate*, DETROIT NEWS, July 15, 2002 (reporting that juvenile death penalty rates have risen “in modern times”).

345. See, e.g., Barry C. Feld, *Race, Politics and Juvenile Justice: The Warren Court and the Conservative “Backlash,”* 87 MINN. L. REV. 1447 (2003); Phillip J. Cook & John H. Lamb, *The Unprecedented Epidemic in Youth Violence*, 24 CRIME & JUSTICE 27 (1998); ZIMRING, *supra* note 15, at 37.

court.³⁴⁶

With the legislative and executive branches stripping the juvenile courts of their jurisdiction to try juveniles charged with certain crimes, even when the charges are lodged against the very young,³⁴⁷ the criminal courts must accept the responsibility to do what juvenile courts have always done. They must recognize the difference between adolescents and adults. To do that, the legal and procedural rules that govern criminal court proceedings against adolescents alleged to have committed violent crimes must reflect what we know about youth. The discussion below is meant to commence the process of reconciliation between the criminal law and the social sciences. It begins by setting out two important principles that must guide our thinking about youth crime. It then suggests certain areas that call out for reform.

A. Guiding Principles

1. A KID IS STILL A KID, EVEN WHEN HE KILLS

The United States Supreme Court has long recognized that juveniles are different from adults in the eyes of the law, even in death penalty jurisprudence. In *Thompson v. Oklahoma*,³⁴⁸ the Court ruled that a certain class of defendants convicted of committing a capital murder is not eligible for execution: those who, at the time of the crime, were fifteen years of age or younger.³⁴⁹ Nevertheless, neither the criminal courts nor those responsible for promulgating criminal laws and procedures have acted upon that principle in the years since *Thompson*. Adolescents tried in criminal court are stripped of their youth and treated for all purposes as adults, even though the Supreme Court has provided an avenue for recognition of their differences. More important than the precise age at which the demarcation between "juvenile" and "adult" occurs is the fact that the Court has established any such demarcation.

346. See, e.g., Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 472-73 (1987) [hereinafter *Legislative Changes*]; Kristen Simms Cross, *When Juvenile Delinquents are Treated as Adults: The Constitutionality of Alabama's Automatic Transfer Statute*, 50 ALA. L. REV. 155, 157 (Fall 1998); Marcy R. Podkopacz & Barry C. Feld, *The Back Door to Prison: Waiver Reform, "Blended Sentencing," and the Law of Unintended Consequences*, 91 J. CRIM. L. & CRIMINOLOGY 997, 998-99 (2001).

347. E.g., Dana Canedy, *2 Opposing Theories in a Murder, and Both Are the Prosecution's*, N.Y. TIMES, Sept. 3, 2002, at A1 (reporting on the commencement of the trial of brothers Alex and Derek King for the murder of their father in late 2001, when they were twelve and thirteen; prosecution also tried a forty-year-old handyman, against whom the boys testified, for their father's murder).

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

349. *Id.* at 835. Fourteen years later, in *Atkins v. Virginia*, the Court announced that those with mental retardation, like those aged fifteen and under, are ineligible for the death penalty. *Atkins v. Virginia*, 536 U.S. 304 (2002).

Having ruled that those fifteen and younger are not old enough to be executed, the Court has established immaturity as a factor of legal significance,³⁵⁰ and that principle must inform all criminal justice policy affecting the treatment of youth.

Prosecutors, judges, and legislators must recognize the phrase "trial as an adult" as the misnomer that it is. Newspaper coverage of the September 2002 trial of brothers Alex and Derek King, ages twelve and thirteen at the time of their father's murder, is illustrative. Accounts up to and throughout the trial and sentencing of the Florida boys repeatedly stated that they were being "tried as adults."³⁵¹ But being tried in adult court does not mean that those young boys suddenly became adults; it simply means that the jurisdiction over the proceedings was changed from juvenile to adult court. Our courts and legislators must begin to understand and appreciate this simple fact. We must cease engaging in the metamorphic fiction of trying juveniles "as adults," and acknowledge that when a juvenile is tried in adult criminal court, he is still a child, or at best, a youth, notwithstanding the label attached to his removal from the juvenile justice system to the criminal justice system. Instead of glossing over the differences between adults and children, we must embrace them and reflect them in our laws and procedures. Doing so will require not a dramatic shift in criminal law jurisprudence, but a return to its foundations.

2. PENAL PROPORTIONALITY

Penal proportionality is a core principle of American criminal law. Historian Francis Allen has written that, for more than two centuries, "a persistent strand in liberal thought relating to penal justice has been the notion that the severity of criminal penalties should be limited by and proportioned to the culpability of the offender and his offense."³⁵² Punishment can be fair only if it is measured by both the amount of harm done and the blameworthiness of the harm-doer.³⁵³ Thus, our courts

350. See *Thompson*, 487 U.S. at 835; *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (recognizing the significance of youth as a mitigating factor in capital cases); see also *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 399-400 (Mo. 2003) (en banc) (applying the rationales of *Thompson* and *Eddings* to overturn the death sentence imposed on seventeen-year-old Christopher Simmons).

351. See Bill Kaczor, *Separate Verdict Shocks Jurors*, LAS VEGAS REV. J., Sept. 8, 2002, at 10A; Canedy, *supra* note 347, at A14.

352. FRANCIS ALLEN, *HABITS* 42-43 (1996). Even though, or perhaps because, he is a Briton, Allen for decades has written with great insightfulness about the American legal system. See, e.g., Francis Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1 (1950); Francis Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L. & CRIMINOLOGY 246 (1961).

353. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 800 (2003).

ought to be in the practice of attempting to fashion sanctions that will meet the individual needs of the offender, taking as a starting point the magnitude of the harm done and the degree of the individual offender's participation. That assessment must begin, for adolescent offenders, with the work of those who know adolescents best. Chief among those are developmental psychologists Elizabeth Scott and Thomas Grisso and their colleagues in the social sciences who have devoted their careers to advancing our understanding of the nature of youth.³⁵⁴

Scott and Grisso describe certain salient features of adolescence as the developmental basis for the distinction between juvenile and adult culpability:

The criminal law posits that the offender is a rational actor, autonomously choosing "to do the bad thing" on the basis of personal values and preferences. The legitimacy of punishment is undermined if criminal choices depart substantially from this autonomy model. If youthful choices to offend are based on diminished ability to make decisions, or if the choices (or the values that shape the choices) are strongly driven by transient developmental influences, then the presumption of free will and rational choice is weakened.³⁵⁵

We know from the social science literature and the cases reviewed above and elsewhere and, no doubt from personal experience, that what Scott and Grisso say is true. Youthful choices are hampered by immature and untested decision-making and are often driven by the uniquely adolescent magnetism of peer influence in its many manifestations.

Yet, fundamental principles of proportionality based on that knowledge are missing entirely from legal rules governing the trial and sentencing of juvenile offenders charged with violent criminal acts. It is indeed perverse that in a time when prosecutors enjoy broad discretion in the treatment of juveniles at the charging stage and judges have somewhat less, but still great, discretion at the sentencing stage, neither the

354. See generally YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE. (Thomas Grisso & Robert G. Schwartz eds., 2000); Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 742 (2000); Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547 (2000); Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 172-73 (1997); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003).

355. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 172-73 (1997); see also Justice Brennan's dissent in *Stanford*, where he opines that even eighteen years of age is a conservative measure for full adult culpability because many psychological and emotional changes consistent with adulthood do not occur until the early twenties. *Stanford v. Kentucky*, 492 U.S. 361, 395-96 (1989).

substantive juvenile law nor the substantive criminal law reflects proportionality based on therapeutic considerations relevant to the treatment of youth.

C. *Suggested Reforms*

1. INTRODUCTION

When we consider the contribution of the social sciences to assessment of the liability and culpability of criminal defendants, our thoughts generally turn to mitigation evidence at the sentencing stage of proceedings. Without discounting the importance of sound and thorough mitigation investigation and presentation for sentencing purposes, I want to suggest that for adolescents facing capital charges, focusing on mitigation at the sentencing stage is too little too late. Youth is rarely, if ever, sufficient in and of itself to overcome aggravators common to the statutory sentencing schemes of most death penalty states, and I suspect that consideration of additional characteristics of youth, such as the group offending and peer influence elements treated here, would have little practical effect at sentencing. Instead, juveniles exposed to the possibility of a capital conviction and death sentence must have an opportunity, before trial, to present evidence challenging their eligibility for trial on capital charges. Matters of such significance cannot, under Supreme Court precedent, be subject solely to the discretion of the government in its role as prosecutor.

Moreover, certain legal rules must be changed. A fundamental tenet of criminal law is that "a man intends the natural and probable consequences of his actions."³⁵⁶ But can the same be said of a boy who is not yet, even by the basest of societal standards, a man? Doctrines of criminal liability, such as the felony murder rule and its attendant vicarious responsibility, which were developed in the context of assessing the culpability of mature and competent adults, do not accord with the psychological and social characteristics of adolescent defendants.³⁵⁷ Nor does the refusal of more than one-half of state and federal jurisdictions to adopt principles of diminished responsibility³⁵⁸ accord with our knowledge of youth.

At the sentencing stage, reform efforts must be directed at certain aggravators, discussed below, that fail to take into account the differences we know to exist between juveniles and adults, differences that should inform not just the sentencing decision but criminal liability and

356. See ZIMRING, *supra* note 15, at 141.

357. *Id.* at 138-42 (discussing diminished responsibility).

358. Travis H.D. Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other Than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051, 1055 (1975).

adolescent culpability in the first instance. Therapeutic considerations must drive youth crime policies in general, and they suggest yet another reform, one which would explicitly address and allow considerations of mercy.

2. PRETRIAL CAPITAL ELIGIBILITY HEARINGS

In *Kent v. United States*,³⁵⁹ the Supreme Court held that a boy of sixteen was entitled to a hearing in juvenile court before the government could institute proceedings against him in adult court.³⁶⁰ Justice Fortas, writing for the Court, stated, "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony – without hearing, without effective assistance of counsel, without a statement of reasons."³⁶¹ The Court did not base its decision in *Kent* on due process, as did *Gault* and its progeny, or on any other constitutional grounds, but rather on its interpretation of the District of Columbia statute at issue "read in the context of constitutional principles relating to due process."³⁶² Thus, the Supreme Court has not recognized a constitutional right to a hearing before being tried in the adult criminal system. But the absence of an absolute right is not a license to ignore the teaching of *Kent*, and that teaching is clear: Our legal system requires a hearing comporting with *Gault*-like due process in matters of such consequence as transferring a child from the jurisdiction of the juvenile court to adult criminal court. If that is true in cases involving non-capital charges, as in *Kent*,³⁶³ certainly the protection must apply to decisions concerning the trial of juveniles charged with capital offenses.

Despite *Kent*, few juveniles receive such individualized consideration before they are tried in adult court. Among the seventy-two juvenile offenders on death row, available records reflect that hearings were conducted in only seven cases,³⁶⁴ and in one Mississippi case, the court

359. *Kent v. United States*, 383 U.S. 541 (1966). *Kent* was the first of the Warren Court decisions that caused the "constitutional domestication of the juvenile court." See *In re Gault*, 387 U.S. 1, 22 (1967) (establishing right to counsel and other elements of due process for juveniles and stating that "the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication"); see also *In re Winship*, 397 U.S. 358 (1970) (holding that due process requires proof beyond a reasonable doubt in juvenile delinquency proceedings); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1970) (holding that fundamental fairness does not require jury trials for juveniles); *Breed v. Jones*, 421 U.S. 519 (1975) (holding that the double jeopardy bar contained in the Fifth Amendment applies to delinquency adjudications).

360. *Kent*, 383 U.S. at 557.

361. *Id.* at 554.

362. *Id.* at 557.

363. *Kent* was indicted on eight counts of housebreaking, robbery, and rape. *Id.* at 548.

364. Four had hearings in juvenile court on the prosecutor's petition for certification to adult criminal court. See *Ex parte Hart*, 612 So. 2d 536, 539 (Ala. 1992); *Knotts v. State*, 686 So. 2d

specifically rejected the juvenile's request for a transfer hearing, concluding that state law did not require it.³⁶⁵ This circumvention of *Kent* has come about through the passage of state statutes that divest juvenile courts of jurisdiction over certain crimes, accomplishing by legislative fiat what *Kent* said could no longer be accomplished even by judges alone.

Nevada's statute exemplifies one version of these "legislative waiver"³⁶⁶ provisions. Section 62B.330(3) of the Nevada Revised Statutes excludes from juvenile court jurisdiction anyone charged with murder or attempted murder, certain sexual assaults, certain firearms offenses, and all other related offenses "arising out of the same facts."³⁶⁷ Those charges simply do not fall within the statutory definition of a "delinquent act" for purposes of juvenile court jurisdiction, and for murder and attempted murder the exclusion applies no matter how young the alleged perpetrator is.³⁶⁸ Assuming the constitutional legitimacy of such statutes,³⁶⁹ it is nonetheless true that the important policy concerns expressed in *Kent* and throughout the juvenile justice system call for pretrial consideration, on a case-by-case basis, of the eligibility of juveniles for prosecution on capital charges.

An analogue for such hearings is the now constitutionally mandated pretrial determination of mental retardation under *Atkins v. Virginia*.³⁷⁰ Pretrial capital eligibility hearings, like pretrial determinations of mental

431, 441 (Ala. Crim. App. 1995); *Slaton v. State*, 680 So. 2d 879, 904 (Ala. Crim. App. 1995), *aff'd*, *Ex parte Slaton*, 680 So. 2d 909 (Ala. 1996); *State v. Soto-Fong*, 928 P.2d 610 (Ariz. 1996). Three were "reverse certification" motions by defendants in criminal court. *See Davis v. State*, 554 So. 2d 1094 (Ala. Crim. App. 1986); *Duke v. State*, 889 So. 2d 1 (Ala. Crim. App. 2002); *Hyde v. State*, 778 So. 2d 199, 224 (Ala. Crim. App. 1998), *aff'd*, *Ex parte Hyde*, 778 So. 2d 237 (Ala. 2000). Six were in Alabama (*Davis*, *Duke*, *Hart*, *Hyde*, *Knotts*, and *Slaton*), and one was in Arizona (*Soto-Fong*).

