

1995

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### Recommended Citation

Suzanne D. Strater, *The Juvenile Death Penalty: In the Best Interests of the Child?*, 26 Loy. U. Chi. L. J. 147 (1995).

Available at: <http://lawcommons.luc.edu/lucj/vol26/iss2/4>

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# The Juvenile Death Penalty: In the Best Interests of the Child?

Suzanne D. Strater\*

## I. INTRODUCTION

In September 1994, eleven-year-old Robert "Yummy" Sandifer allegedly inadvertently killed innocent, neighborhood, fourteen-year-old Shavon Dean while spraying bullets at rival gang members in Chicago.<sup>1</sup> Prosecutors will not be asking for the death penalty during Yummy's murder trial, as others already executed Yummy.<sup>2</sup> Days after the Dean killing, Yummy was found shot to death in a pool of his own blood.<sup>3</sup> Two of his own gang members, ages fourteen and sixteen, were charged with Yummy's murder.<sup>4</sup> This shocking tale has grabbed the attention of the country and the media, most notably making the cover of *Time* magazine.<sup>5</sup> Articles on the juvenile justice system,<sup>6</sup> youth violence,<sup>7</sup> and the crime bill<sup>8</sup> followed. The nation's

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1. Nancy R. Gibbs, *Murder in Miniature*, TIME, Sept. 19, 1994, at 54.
2. Julie Grace, *There Are No Children Here*, TIME, Sept. 12, 1994, at 44.
3. *Young Killers Lost Childhoods Often Carry Deadly Price*, DET. FREE PRESS, Sept. 6, 1994, at 14A [hereinafter *Young Killers*].
4. John W. Fountain & Gary Marx, *Boy's Wake a Lesson for Roseland, Mourners Bring Kids to Learn from Tragedy*, CHI. TRIB., Sept. 7, 1994, at 1; William H. Freivogel, *Murdered Boy's Story Lingers, With Messages*, ST. LOUIS POST DISPATCH, Sept. 12, 1994, at 5B.
5. Gibbs, *supra* note 1, at 54; Richard Lacayo, *When Kids Go Bad*, TIME, Sept. 19, 1994, at 60.
6. Patricia Edmonds & Sam V. Meddis, *Is Juvenile Justice System "Creating Monsters"?* *Public Angry Over Level of Violence*, USA TODAY, Sept. 28, 1994, at 1A.
7. *An 11-Year-Old Killer's Gangland Death*, S.F. CHRON., Sept. 6, 1994, at A14; Mary Schmich, *Boy's Innocence Died Before Him*, CHI. TRIB., Sept. 2, 1994, § 2, at 1. Schmich refers to other murders committed by youth including two twelve-year-olds killing a fifty-year-old migrant apple-picker in Washington State by shooting the victim 18 times; a thirteen-year-old boy in New York State accused of strangling a twelve-year-old friend; and two ten-year-old British boys beating a two-year-old to death

reaction has varied. One editorial suggested that "we will see Robert Sandifer time and time again, wearing the face of yet another should-be-child marked for death by other should-be-children who have no respect for life because life never respected them."<sup>9</sup> Other authors asserted: "With every brutal crime by a child, a troubled nation demands longer jail sentences, tougher treatment, even the death penalty—anything to stop the violence."<sup>10</sup>

The latest arena for the juvenile<sup>11</sup> death penalty debate is the State of Florida. In the last few years, Florida has experienced a rash of slayings of foreign tourists by adolescents.<sup>12</sup> The killings have tarnished Florida's reputation as a vacationland,<sup>13</sup> and have caused the issue of the juvenile death penalty to surface again. One highly publicized case involved four adolescents charged with killing a British tourist.<sup>14</sup> The State is presently prosecuting two of these boys as adults.<sup>15</sup> The boys were sixteen-years-old and fourteen-years-old when charged.<sup>16</sup> If convicted, the sixteen-year-old may be sentenced to death in Florida's electric chair.<sup>17</sup> The case raised a sociological and

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with bricks and an iron bar. *Id.*

8. Roger E. Hernandez, *It's the Crime Bill—or Nothing*, S.F. EXAMINER, Oct. 3, 1994, at A17. The National Crime Bill instituted prevention programs and tougher sentences for street crimes. *Id.* Hernandez argues that despite the crime bill, American cities will still be unsafe. *Id.* He asserts that helping one troubled child at a time may be the only answer. *Id.*

9. *Young Killers*, *supra* note 3, at 14A.