365. *Foster v. State*, 639 So. 2d 1263, 1307-08 (Miss. 1994).

366. Two types of statutory provisions are common: "legislative waiver" statutes, in which the legislature categorically removes jurisdiction from the juvenile court for certain offenses; and "judicial waiver" statutes, in which the juvenile court determines, pursuant to legislatively established criteria, whether to retain jurisdiction or "waive" the juvenile into adult court. *See, e.g., NEV. REV. STAT.* 62B.330(3) (2005) (legislative waiver); *NEV. REV. STAT.* 62B.390 (2005) (judicial waiver).

367. *See NEV. REV. STAT.* 62B.330(3) (2005) (murder or attempted murder); (2)(b) (sexual assault); (2)(c) (firearms offenses); (2)(d) (felonies resulting in death or substantial bodily harm). Each subsection includes the language "and any other related offenses arising out of the same facts. . . regardless of the nature of the offense."

368. *NEV. REV. STAT.* 62B.330(3)(a) (2005).

369. That issue is beyond the scope of this paper. Scholars and advocates have discussed and debated the constitutionality of legislative waiver provisions in numerous articles over the past decade. *See, e.g., Legislative Changes*, *supra* note 346, at 1306; Cross, *supra* note 346; Douglas A. Hager, *Does the Texas Juvenile Waiver Statute Comport with the Requirements of Due Process?*, 26 TEX. TECH. L. REV. 813 (1995).

370. *Atkins v. Virginia*, 536 U.S. 304 (2002).

retardation, would focus on matters of mitigation traditionally reserved for post-trial sentencing determinations. Principles of penal proportionality and "a kid is still a kid" would guide these pretrial capital eligibility proceedings. As in cases of mental retardation, each jurisdiction would establish the necessary procedures for such hearings.³⁷¹

3. LIABILITY DOCTRINES

a. Felony Murder and Vicarious Responsibility

The common law felony murder rule holds that if in the commission of a felony one commits an unintended murder, the offender is guilty of murder.³⁷² The essence of the felony murder rule, thus, is the exaction of punishment for the random nature of a crime resulting in the death of the victim. As Anne Campbell has observed, "[t]he dividing line between an aggravated assault and a homicide is often a matter of luck. In most cases of homicide with a gun, the killer does not intend to kill. Usually a single shot is fired, and chance decides whether it strikes the victim's chest or leg."³⁷³ Because unintended consequences are the hallmark of adolescent behavior, the felony murder rule is particularly harsh in its application to youth.

Even though most jurisdictions have placed limits on the scope of the felony murder rule,³⁷⁴ they have not taken the further step of limiting the responsibility of co-offenders who were not the triggerman. Long-standing principles of vicarious responsibility impose liability on all those participating in the underlying felony on a co-equal basis.³⁷⁵ Thus, a killing in the course of the commission of certain felonies, such as armed robbery, burglary, rape, and kidnapping, justifies a murder conviction for all accomplices, regardless of each individual's degree of, or actual, participation in the act of killing.³⁷⁶ Wayne LaFave illustrates this legal doctrine as follows:

Even though [A and B] have made no . . . agreement, if in the process of robbing or attempting to rob X B's gun goes off accidentally, killing X, A would be guilty of the felony murder of X as much as B

371. See Death Penalty Information Center, States that Have Changed Their Statutes to Comply with the Supreme Court's Decision in *Atkins v. Virginia*, at <http://www.deathpenaltyinfo.org/article.php?scid=28&did=668> (last visited Jan. 22, 2005).

372. WAYNE R. LAFAVE, *CRIMINAL LAW* 744 (4th ed. 2003).

373. ANNE C. CAMPBELL, *MEN, WOMEN AND AGGRESSION* 127 (1993).

374. LAFAVE, *supra* note 372, at 744 (listing four types of limits states have used: permitting the rule's use as to only certain types of felonies, more strictly interpreting the requirement of proximate or legal cause, constricting the time frame defining the felony, and requiring that the felony be independent of the homicide).

375. *Id.* at 747-49.

376. David McCord, *State Death Sentencing for Felony Murder Accomplices Under the Enmund and Tison Standards*, 32 ARIZ. ST. L.J. 843, 843 (2000).

would be, under the rule concerning parties to crime that all parties are guilty for deviations from the common plan which are the foreseeable consequences of carrying out the plan (an accidental shooting during an armed robbery being a typical example of a foreseeable deviation from the plan to rob).³⁷⁷

Because an accomplice who was not even on the scene of the killing faces a penalty equal to that of the actual killer, questions of individual culpability may go unexamined in every multiple offender felony-murder case. While this departure from the principle of penal proportionality is problematic in any instance, it confounds both justice and reason in capital cases. Yet, felony murders are the single most common type of murder for those serving death sentences, both generally³⁷⁸ and among the adolescent population studied here.³⁷⁹ This is true despite the fact that felony murders represent a relatively small proportion of non-capital homicides.³⁸⁰

Richard Rosen³⁸¹ and others³⁸² have criticized the felony-murder rule as an unprincipled departure from criminal law requirements that liability be predicated on an individual's mens rea and level of participation in the offense.³⁸³ Although the Supreme Court attempted, in a series of cases in the 1980s,³⁸⁴ to establish a workable standard for determining culpability in felony-murder capital cases, that standard has not produced reliability in the state courts, where the vast majority of death sentences are rendered.³⁸⁵ After analyzing nearly two hundred state supreme court decisions in felony murder capital cases, David

377. LAFAYE, *supra* note 372, at 744.

378. Crocker, *supra* note 271, at 695 (citing SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION 45 (1989) (reporting felony murder as basis for 80% of those on death row in Florida and Georgia)); David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133, 138 (1986) (more than 80% of death row defendants became death eligible because of state felony-murder rules).

379. See *supra* notes 278-339 and accompanying text.

380. See Crocker, *supra* note 271, at 695 (citing GROSS & MAURO, *supra* note 378, at 45 (reporting data from Georgia, where 17.5% of all homicides were felony murders, compared to 80% of those on death row; and Florida, where the proportions were similar, 18.1% to 80%)).

381. Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103 (1990).

382. See, e.g., McCord, *supra* note 376, at 843-44; Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 359 (1995); Norman J. Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, 32 ARIZ. L. REV. 819, 819-820 (1990); George P. Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L. REV. 413, 427-29 (1981).

383. Rosen, *supra* note 381, at 1104-05.

384. *Enmund v. Florida*, 485 U.S. 782 (1982); *Cabana v. Bullock*, 474 U.S. 376 (1986); *Tison v. Arizona*, 481 U.S. 137 (1987). For a discussion and analysis of those rulings, see McCord, *supra* note 376, at 844-60.