10. Edmonds & Meddis, *supra* note 6, at 1A.

11. In this discussion, as in most, "juvenile" refers to a person who is under the age of eighteen.

12. Larry Rohter, *Talk of Florida: How to End Crime*, N.Y. TIMES, Mar. 27, 1994, § 1, at 18.

13. *Id.*

14. Mike Clary, *Florida Youths at Center of Death-Penalty Debate: Recent Slayings of Foreign Tourists Rekindle Discussion*, DALLAS MORNING NEWS, Oct. 9, 1993, at 39A; Martin Dyckman, *Cynical Scapegoating*, ST. PETERSBURG TIMES, Oct. 26, 1993, at 9A. As of November 1994, two of the four boys pleaded to lesser charges and are awaiting sentencing. Adam Yeomans, *Victim Testifies in British Tourist Slaying*, AP WORLDSTREAM, Nov. 15, 1994, (International News).

15. *See supra* note 14. There are two procedures whereby an adult criminal court obtains jurisdiction in juvenile cases. The first is direct filing. Under this method, a statute requires that certain cases are always handled in adult criminal court or allows the prosecutor to make a case-by-case determination. VICTOR L. STREIB, *DEATH PENALTY FOR JUVENILES* 13-14 (1987). The second alternative allows the juvenile court to waive its jurisdiction and transfer the case to an adult criminal court. *Id.* For an in-depth discussion of waiver, see S. David Kozich, Comment, *A Model for the Transfer of Juvenile Felony Offenders to Adult Court Jurisdiction*, 4 J. JUV. L. 170 (1980).

16. *4 Florida Teen-Agers Indicted in Death of British Tourist*, L.A. TIMES, Oct. 23, 1993, at A18.

17. Clary, *supra* note 14, at 39A. In the first trial of one of the juveniles, the

legal debate over the juvenile death penalty. One commentator warned:

Now if you think the Brits were shocked by the shooting, just wait until we try to fry a kid for it. Britain, in company with the rest of Western Europe, gave up executions long ago. They've stuck to their moral principle despite serious provocations from the Irish Republican Army. Countries that do not execute anyone will not easily understand how a supposedly civilized country like the United States can undertake to execute children.<sup>18</sup>

As a matter of fact, the mother of the murdered British tourist,<sup>19</sup> as well as his injured girlfriend,<sup>20</sup> do not want the death penalty for these juveniles.<sup>21</sup> Why then, in a civilized country like America, is the death penalty for juveniles accepted and in some cases encouraged?

The debate over the juvenile death penalty is complex. Many opponents argue that juveniles are less culpable than adults and, therefore, should not be held to an adult standard of punishment.<sup>22</sup> This Article's analysis goes beyond the traditional criticisms of the juvenile death penalty, such as lack of legal or moral culpability, and discusses the conflict between a state's imposition of the juvenile death penalty and its *parens patriae*<sup>23</sup> duty to protect children by considering their best interests.

First, this Article traces the history of the juvenile death penalty in the United States.<sup>24</sup> Next, this Article outlines the present legal status

prosecutors waived the death penalty. See Yeomans, *supra* note 14. However, the first trial was declared a mistrial due to jury deadlock. John Ezard, *Florida Trial Ordeal to Be Repeated*, GUARDIAN, Nov. 19, 1994, (The Guardian Home Page), at 6. Florida intends to re-prosecute the youth; his accomplice will stand trial in January of 1995. *State to Seek New Trial in Tourist Slaying*, REUTERS, Nov. 19, 1994.

18. Dyckman, *supra* note 14, at 9A.

19. Deborah Sharp, *Florida Wrestling with 'Scary' Teen Crime*, USA TODAY, Oct. 7, 1993, at 3A. Sharp's article indicates that juveniles were arrested for murder or manslaughter in 166 Florida cases in 1992. *Id.* Thus, in 1993, in Florida juvenile murder arrests were up approximately 17% from 1992. *Id.* Consequently, considerable outrage has resulted, including the demand for the death penalty in such cases. *Id.*

20. Donna O'Neal, *Attack Survivor: No Death Penalty; The Slain British Tourist's Girlfriend Says the Killers, Who Also Wounded Her in the I-10 Attack, Should Not Be Executed*, ORLANDO SENTINEL, Oct. 7, 1993, at A1.

21. *Id.*; Sharp, *supra* note 19, at 3A.

22. "Our laws, civil as well as criminal, reflect the truth that children are less responsible for their circumstances and hence for their conduct than are adults." Hugo A. Bedau, *Foreword* to STREIB, *supra* note 15, at viii.

23. "*Parens patriae*" refers to a state's traditional role as the guardian of persons under legal disability, such as juveniles, under which it acts to promote their welfare. BLACK'S LAW DICTIONARY 769 (6th ed. 1990). See *infra* part V for further analysis of this concept.