385. McCord, *supra* note 376, at 892-93.

McCord concluded that mistakes are inevitable unless the courts adopt certain reforms.³⁸⁶

McCord proposes reforms at both the trial and appellate levels. Citing as an example the Montana Supreme Court's conclusion under its state constitution,³⁸⁷ McCord calls for a requirement that each death-eligible defendant have the prior intent, or knowledge of an accomplice's intent, to kill.³⁸⁸ McCord also would exclude from death eligibility those killings arising out of "simple burglary gone quickly awry,"³⁸⁹ and would impose additional safeguards, such as "clear corroboration" of the testimony of a turncoat cohort or jailhouse informant³⁹⁰ and proof of the defendant's presence at the murder scene.³⁹¹ At the appellate level, McCord advocates that courts apply a "reasoned-but-not-knee-jerk-intra-case proportionality review."³⁹² These and other proposed reforms, McCord notes, would not "completely eliminate wrongful death sentences for felony murder accomplices," but they would make those sentences "more just and predictable."³⁹³

What is true for felony murder capital cases in general is true for juvenile offenders on death row, as revealed by the cases studied here. Of the seventy-two adolescent defendants on death row today, at least forty-three, or nearly sixty percent, were convicted of murders committed during the course of another felony.³⁹⁴ Few of those juvenile offenders were the principal actors, yet all forty-three received the death penalty. State courts and legislatures must make reform of the felony-murder rule and its vicarious responsibility component a priority, if we are to spare our youth from wrongful executions.

386. *Id.*

387. *See id.* at 893 (citing *Kills on Top v. State*, 928 P.2d 182, 204 (Mont. 1996)).

388. *Id.*

389. *Id.* at 894.

390. *Id.* at 893.

391. *Id.* at 894.

392. *Id.* at 894-95.

393. *Id.* at 896.

394. *See supra* notes 278-339 and accompanying text.

b. Diminished Responsibility, a.k.a. "Youth Discount"³⁹⁵

Sanford Kadish has described as "niggardly"³⁹⁶ the law's response to the defense of excuse.³⁹⁷ The law's resistance to the excuse of diminished responsibility is no exception. Less than one-half of state and federal jurisdictions recognize diminished responsibility as an excusing defense.³⁹⁸ LaFave concludes that the majority of jurisdictions have based their rejection of diminished responsibility on "a mistaken assumption that the doctrine does not involve considerations separate and distinct from established law concerning the defense of insanity."³⁹⁹ In the context of criminal law, insanity is an all-or-nothing proposition; it is either a complete defense or no defense at all.⁴⁰⁰ Resistance to diminished responsibility as an excuse that will diminish, but not negate, responsibility for a criminal act, generally rests on the erroneous conclusion that a defendant who knows right from wrong⁴⁰¹ must be fully responsible for the crime brought about by his actions.⁴⁰²

Like insanity, the excuse of infancy has deep roots as a legal defense to full criminal responsibility.⁴⁰³ For some time, state criminal

395. The term "youth discount" was coined by noted juvenile justice scholar Barry C. Feld and found its first, though hardly its only, published expression in 1988. See Barry C. Feld, *The Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 912 (1988); see also Barry C. Feld, *The Transformation of the Juvenile Court II: Race and the "Crack Down" on Youth Crime*, 84 MINN. L. REV. 327, 330 (1999); Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189, 250 (1998); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 70 (1997); Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1127 (1995); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 724 (1991).

396. Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 262 (1987) ("Infancy and legal insanity are the only two excuses of [nonresponsibility] the law allows, and since the juvenile court laws have made the defense of infancy in practice redundant, legal insanity is the only significant defense remaining in this category.").

397. See *id.* Kadish begins by stating the basis for criminal law's recognition of excusing defenses:

In both criminal law and everyday moral judgments the concept of excuse plays a major role. This is because the practice of blaming is intrinsically selective. It cannot survive if all harm-doers are to be blamed, any more than it can if none are. Excuse is one of those central concepts that serve to draw the line between the blameworthy and the blameless and so make a blaming system possible.

Id. at 257; see also Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091 (1985).

398. LAFAVE, *supra* note 372, at 452.

399. *Id.*

400. *Id.*

401. See *M'Naughton's Case*, 8 ENG. REP. 718 (1843) (establishing knowing right from wrong as an element of the legal test for insanity).

402. LAFAVE, *supra* note 372, at 452.

403. Indeed, infancy's roots reach deeper than insanity, appearing first in Roman Civil Law and evolving fully by the seventeenth century. See LAFAVE, *supra* note 372, at 485 (citing 1 E.

codes perpetuated the infancy doctrine, which presumed that children under the age of seven lacked the capacity to form criminal intent, treated children fourteen and older as fully responsible adults, and created a rebuttable presumption that children between the ages of seven and fourteen lacked criminal capacity.⁴⁰⁴ Kadish wrote in 1987, however, that "the juvenile court laws have made the defense of infancy in practice redundant."⁴⁰⁵ True as Kadish's remark may have been at a time when juvenile courts' jurisdiction over juveniles reigned supreme, more recent trends toward trying juveniles in adult court suggest the wisdom of resurrecting infancy, or a more developmentally appropriate version of it, as a defense for juveniles being tried "as adults."

Barry Feld's explicit, age-based "youth discount"⁴⁰⁶ may be just that defense. Feld describes his proposed youth discount as "a sliding scale of developmental and criminal responsibility" that recognizes "the lesser culpability of younger offenders."⁴⁰⁷ Although current social science learning does not permit precise measurement of the extent to which adolescents may be entitled to rely on a doctrine of diminished responsibility such as Feld's youth discount, it suggests an important conclusion about age and diminished responsibility, to wit: adolescents achieve different kinds of adult-level competencies at different ages.⁴⁰⁸ For example, if only the cognitive capacity to make judgments in paper-and-pencil exercises is considered to have importance, adolescents are usually well equipped by their sixteenth birthdays.⁴⁰⁹ If, however, social experience in areas such as anger and impulse management and coping with peer pressures is necessary, expecting abilities comparable to adults before age eighteen or nineteen is mere "wishful thinking."⁴¹⁰

Some may balk at applying an excuse of diminished responsibility to any of the unlawful acts of youth; others may accept the doctrine in

COKE, INSTITUTES ON THE LAWS OF ENGLAND 247b (1642)); Frederick Woodbridge, *Physical and Mental Infancy in the Criminal Law*, 87 U. PA. L. REV. 426, 435 (1939); A. W. G. Kean, *The History of the Criminal Liability of Children*, 53 L.Q. REV. 364 (1937).

404. See, e.g., Tanenhaus, *supra* note 162.

405. Kadish, *supra* note 396, at 262.

406. See Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 70 (1997). Feld voices his preference for a "categorical 'youth discount' that uses age as a conclusive proxy for reduced culpability and a shorter sentence" to an "'individualized' inquiry into the criminal responsibility of each young offender" to maintain consistency with the objective standards of criminal law. *Id.* at 121.