24. See *infra* part II.

of the juvenile death penalty by examining the constitutionality of the death penalty in general,<sup>25</sup> the juvenile death penalty specifically,<sup>26</sup> and the legislative treatment of the death penalty, identifying minimum statutory age limits, if any.<sup>27</sup> This Article then provides a brief overview of the traditional criticisms of the juvenile death penalty.<sup>28</sup> This Article discusses a state's broad *parens patriae* duty toward its youths and the "best interests of the child" standard. This discussion uses the juvenile justice system, custody, and adoption as illustrations of the overarching application of the *parens patriae* duty<sup>29</sup> and the best interests of the child standard throughout juvenile law.<sup>30</sup> This Article then considers a state's duty toward its youths in the context of the juvenile death penalty.<sup>31</sup> This Article ultimately concludes that the juvenile death penalty directly conflicts with a state's duty to protect children. Accordingly, this Article urges state legislators, in considering whether to enact juvenile death penalty legislation, and the United States Supreme Court, in determining the constitutionality of such legislation, to consider this conflict.<sup>32</sup>

## II. HISTORICAL PERSPECTIVE ON THE JUVENILE DEATH PENALTY

The rationale for the juvenile death penalty is often traced to Blackstone's *Commentaries on the Laws of England*,<sup>33</sup> which articulated the common law impact of age on the death penalty.<sup>34</sup> According to interpretations of Blackstone's theories, juveniles below the age of seven were incapable of forming criminal intent, and a rebuttable presumption of incapacity applied to individuals aged seven to fourteen.<sup>35</sup> The law presumed that children fourteen or older had the same criminal capacity as adults.<sup>36</sup>

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25. See *infra* part III.A.

26. See *infra* part III.B.

27. See *infra* part III.C.

28. See *infra* part IV.

29. See *infra* part V.A-B.

30. See *infra* part V.A-B.

31. See *infra* part V.C.

32. See *infra* parts V-VI.

33. WILLIAM BLACKSTONE, COMMENTARIES.

34. 4 *id.* at \*22-24.

35. *Thompson v. Oklahoma*, 487 U.S. 815, 864-78 (1988) (Scalia, J., dissenting). Justice Scalia provides a cursory analysis of the historical perspective of the juvenile death penalty in his dissent. *Id.* at 859-78 (Scalia, J., dissenting).

36. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 936 (1982). For additional information on the history of the juvenile death penalty, see Victor L. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for*

The first known execution of a youth under the age of eighteen, on what later became American soil, took place in Plymouth Colony in 1642,<sup>37</sup> over a century before the adoption of the Eighth Amendment.<sup>38</sup> The youngest offender ever executed under the United States Constitution was James Arcene, a ten-year-old Cherokee, who was hanged in Arkansas in 1885 for participating in a robbery and a murder.<sup>39</sup> In the twentieth century, prior to *Furman v. Georgia*,<sup>40</sup> which found capital punishment unconstitutional as it was then applied,<sup>41</sup> approximately 175 adolescents were executed.<sup>42</sup> Since the Court ruled in 1976 that the death penalty is not per se unconstitutional,<sup>43</sup> 110 additional children have been sentenced to death.<sup>44</sup>

By the 1990s, approximately 287 juveniles had been executed for criminal offenses in the United States.<sup>45</sup> Nearly two-thirds of the juvenile executions took place in the South.<sup>46</sup> All but nine of the adolescents executed were male.<sup>47</sup> Furthermore, three-fourths of the juveniles executed were people of color.<sup>48</sup> Overwhelmingly, their victims were white.<sup>49</sup>

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*Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613, 614-36 (1983).

37. For an analysis of this case and other early case studies, see STREIB, *supra* note 15, at 73-94.

38. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. For a discussion of the Eighth Amendment in relation to the death penalty, see *infra* part III.A.

39. *History of the Juvenile Death Penalty: Key Events in the United States*, WASH. POST, July 19, 1988, (Health), at Z15.

40. 408 U.S. 238 (1972) (5-4 decision).

41. *Id.* at 240 (per curiam).

42. Etta J. Mullin, Note, *At What Age Should They Die? The United States Supreme Court Decision with Respect to Juvenile Offenders and the Death Penalty*, Stanford v. Kentucky and Wilkins v. Missouri, 109 S. Ct. 2969 (1990), 16 T. MARSHALL L. REV. 161, 163-64 (1990).

43. *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (plurality opinion); *id.* at 207 (White, J., concurring).

44. Charles Z. Smith, *The Death Penalty and Juveniles*, 2 KY. CHILDREN'S RTS. J. 1, 5 tbl. 1 (1992).

45. *Id.* at 10. See also Linda Andre-Wells, Note, *Imposing the Death Penalty Upon Juvenile Offenders: A Current Application of the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment*, 21 N.M. L. REV. 373, 375 (1991) (giving additional statistical information).

46. Georgia has had the most juvenile executions at 40, followed by North Carolina, Ohio, and Virginia, each with 19 juvenile executions. Don Colburn, *Most Put to Death for Juvenile Offenses Are Black Males*, WASH. POST, July 19, 1988, (Health), at Z16.

47. *Id.*

48. *Id.*

49. *Id.* Approximately 89% of all victims have been white. *Id.*

Even though juvenile executions have taken place in our country's history, many authorities characterize the actual enforcement of the juvenile death penalty as rare,<sup>50</sup> especially in comparison to adult death penalty cases.<sup>51</sup> Societal interest in the juvenile death penalty, however, has recently revived,<sup>52</sup> and the constitutional and legal ramifications of the juvenile death penalty remain in dispute. The next section of this analysis will trace the Supreme Court's evaluation of the death penalty in general, and will then focus specifically on the application of capital punishment to minors.

### III. LEGAL BACKGROUND OF THE JUVENILE DEATH PENALTY

#### A. *The Constitutionality of the Death Penalty*

Although a thorough examination of the constitutionality of the death penalty is beyond the scope of this analysis, a brief introduction is necessary in order to place the juvenile death penalty in context. The framework for analyzing the general constitutionality of the death penalty originates with the Eighth Amendment to the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment.<sup>53</sup> The Eighth Amendment bans the infliction of cruel and unusual punishment.<sup>54</sup> Originally, the framers of the Eighth Amendment only intended to outlaw the torturous punishments practiced in sixteenth through eighteenth-century England; they did not necessarily intend to proscribe punishments disproportionate to the crime.<sup>55</sup>

At the turn of the twentieth century, in *Weems v. United States*,<sup>56</sup> the Supreme Court expanded the historical interpretation of the Eighth Amendment. The *Weems* Court stated that the Eighth Amendment "is

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50. Mullin, *supra* note 42, at 161.

51. Smith, *supra* note 44, at 4.

52. See *supra* notes 1-23 and accompanying text.

53. See *Robinson v. California*, 370 U.S. 660, 667-68 (1962) (applying the Eighth Amendment to the states, via the Fourteenth Amendment, for the first time). It is now well established that the Eighth Amendment applies to the states through the Fourteenth Amendment. See *Wilson v. Seiter*, 501 U.S. 294, 296-97 (1991).

54. U.S. CONST. amend. VIII. See *supra* note 38 for the text of the Eighth Amendment.

55. Gregory Bassham, *Rethinking the Emerging Jurisprudence of Juvenile Death*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 467, 468 (1991).

56. 217 U.S. 349 (1910) (striking down a sentence of 15 years imprisonment for surveillance and tampering with documents as cruel and unusual punishment). The defendant charged with surveillance and tampering was an officer of the Bureau of the Coast Guard and Transportation of the United States Government of the Philippine Islands; thus, he was sentenced in the Philippines. *Id.* at 357.

not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”<sup>57</sup> In 1958, the Supreme Court focused on this broader analysis and implemented a definition of “cruel and unusual” which looked to “evolving standards of decency that mark the progress of a maturing society.”<sup>58</sup>

In 1972, in *Furman v. Georgia*,<sup>59</sup> the Court directly addressed the issue of the death penalty as cruel and unusual punishment, in the context of determining the constitutionality of the capital punishment statutes of Georgia and Texas.<sup>60</sup> In a per curiam opinion, with five separate concurrences, the Court concluded that the death penalty, as then applied, was cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments and, thus, unconstitutional.<sup>61</sup> The Court did not decide, however, that the death penalty was unconstitutional for all crimes, under all circumstances.<sup>62</sup>

Four years later, in *Gregg v. Georgia*,<sup>63</sup> the Court held that the imposition of the death penalty did not constitute a per se Eighth Amendment violation<sup>64</sup> and found a revised statutory scheme constitutional.<sup>65</sup> Since the *Gregg* ruling, executions have numbered thirty to forty per year, and the national death row population was expected to be approximately 2948 by the end of 1994.<sup>66</sup> This population is the largest number of people on death row in any nation’s history.<sup>67</sup>

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57. *Id.* at 378.

58. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (invalidating a sentence of denaturalization for wartime desertion).

59. 408 U.S. 238 (1972) (5-4 decision).

60. *Id.* at 239-40 (per curiam). The Court consolidated *Furman* with *Branch v. Texas*, a case appealed from the Texas Court of Criminal Appeals. *Id.*

61. *Id.* (per curiam). In his concurring opinion, Justice Stewart stated: “[T]he Eight and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.” *Id.* at 310 (Stewart, J., concurring). Justice Douglas, in his concurring opinion, determined that the “evolving standards of decency” test was the benchmark for defining cruel and unusual punishment. *Id.* at 242 (Douglas, J., concurring).

62. Streib, *supra* note 36, at 632.

63. 428 U.S. 153 (1976).