407. *Id.* at 70. Feld conceives of the "youth discount" as a factor at the sentencing stage, see *id.*, and has not spoken of it as a doctrine of diminished responsibility. With apologies to Professor Feld, any lapse of judgment in extending his conception to the guilt stage, as a variant of the defense of excuse, is mine alone.

408. Steinberg & Cauffman, *supra* note 72, at 268.

409. *Id.*

410. *Id.*; see also ZIMRING, *supra* note 15, at 80-81.

principle but resist its application to capital and other lesser, though serious, offenses. Courts and legislatures must resist the temptation to limit the availability of diminished responsibility to small offenses. This is more than a pragmatic concern; it goes to the heart of the meaning of and justification for the excuse. Zimring urges, "if the doctrine of diminished responsibility means anything in relation to the punishment of immature offenders, its impact cannot be limited to trivial cases. Diminished responsibility is either generally applicable or generally unpersuasive as a mitigating principle."⁴¹¹ Thus, a youth discount must apply to all crimes committed by youth, even and most importantly those the law categorizes as capital offenses. As Zimring further explains, "[t]here is no logical basis for limiting the scope of a mitigation principle because the harm caused by the criminal act is great. Doctrines of diminished responsibility have their greatest impact when large injuries have been caused by actors not fully capable of understanding and self-control."⁴¹² The death of a person is the largest injury one can inflict; the law must not compound that injury by taking the life of anyone who, by virtue of his youth, is not fully responsible for his actions.

c. Proportionate Responsibility

A further question is how to recognize the social nature of human behavior, particularly during adolescence, in a criminal justice system based on principles of individual accountability. Accomplice liability and other principles holding co-offenders equally responsible have long existed alongside the individualistic underpinnings of the criminal law. The problem is that the law has divorced those principles of shared responsibility from principles of proportionate liability. Instead of making all co-offenders fully responsible for a single crime, a juvenile justice oriented policy would apportion responsibility among the individual co-offenders. Particularly with juveniles, we must be holistic and not merely punitive in our approach to righting a wrong through our crimi-

411. ZIMRING, *supra* note 15, at 84. Zimring explains, further:

From manslaughter to first degree murder, the range of minimum punishment is from probation to life imprisonment or execution, and the elements that differentiate these crimes are almost exclusively the subjective features of intent, advertence, and motivation that highlight the importance of doctrines of diminished responsibility. When the difference between premeditation (first degree murder) and malice (second degree murder) can mean fifteen years' more imprisonment and when equally lethal acts can be punished by probation (if negligent) or long imprisonment (if grossly reckless), a defendant's youth and immaturity should have a very large influence on the level of deserved punishment.

Id. at 140 (internal citations omitted).

412. *Id.* at 84.

nal laws. Accordingly, our criminal justice system must embrace principles of proportionate responsibility.

4. SENTENCING CONSIDERATIONS

a. Background

The pair of Supreme Court cases that first decided the applicability of the death penalty to adolescents⁴¹³ and mentally retarded persons⁴¹⁴ are temporally and theoretically inseparable.⁴¹⁵ Until 2002, those rulings held that both adolescents and those who are mentally retarded could be subject to the ultimate criminal sanction of death.⁴¹⁶ Then, in *Atkins v. Virginia*,⁴¹⁷ the Supreme Court broke with precedent and found that mentally retarded persons "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."⁴¹⁸ The Court explained, further, that although "their deficiencies do not warrant an exemption from criminal sanctions, . . . they do diminish their personal culpability."⁴¹⁹ The Court continued:

Because of their impairments, however, by definition [mentally retarded persons] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There . . . is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.⁴²⁰

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

414. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

415. On the same day in 1989, the Supreme Court decided that the Constitution does not prohibit the execution of sixteen and seventeen year-olds, *Stanford*, or of mentally retarded persons, *Penry*. The Court's reasoning was the same for both: the Eighth Amendment prohibition against cruel and unusual punishment does not preclude the execution of a person solely because of his mental retardation, *Penry*, 492 U.S. at 340, or his youth, *Stanford*, 492 U.S. at 380.

416. See *Stanford*, 492 U.S. at 380; *Penry*, 492 U.S. at 340.

417. *Atkins v. Virginia*, 536 U.S. 304 (2002).

418. *Id.* at 306.

419. *Id.* at 318.

420. *Id.* (citing J. McGee & F. Menolascino, *The Evaluation of Defendants with Mental Retardation in the Criminal Justice System*, in *THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION* 55, 58-60 (R. Conley, R. Luckasson, & G. Bouthilet eds., 1992); Kenneth L. Appelbaum & Paul S. Appelbaum, *Criminal-Justice Related Competencies in Defendants with Mental Retardation*, 14 J. PSYCHIATRY & L. 483, 487-89 (1994); James Ellis & Ruth Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 429 (1985); Levy-Shiff, Kedem, & Sevilia, *Ego Identity in Mentally Retarded Adolescents*, 94 AM. J. MENTAL RETARDATION 541, 547 (1990); Thomas L. Whitman, *Self Regulation and Mental Retardation*, 94 AM. J. MENTAL RETARDATION 347, 360 (1990); Caroline Everington & Solomon M. Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 MENTAL RETARDATION 212, 212-13 (1999).

If we did not know that the Court was describing mentally retarded persons, we might well believe it was speaking of adolescents.⁴²¹ Because of the many similarities between the mentally retarded and those temporarily disabled by their youth, the advent of *Atkins* creates an opportunity, if not the responsibility, for the Supreme Court, and for state courts and legislatures that have not already done so, to abolish the juvenile death penalty. Failing that, those bodies must acknowledge *Atkins*' implications for capital sentencing and the assessment of adolescent criminality and responsibility. The reforms suggested here reflect my nascent thinking about a sentencing regime that continues to embrace the death penalty for juvenile offenders.

b. Aggravating Circumstances

The modern death penalty era began with *Furman v. Georgia*,⁴²² which condemned as unconstitutional under the Eighth Amendment juries' then "unfettered"⁴²³ discretion in capital sentencing. In the years following *Furman*, the Supreme Court approved various legislative enactments which, the Court ruled, had sufficiently narrowed the class of offenders to whom the death penalty would apply to pass constitutional muster.⁴²⁴ The most prominent of those early post-*Furman* cases, *Gregg v. Georgia*,⁴²⁵ approved a Georgia sentencing statute containing specific aggravating and mitigating circumstances, ruling that it provided the "guided discretion" necessary to accomplish the narrowing required by the Eighth Amendment.⁴²⁶ Seven years later, however, the Court announced a rule in *Zant v. Stephens*⁴²⁷ that permits the state, once

421. See *supra* notes 72-83 and accompanying text. The *Atkins* Court reasoned, further, that the diminished ability of mentally retarded persons justifies "a categorical rule making such offenders ineligible for the death penalty" to avoid the risk of wrongful execution not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. *Atkins*, 536 U.S. at 320. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Perry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. Mentally retarded defendants in the aggregate face a special risk of wrongful execution. *Atkins*, 536 U.S. at 320.