64. Streib, *supra* note 36, at 632-33.

65. See *Gregg*, 428 U.S. at 190-98 (plurality opinion), for a summary of this scheme.

66. David A. Kaplan, *Death Be Not Proud at the Court*, NEWSWEEK, Mar. 7, 1994, at 52; Tony Mauro & Mark Potok, *Death Penalty Becoming “Real” / 6 Had Been Scheduled This Week*, USA TODAY, Dec. 7, 1994, at 3A.

67. Kaplan, *supra* note 66, at 52.

B. *The Constitutionality of the Juvenile Death Penalty*

Although the Court avoided the issue by deciding the case on different grounds,<sup>68</sup> the constitutionality of the juvenile death penalty came before the Supreme Court for the first time in *Eddings v. Oklahoma*.<sup>69</sup> The Court, however, emphasized age as a mitigating factor in the sentencing of capital crimes.<sup>70</sup> Six years later, the Supreme Court revisited the issue of the juvenile death penalty in its decision in *Thompson v. Oklahoma*.<sup>71</sup> In a plurality decision,<sup>72</sup> the Court reversed a fifteen-year-old's death sentence using the evolving standards of decency test set forth in *Trop v. Dulles*.<sup>73</sup> Under this test, the Court analyzed contemporary values as reflected by state statutes and sentencing juries, finding that our civilized society rejects the application of the death penalty to a fifteen-year-old.<sup>74</sup>

Ironically, just one-and-one-half years later, in *Stanford v. Kentucky*,<sup>75</sup> the Court also looked to state statutes in formulating its holding that society has not rejected the application of the death penalty to sixteen and seventeen-year-olds.<sup>76</sup> In *Stanford*, the Court again analyzed the juvenile death penalty in relation to evolving standards of decency and statutory enactments,<sup>77</sup> concluding that no such national

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68. *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). The Oklahoma trial court did not take mitigating circumstances into consideration in sentencing; therefore, the Supreme Court reversed the sentence and remanded the case for further proceedings. *Id.* at 116-17.

69. *Id.* at 104.

70. *Id.* at 116.

71. 487 U.S. 815 (1988) (plurality opinion).

72. The *Thompson* Court did not reach a majority opinion in determining the constitutionality of the juvenile death penalty. *See id.* at 815 (plurality opinion). The four justice plurality opinion held that imposing the death penalty on a child under sixteen is "unconstitutional punishment." *Id.* at 838 (plurality opinion). Justice O'Connor wrote a concurring opinion in which she agreed with the ultimate decision of the plurality, but found that the information before the Court was inadequate to decide, based on the evolving standards of decency test, whether the death penalty for children under sixteen was unconstitutional. *Id.* at 848-59 (O'Connor, J., concurring). The three-justice dissent found that the juvenile death penalty was not unconstitutional. *Id.* at 859 (Scalia, J., dissenting).

73. *Id.* at 821 (plurality opinion) (citing *Trop v. Dulles*, 356 U.S. 86 (1958)).

74. *Id.* at 821-23 (plurality opinion). The *Thompson* Court did not ban the juvenile death penalty altogether, rather the Court banned the juvenile death penalty for those under the age of sixteen. *Id.* at 838 (plurality opinion).

75. 492 U.S. 361 (1989) (plurality opinion). The Court consolidated *Stanford* with *Wilkins v. Missouri*. *Id.* at 366 (plurality opinion).

76. *Id.* at 370-71 (plurality opinion). Most of Justice Scalia's opinion constituted the opinion of the Court, however, parts IV.B and V constitute only a plurality opinion of the Court. *Id.* at 364.

77. *Id.* at 369 (plurality opinion). The Court also applied a traditional common law

consensus against capital punishment existed for youths aged sixteen and seventeen.<sup>78</sup> The Court rejected various opinion polls, as well as the positions of a number of professional associations, which contended that public attitude opposed capital punishment for juveniles.<sup>79</sup> The *Stanford* holding leaves many questions unanswered, including the constitutionality of statutes allowing the execution of those under the age of sixteen. Taken together, however, *Thompson* and *Stanford* seem to comprise one rule: the line between juveniles and adults for the purpose of imposing the death penalty is age sixteen.<sup>80</sup> Legislative enactments and the issues surrounding them follow in the section below.

### C. Legislative Treatment of the Juvenile Death Penalty

Currently, thirty-seven states have enacted the death penalty for adults.<sup>81</sup> Thus, only thirteen states and the District of Columbia prohibit capital punishment altogether.<sup>82</sup> Of the thirty-seven states that allow capital punishment, twenty-four permit the imposition of the death penalty on juveniles.<sup>83</sup> Fourteen of these states have set a minimum age for capital punishment,<sup>84</sup> including North Carolina at

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analysis of whether this punishment was cruel and unusual at the time the Bill of Rights was adopted. The Court concluded that the death penalty for juveniles did not contravene this test. *Id.* at 368 (plurality opinion) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*23-24). Furthermore, Justice Scalia found statutes setting the legal age for other activities such as driving, voting, and drinking alcohol, irrelevant. *Id.* at 374-75 (plurality opinion).