422. *Furman v. Georgia*, 408 U.S. 238 (1972) (condemning as violative of the Eighth Amendment the arbitrary and capricious nature of the death penalty as imposed under current law).

423. *Id.* at 247.

424. See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

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

426. *Id.* at 196-98.

427. *Zant v. Stevens*, 462 U.S. 862 (1983).

it has proven one statutory aggravating circumstance, to introduce any and all evidence, both statutory and non-statutory, of aggravation.⁴²⁸ Since *Stephens*, aggravators have proliferated.⁴²⁹

The ease of proving a threshold aggravator in most capital cases involving juvenile offenders post-*Stephens* creates nearly insurmountable hurdles for adolescent capital defendants.⁴³⁰ Moreover, because of the over-inclusiveness *Stephens* permits, it fails to perform the function of imposing death only on those who deserve it. For example, nearly every state capital sentencing regime establishes as one of its list of aggravators the commission of murder "in the course of another felony."⁴³¹ Nearly every juvenile offender on death row qualifies for this aggravator,⁴³² and it is not surprising that they do. Most adolescents do not set out to commit homicide, but to obtain some easy cash or jack a car.⁴³³ It is a simple fact of adolescence.

Moreover, for murders made death-eligible through application of the felony-murder rule, the "other felony" aggravator permits double counting of a single circumstance. This inequity is magnified by the high proportion of those on death row who were convicted of felony murder.⁴³⁴ The persistence of the "other felony" aggravator assures that capital sentencing "remains available for persons convicted of felony-murder regardless whether the defendant intended to commit, attempted to commit, or actually committed murder."⁴³⁵ Indeed, states have executed several "non-triggermen" since *Furman*.⁴³⁶

Other aggravating circumstances have a particularly punitive effect when applied to adolescents. The common "future dangerousness" aggravating circumstance often transforms a defendant's youth from a mitigator into an aggravator, based on jurors' false conception that anyone who kills so young must be destined to kill again. Similarly, aggravators such as "committing a murder as a part of a gang activity or to advance one's position in a gang" and "creating a grave risk of death for one or more persons" burden youth, who by virtue of their age, act in

428. *Id.* at 876-79.

429. See Jeffrey L. Kirchmeier, *Aggravating and Mitigating Circumstances: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345 (1998); see also Steiker & Steiker, *supra* note 382, at 376.

430. I do not mean to suggest that the young alone face substantial obstacles in the sentencing regimes approved by and enacted pursuant to *Stephens*. Certainly all capital defendants face the obstacles discussed here.

431. See James R. Acker & C.S. Lanier, *Parsing this Lexicon of Death*, 30 CRIM. L. BULL. 107, 121 (1994).

432. See App. A.

433. *Id.*

434. See *supra* notes 378-80 and accompanying text.

435. Steiker & Steiker, *supra* note 382, at 377.

436. *Id.*

concert with others through the overwhelming adolescent need for group affiliation. So, too, motivating factors such as "pecuniary gain" and "no apparent motive" have particular relevance for youth.

Retaining factors such as those identified here, and others, as constitutionally permissible aggravators is contrary to what we know about youth. It is beyond dispute that adolescents are prone to group offending, peer pressure, poor judgment, impulsivity, and a host of other markers of adolescence that are shed as we mature into adulthood. In a just and therapeutic legal system, these aggravating factors would become mitigators when dealing with the capital sentencing of youth.

c. Mitigation and Mercy

In *Woodson v. North Carolina*,⁴³⁷ the Supreme Court held that the "fundamental respect for humanity underlying the Eighth Amendment" requires that each capital defendant be treated as an individual.⁴³⁸ The Court elaborated on the *Woodson* principle in *Lockett v. Ohio*,⁴³⁹ where it stated that "the sentencer must not be precluded from considering, as a mitigating factor, any aspect of a defendant's character and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."⁴⁴⁰ Even so, jurors still feel constrained to impose death if they find even a single aggravator.⁴⁴¹

*Blystone v. Pennsylvania*⁴⁴² provides a concrete example of the harm done to defendants under the current system. Pennsylvania law provided that, although Blystone had presented no mitigating evidence at sentencing, the jury could still find mitigating circumstances based upon their review of all the evidence from the guilt and sentencing stages.⁴⁴³ During their deliberations, the *Blystone* jury twice asked the court for a definition of mitigation and, the second time, asked further whether the law required them to impose the death penalty if they found one aggravating circumstance but no specific mitigating circum-

437. *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion); see also *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion).

438. *Woodson*, 428 U.S. at 301 ("evolving standards of decency," as well as the ideal of human dignity underlying the Eighth Amendment, require individualized sentencing).

439. *Lockett v. Ohio*, 438 U.S. 586, 608-09 (1978) (plurality opinion).

440. *Id.* at 606. See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (striking down death sentence imposed in the mistaken impression that defendant's troubled youth was not mitigating evidence).

441. See, e.g., *Blystone v. Pennsylvania*, 494 U.S. 299 (1990). This is why categorical exclusions are necessary to protect certain particularly vulnerable classes of individuals. See *Atkins v. Virginia*, 536 U.S. 304 (2002).

442. *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

443. See 42 PA. CONS. STAT. § 9711 (1998).

stance.⁴⁴⁴ Each time, the judge failed to respond to jurors' apparent confusion and simply reread the initial instructions, which did not define mitigation.⁴⁴⁵ The jurors returned to their deliberations and delivered a sentence of death.⁴⁴⁶

Explicit consideration of mercy would provide a mechanism for jurors to give effect to their not uncommon sense of frustration and confusion about the role of mitigation in the individualized sentencing decision. Nothing in the line of cases following *Woodson* and *Lockett* suggests that considerations of mercy violate the Constitution.⁴⁴⁷ However, although philosophers have long grappled with questions of the role of mercy in the exaction of punishment for acts society condemns,⁴⁴⁸ and a few notable criminal law scholars have focused on the concept of mercy,⁴⁴⁹ the courts have been, for the most part, silent. On the rare occasion when the Supreme Court has expressly considered mercy, "its talk [has been] neither prominent nor especially illuminating."⁴⁵⁰ But once a jury concludes that a defendant is "death-eligible," the individualized sentencing mandated by the Eighth Amendment⁴⁵¹

444. See Memorandum of Law in Support of Writ of Habeas Corpus at 64, *Blystone et al. v. Horn*, No. 99-490 (W.D. Pa. Filed Mar. 29, 2000).

445. *Id.*

446. *Blystone*, 494 U.S. at 302.

447. See Kirchmeier, *supra* note 429; see also Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out?: Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L. J. 835, 862-66 (1992) (reviewing BEVERLY LOWRY, *CROSSED OVER: A MURDER, A MEMOIR* (1992) (telling the story of Karla Faye Tucker's life)).