78. *Id.* at 373 (plurality opinion). There is more at work here than the age difference between fifteen-year-olds and sixteen or seventeen-year-olds. The change in the Court's attitude may be explained by the shift in members of the Court and by Justice O'Connor's swing vote. The *Thompson* decision was a four-Justice plurality, which included Justice O'Connor's deciding vote on narrower grounds. *Thompson*, 487 U.S. at 818 (plurality opinion). Justice Kennedy did not take part in the decision; thus there were only three dissenters. *Id.* (plurality opinion). In the *Stanford* decision, Justice O'Connor's fifth vote on narrower grounds tipped the scale. *Stanford*, 492 U.S. at 380 (plurality opinion). There were a total of four dissenters in *Stanford*. *Id.* (plurality opinion).

79. *Stanford*, 492 U.S. at 377-78 (plurality opinion).

80. Clifford K. Dorne & Kenneth E. Gewerth, *Imposing the Death Penalty on Juvenile Murderers: A Constitutional Assessment*, 75 JUDICATURE 6, 8-9 (1991).

81. See *infra* app. A for a listing of state statutes. Moreover, on Tuesday, March 7, 1995, New York became the thirty-eight state to enact the death penalty for adults. *N.Y. Brings Back Death Penalty*, CHI. TRIB., Mar. 7, 1995, at 1 (evening update). The law currently awaits codification. Whether the law permits the imposition of the death penalty on juveniles is unknown.

82. See Smith, *supra* note 44, at 2-4.

83. See *infra* app. A. These include states that explicitly allow the death penalty for juveniles and those in which no minimum age has been established.

84. These states include Alabama, Arkansas, Georgia, Indiana, Kentucky, Louisiana,

fourteen,<sup>85</sup> Louisiana at fifteen,<sup>86</sup> and Arkansas at fourteen.<sup>87</sup> Ten of the twenty-four states allowing juvenile capital punishment do not set a minimum age for the death penalty.<sup>88</sup>

The unconstitutionality of some of these state statutes *may* seem clear from the earlier discussion of Supreme Court decisions.<sup>89</sup> Nevertheless, prosecutors are seeking the death penalty in cases involving children under the age of sixteen,<sup>90</sup> apparently arguing that the law is not settled based on the lack of a majority opinion in *Thompson v. Oklahoma*.<sup>91</sup>

In addition to prosecutors seeking the death penalty for children, the public is lobbying for tougher state criminal laws, evidencing some public support for the juvenile death penalty.<sup>92</sup> Prior to the Florida Supreme Court's decision in *Allen v. State*,<sup>93</sup> Florida legislators

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Mississippi, Missouri, Nevada, North Carolina, Oklahoma, Texas, Virginia, and Wyoming. See *infra* app. A.

85. N.C. GEN. STAT. § 14-17 (1994). The North Carolina death penalty statute allows the death penalty for fourteen-year-olds who are convicted of a murder that occurred while they were already incarcerated for a previous murder. *Id.*

86. LA. CHILDREN'S CODE ANN. art. 305, *as amended* by Act of July 6, 1994, 1994 La. Sess. Law Serv. 15 (West) (requiring a juvenile to be transferred to adult court when he or she has reached the age of fifteen and there is probable cause to believe that he or she committed first or second degree murder).

87. ARK. CODE ANN. § 9-27-318 (Michie 1987 & Supp. 1994) (allowing transfer to adult court at age fourteen for a capital murder offense).

88. These states include the following: Arizona, Delaware, Florida, Idaho, Montana, Pennsylvania, South Carolina, South Dakota, Utah, and Washington. See *infra* app. A for the citations to these state statutes.

89. See *supra* notes 68-80 and accompanying text.

90. Lynne Bumpus-Hooper, *What Age Is Old Enough to Be Killed? Death Penalty for Young Teens Is Unconstitutional, Experts Say*, ORLANDO SENTINEL TRIB., Feb. 7, 1993, at A16; Dyckman, *supra* note 14, at 39A; see also Dennis Wagner, *Suspect's Mom Cites System in Slaying: Juvenile Officials Didn't Detain Son, Court Told*, PHOENIX GAZETTE, Aug. 6, 1994, at B1 (discussing case in which Arizona prosecutor may seek the death penalty for a sixteen-year-old homicide suspect).

91. 487 U.S. 815 (1988). See *supra* notes 71-74 and accompanying text for a discussion of *Thompson*.