448. See, e.g., SENECA, *On Mercy*, in SENECA: MORAL AND POLITICAL ESSAYS (John M. Cooper & J.F. Procope eds. & trans., 1995); Jeffrie G. Murphy, *Mercy and Legal Justice*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 162 (1988); Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1468-73 (1990); H. Scott Hestevold, *Justice to Mercy*, 46 PHIL. & PHENOM. RES. 281 (1985); Claudia Card, *On Mercy*, 81 PHIL. REV. 182 (1972); Alwynne Smart, *Mercy*, 43 PHIL. 345 (1968).

449. See Martha Nussbaum, *Loving v. Virginia and the Literary Imagination*, 17 QUINNIPIAC L. REV. 337 (1997); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); Martha C. Nussbaum, *Poets As Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. CHI. L. REV. 1477 (1995); Martha C. Nussbaum, *The Use and Abuse of Philosophy in Legal Education*, 45 STAN. L. REV. 1627 (1993); see also Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621 (1998); Stephen P. Garvey, *"As the Gentle Rain from Heaven": Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989 (1996); Andrew von Hirsch, *Equality, "Anisonomy," and Justice: A Review of Madness and the Criminal Law*, 82 MICH. L. REV. 1093, 1107 (1984) (book review).

450. Garvey, *supra* note 449, at 991. The Court at times characterizes mercy as "a benevolent virtue for which the law should make room," and at other times, as a source of irrationality that is bound to produce arbitrary and capricious results. *Compare* *California v. Brown*, 479 U.S. 538, 563 (1987) (Blackmun, J., dissenting from ruling upholding death penalty in challenge to jury instruction that "mere . . . sympathy" should play no part in the jury's decision), *with* *Morgan v. Illinois*, 504 U.S. 719, 739 (1992) (Scalia, J., dissenting from reversal of death sentence and criticizing the majority for holding that no one who was "merciless" could sit on a capital jury).

451. See *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion).

makes considerations of mercy indispensable to rendering justice.⁴⁵² A full exploration of possible avenues for assuring the proper consideration of mercy in capital sentencing is beyond the purview of this article; however, one thought bears mention here.

One of the common criticisms of allowing mercy as a consideration in capital sentencing is that it permits those who "deserve" to die to escape death.⁴⁵³ Those critiques, however, fail to grasp the essence of mercy. Mercy is by definition available only to those who deserve to be punished; that is, in capital cases, only those the jury has determined, on the basis of the harm wrought by their actions, "deserve" to be sentenced to death.⁴⁵⁴ Thus, whether one deserves to die is irrelevant in the "mercy" phase of sentencing. At the mercy phase, sentencers must embrace only those mitigators (and aggravators) that provide a reason to grant (or not to grant) mercy, and must decline to consider those that provide a basis for believing that death is or is not deserved. For example, evidence that a murder was committed in a particularly "cruel and heinous" fashion is a common aggravating circumstance that often provides the basis for imposing the death penalty. It cannot, however, be used as a reason to refuse a plea for mercy. Having decided that the defendant deserves to die because of the "cruel and heinous" nature of his crime, jurors must then look to the character of the defendant to determine whether, despite the monstrosity of his crime, his life should be spared.⁴⁵⁵

452. See, e.g., Jeffrie G. Murphy, *Forgiveness, Mercy, and the Retributive Emotions*, CRIM. JUST. ETHICS Summer/Fall 1988, at 3, 12 ("This demand for individuation—a tailoring of our retributive response to the individual natures of the persons with whom we are dealing—is a part of what we mean by taking persons seriously as persons and is thus a basic demand of justice."); Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 330-38 (1993) (defining the role of mercy in criminal sentencing).

453. See, e.g., Steiker & Steiker, *supra* note 447, at 862 ("Openended capital sentencing schemes are not troublesome merely because they might impose death when it is not 'deserved' according to actual community consensus, but also because they might fail to impose the death penalty when it is 'deserved.'"). But see David McCord, *Judging the Effectiveness of the Supreme Court's Death Penalty Jurisprudence According to the Court's Own Goals: Mild Success or Major Disaster?*, 24 FLA. ST. U. L. REV. 545 (1997) (criticizing Steiker & Steiker and others he labels "academic underinclusionists").

454. See Garvey, *supra* note 449, at 1013. See generally Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996); Murphy, *supra* note 452, at 20, 25.

455. See Garvey, *supra* note 449, for an illuminating discussion of the role of mercy in capital sentencing and a proposal for assuring its proper inclusion in the sentencing phase of capital proceedings. See also *Jenkins v. State*, 498 S.E.2d 502, 515 (Ga. 1998) (approving death sentence in which trial judge instructed jurors that they could "return a life sentence for any reason or no reason at all, and that they could consider 'feelings of sympathy and mercy that flow from the evidence'" (citing O.C.G.A. 17-10-2(c) (instructing judges to conduct pre-sentence hearings in capital cases, where jurors consider whether any statutory aggravators or mitigators exist and "whether to recommend mercy"))).

For juvenile offenders, distinguishing between the nature of the harm done and the nature of the harm-doer is crucial. By virtue of their years, adolescents have had little opportunity to exercise autonomous control over the development of their character. Who they are is much more a product of biology and environment than of their own free choice. Mercy recognizes these truisms and affords jurors the opportunity to withhold the ultimate punishment from those who, though they acted badly, are not bad persons.

VII. CONCLUSION

Beyond the formulation of juvenile and criminal justice policy in general, making a place in the law for consideration of the role of peer influence and group offending in adolescent violence is essential to save lives. As with adult criminals, in youth crime the question of legal causation is paramount. Juvenile criminology is founded on the principle that children and youth are less responsible for their actions than adults because they are not yet fully developed; they are by definition less mature. Although juveniles charged with murder are tried "as adults" in criminal court rather than in juvenile court, the forum for the trial does not change the nature of those being tried. Teens who kill are not transformed into adults by virtue of the commission of the crime, or by the transfer of jurisdiction from the juvenile court to the adult criminal court. In the criminal courtroom, "the kid [may be] a criminal but the criminal is still a kid."⁴⁵⁶

Our juvenile and criminal justice systems must join in a common strategy to serve the complex needs of juveniles and society. The most important component of that strategy is a consensus on basic principles of penal proportionality and the immaturity of youth. Those principles must undergird all proceedings involving youth, and particularly capital proceedings, where the stakes are so high and the consequences irreversible. We must allow our young people to recover from their youth. Executing them is not the solution.

456. ZIMRING, *supra* note 15, at 142.

APPENDIX A

JUVENILE OFFENDERS ON DEATH ROW

NAME	D ⁱ	V ⁱⁱ	INFLUENCE	NATURE OF CRIME	CDS ⁱⁱⁱ	DP ^{iv}
Acuna, Robert Aaron	Alone	N	Robbery of residence			NM
Adams, Renaldo Chante	Alone	N		Burglary of residence, sexual assault		NM
Adams, Thomas Mark	Alone	A		Burglary of residence, marijuana		A
Aguilar, Tonatihu	Alone	S		Drive-by shooting		NM
Alvarado, Steven Brian	D + 2	A	Gang	Drug deal at Vs' residence		NM
Arroyo, Randy	D + 2	S	Gang	Carjacked RX7 to steal parts	1D, 1T	J
Arthur, Mark Sam	D + 2	A	Wife of victim	Revenge, kill abusive husband	1L, 1P	NM
Barraza, Mauro Morris	Alone	S	High	Burglary of residence, sexual assault		NM
Bernal, Johnnie	D + 4	S	High	Drive-by robbery		NM
Bonds, James Willis	D + 1	S		Burglary of rental office		NM
Bonifay, James Patrick	D + 2	S	Older cousin	Revenge for firing cousin	2T	A
Bridgewater, Roy	D + 1	S	Co-D	Burglary of residence		A
Capetillo, Edward Brian	D + 4	A	High, other Ds	Burglary of residence		NM
Chapman, Lamorris J.	D + 5	A		Revenge against cheating girlfriend		A
Cobb, Raymond Levi	Alone	N	High	Burglary of residence		A
Craig, Dale Dwayne	D + 3	S		Carjacking of Bronco	1L, 2T	J
Davis, Timothy Charles	Alone	A		Burglary of grocery store, sexual assault		J
Dewberry, John Curtis	D + 1	A	Adult brother	Revenge for gay advances	1L	J

ⁱ D = Defendant; + # = Number of co-defendants or accomplices.

ⁱⁱ V = Victim. Victim classifications are: A = Acquaintance; F = Family member; N = Neighbor; P = Police officer; S = Stranger.

ⁱⁱⁱ CDS = Co-Defendant's sentence, if known. D = Death; L = Life; P = Probation; T = Term of years.

^{iv} DP = Defendant's priors. A = Adult record; J = Juvenile record; N = No record; NM = None mentioned; NSH = No significant history of prior criminal acts (as defined by the states using this category).

NAME	D ⁱ	V ⁱⁱ	INFLUENCE	NATURE OF CRIME	CDS ⁱⁱⁱ	DP ^{iv}
Dickens, Justin Wiley	Alone, but	S	Drug dealer	Burglary of jewelry store		NM
Dixon, Anthony Tyrone	Alone, but	S		Carjacking of red T ^o bird		A
Dominguez, Michael (Miguel)	Alone	A		Revenge for dissing girlfriend		J
Duke, Mark Anthony	D + 3	F		Revenge, not getting dad's truck	1D	NM
Duncan, Trace Royal	D + 3	S	High	Kidnapping, sexual assault	2D, 1L	NSH
Dycus, Kelvin	D + 1 B16	N		Burglary of residence		NM
Eskridge, Roderick	D + 4	S		Robbery of stranger		NM
Foster, Ronald Chris	Alone, but	A	12 beers	Burglary of Superette store	1T	N
Gibson, Exzavious Lee	Alone	S		Burglary of grocery store		NM
Golphin, Kevin Salvador	D + 1	P	Adult brother	Carjacking at finance office	1D	NM
Guillen, Derek Jermaine	D + 4	N		Burglary of residence		NM
Hart, Gary Davis II	D + 1	S	Adult co-D	Burglary of restaurant		NM
Holly, William Joseph	D + 2	S		Carjacking of taxicab		NM
Horn, Patrick	Alone, but	S		Drug-related kidnapping, sexual assault		NM
Howard, Cedric D'Wayne	D + 9	A	Gang	Burglary of residence	1D, 2L	J
Hughes, Herman Lee Jr.	D + 1	S	Uncle, beers	Burglary of video poker parlor	1T, 1P	N
Hughes, Kevin	Alone	A		Sexual assault, young girls		N
Hyde, James Matthew	D + 2	A	Co-D	Revenge, co-D planned hit against witness	1T	NSH
Jackson, Levi Jaimes	D + 2	S	Gang	Carjacking	1T	J
Jenkins, Larry Leonarde	Alone, but	S		Burglary of laundromat		NM
Johnson, Eddie C.	D + 2	S	Gang	Robbery in home driveway		NM
Johnson, Shermaine Ali	Alone	A		Sexual assault		NM

NAME	D	V	INFLUENCE	NATURE OF CRIME	CDS	DP
Jones, Anzel Keon	Alone, but	N		Revenge for Ns' complaint, sexual assault		NM
Knotts, William Thomas	Alone, but	S		Revenge for abuse of friend		J
Laird, Kenneth Jeremy	Alone, but	A		Burglary of residence		J
LeCroy, Cleo Douglas	D + 1	S		Robbery of campers		NSH
Lee, Percy	D + 1	A		Revenge for kicking D out, sexual assault	1D	NSH
Little, Leo Gordon	D + 1	S	High, gang	Robbery of accountant		NM
Loggins, Kenneth	D + 3	S	High	Kidnapping, sexual assault	2D, 1L	NSH
Lopez, Michael Anthony, Jr.	D + 5	P	High, gang	Evading arrest for probation violation		NM
McGilberry, Stephen Virgil	D + 1	F		Revenge, family Bronco taken away		NM
Monterrubio, Jose Ignacio	D + 1	A		Sexual assault	1L	NM
Morgan, Eric Dale	D + 1	S		Robbery of convenience store	1T	NM
Neal, John Lionel	Alone	S		Burglary of residence		NM
Perez, Efrian	D + 7	S	High, gang	Gang initiation, sexual assault	4D, 1T	NM
Powers, Ted Benjamin	Alone	S		Burglary of residence		NM
Pressley, Marcus Dewayne	D + 2	S		Burglary of pawn shop		NSH
Ramirez, Nathan	D + 1	N		Burglary of residence	1L	NM
Reeves, Whitney	D + 1	A		Revenge, testimony against co-D		NM
Salinas, Jorge Alfredo	D + 2	S		Carjacking		NM
Slaton, Nathan D.	Alone	N		Shooting BB gun, sexual assault		J
Solomon, Christopher Julian	D + 2	S	High	Robbery of man in disabled vehicle		NM
Soriano, Oswaldo Regaldo	D + 1	S		Burglary of convenience store		N
Soto-Fong, Martin Raul	D + 2	A		Burglary of El Grande Market		J

NAME	D	V	INFLUENCE	NATURE OF CRIME	CDS	DP
Springsteen, Robert Burns, IV	D + 3	S		Burglary of yogurt shop		NM
Tran, Son Vu Khai	D + 2	A	Adult co-D, gang	Revenge, competition over a woman.	2L	NM
Villareal, Raul Omar	D + 7	S	High, gang.	Gang initiation, sexual assault	4D, 1T	NM
Walters, Travis LeVance	Alone	S		Burglary of Hardee's		J
Williams, Bruce Lee	Alone	S		Carjacking, sexual assault		J
Williams, Nanon McKewn	D + 1	A		Drug deal		NM
Wilson, Aaron	D + 3	S	Adult co-D	Carjacking, sexual assault		NM
Wilson, Geno Capoletti	Alone, but	S	High	Robbery of door-to- door salesman		J
Wimberly, Shaber Chamond	D + 1	S		Burglary of residence		NM
Wynn, Gregory Renard	Alone, but	A		Burglary of Hardee's after firing		NSH