92. Keith A. Harriston, *D.C. Referendum Fueled by Fear, Leaders Say Crime-Wearry Voters May Support Death Penalty*, WASH. POST, Oct. 26, 1992, at A1; see also *No Death Sentence For Anyone Younger Than 16, Court Says*, MIAMI HERALD, Mar. 25, 1994, at 6B (discussing Florida Supreme Court's ruling that the death sentence cannot be imposed on anyone under sixteen in a case involving an eighteen-year-old who was fifteen when the crime was committed); Rorie Sherman, *Juvenile Judges Say: Time to Get Tough*, NAT'L L.J., Aug. 8, 1994, at A1 (explaining an August 1994 poll taken of 250 juvenile judges, in which two out of every five opined that there are situations under which juveniles should face capital punishment).

93. 636 So. 2d 494 (Fla. 1994) (*per curiam*). The Florida Supreme Court held that the death penalty violated the state constitution when applied to children under sixteen. *Id.* at 497. See *infra* notes 166-72 and accompanying text for a complete discussion of this case.

debated a bill that would have allowed the execution of children as young as fourteen.<sup>94</sup> Additionally, Congress' latest crime bill reflects the public's desire for tougher criminal laws: the bill enlarges the total number of capital federal crimes by sixty and limits the number of appeals for death row inmates.<sup>95</sup> Furthermore, in November 1993, congressional opposition forced Senator Paul Simon of Illinois to withdraw a proposed amendment to the crime bill that would have banned the death penalty for juvenile offenders.<sup>96</sup>

Meanwhile, despite this support for the juvenile death penalty, the opposition to the juvenile death penalty has also become more vocal.<sup>97</sup> The next section of this Article will explore some of the traditional rationales against the juvenile death penalty, highlighting the arguments of the most active children's advocates and anti-death penalty forces.

#### IV. TRADITIONAL CRITICISM OF THE JUVENILE DEATH PENALTY

One of the most vocal opponents of the death penalty, and the juvenile death penalty specifically, is the human rights organization, Amnesty International.<sup>98</sup> According to Amnesty International, in the last five years only seven countries, including the United States, have

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94. Rohter, *supra* note 12, at 18.

95. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). The federal crime bill expanded the availability of the death penalty to persons convicted of civil rights murders, rape and child molestation murders, sexual exploitation of children, and murder of federal witnesses, to name a few. *Id.* §§ 60001-60026; see also Ana Puga, *House Votes to Limit Amendments During Crime Bill Battle*, BOSTON GLOBE, Apr. 14, 1994, at 5 (discussing bill to expand the death penalty to cover more crimes, and to limit the number of appeals allowed for death row inmates); Ana Puga, *Death-Penalty Guidelines in Federal Crimes Debated*, BOSTON GLOBE, Aug. 8, 1994, at 6 (explaining that the anti-crime bill before Congress creates 60 new crimes punishable by the death penalty). Puga points out that the federal government has not executed anyone since 1963. *Id.*

96. Ana Puga, *Senators Withdraw Disputed Crime Bill Amendments*, BOSTON GLOBE, Nov. 16, 1993, at 5.

97. See *infra* part IV.

98. Amnesty International was founded in London in 1961 and has since become a worldwide advocate of human rights. Brief for Amicus Curiae Amnesty International in Support of Petitioner at 2, *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (No. 86-6169). In February 1987, Amnesty International started a worldwide campaign to abolish the death penalty. *Id.* at 3. Amnesty International's stance was clear: "Amnesty International does not approve of and would not defend any violent crime. [Amnesty International] cannot regard the death penalty—particularly as applied to crimes committed by juvenile offenders—other than as cruel, inhuman and degrading treatment and incompatible with respect for the inherent dignity of the human person." *Id.* at 4 (footnote omitted).

executed people for committing crimes while under the age of eighteen: Iran, Iraq, Nigeria, Pakistan, Saudi Arabia, and Yemen.<sup>99</sup> Amnesty International has relentlessly opposed the recent demand for the application of the death penalty in juvenile cases.<sup>100</sup>

Another vocal opponent of the juvenile death penalty is the United Nations. The United Nations General Assembly expressed its disapproval of the juvenile death penalty through the *Convention on the Rights of the Child*.<sup>101</sup> As early as 1977, the United States signed two

99. See Robert A. Jordan, *A Cry for Death—To the Death Penalty*, BOSTON GLOBE, Jan. 23, 1994, (Focus), at 71. The comparison of the United States to Third World countries is intentional and surfaces in many criticisms of the juvenile death penalty in this country. See, e.g., Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311, 1333 (1993); Jason Berry, *Executions: A Costly Way to Fight Crime*, ST. PETERSBURG TIMES, Nov. 21, 1993, (Perspective), at 8D.

100. In an open letter to President Clinton in early January 1994, Amnesty International maintained that there was "ample, well-documented evidence that the death penalty is arbitrary, unfair and racially discriminatory; that it is imposed on those without adequate legal counsel, on juvenile offenders and on the mentally ill and retarded." Jordan, *supra* note 99, at 71. Less than two months later, in his dissent to a denial of certiorari, Justice Blackman stated a similar rationale for his opposition to the death penalty in general. He declared:

Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all . . . and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.

Callins v. Collins, 114 S. Ct. 1127, 1129 (1994) (Blackmun, J., dissenting) (citation omitted).

Furthermore, Amnesty International asserted:

[T]here exists a well developed, unequivocal international legal and moral consensus prohibiting all nations from executing children for their crimes. However heinous the crime, the imposition on a young person of a sentence of utmost cruelty, which denies the possibility of rehabilitation or reform, is contrary to contemporary standards of justice and humane treatment.

Brief for Amicus Curiae Amnesty International In Support of Petitioner at 5, *Thompson*, 487 U.S. 815 (No. 86-6169). Other amici briefs in support of the petitioner reflect the widespread opposition to the juvenile death penalty. The organizations submitting briefs included: Office of the State Appellate Defender of Illinois, the American Bar Association, National Legal Aid and Defender Association, The American Jewish Committee, American Society for Adolescent Psychiatry, The American Orthopsychiatric Association, International Human Rights Law Group, Child Welfare League of America, National Network of Runaway and Youth Services, and Defense for Children International—USA. *Thompson*, 487 U.S. at 818 (plurality opinion).

101. G.A. Res. 44/25, U.N. Doc. A/Res/44/25 (1989), reprinted in 28 I.L.M. 1448, 1456-76 (1989), addendum in 29 I.L.M. 1340 (1990). Article 37(a) of this document states: "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below

treaties which banned juvenile capital punishment, but the Senate never ratified these treaties.<sup>102</sup> While the United States recently became one of the 177 signatories to the *Convention on the Rights of the Child*, the Senate has not yet ratified it.<sup>103</sup>

The leading legal authority and strong opponent of the juvenile death penalty is Professor Victor Streib.<sup>104</sup> Professor Streib contends that, even after attempting to maintain the stance of an objective researcher, his discoveries repeatedly lead him to the flaws of the juvenile death penalty.<sup>105</sup> Professor Streib has criticized the deterrence rationale put

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eighteen years of age . . . ." *Id.* art. 37(a). For a comprehensive analysis of the juvenile justice system as it relates to this treaty, see Jennifer D. Tinkler, *The Juvenile Justice System in the United States and the United Nations Convention on the Rights of the Child*, 12 B.C. THIRD WORLD L.J. 469 (1992). For a well presented introduction to this document, see KAY CASTELLE, *IN THE CHILD'S BEST INTEREST: A PRIMER ON THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD* (3d ed. 1990).

102. *Spare the Kids*, *NEWSDAY*, Oct. 17, 1991, at 56. The President of the United States has the power to sign treaties, but the treaties are not the law without Senate ratification. U.S. CONST. art. II, § 2, cl. 2. Therefore, the signing of the treaty did not affect the state death penalty statutes. The Inter-American Commission of Human Rights actually found the United States in violation of international human rights law in regard to the South Carolina case of juvenile James Terry Roach. David Weissbrodt, *Execution of Juvenile Offenders by the United States Violates International Human Rights Law*, 3 AM. U. J. INT'L L. & POL'Y 339, 339-40 (1988).

103. On Thursday, February 16, 1995 Madeleine Albright, the United States delegate to the United Nations, signed the *Convention on the Rights of the Child*. *U.S. Signs UN Pact on Children's Rights*, CHI. TRIB., Feb. 17, 1995, at N11. The treaty currently awaits ratification by the Senate. See U.S. CONST. art. II, § 2, cl. 2. Moreover, of the 177 signatories to the Convention only 169 have ratified it. *U.S. Finally Agrees to Sign UN Accord for Children*, CHI. TRIB., Feb. 12, 1995, at C22.

104. Professor Streib is a professor of Law at Cleveland-Marshall College of Law, Cleveland State University, and is considered the foremost authority on the juvenile death penalty. MARTINDALE-HUBBELL LAW DIRECTORY, Practice Profiles Section (1994). He received his undergraduate degree from Auburn University and his Juris Doctorate from Indiana University-Bloomington School of Law. *Id.* Before becoming a Criminal Justice and Procedure instructor at Cleveland-Marshall College of Law, Professor Streib taught Forensic Studies at Indiana University. *Id.* Professor Streib has written over one hundred papers, articles, and books on the juvenile death penalty and has represented or appeared on behalf of juvenile defendants in many high profile cases, including those of William Wayne Thompson and Jerome Allen. Andre-Wells, *supra* note 45, at 375 n.21. See *supra* notes 71-74 for a complete discussion of *Thompson*, 487 U.S. 815 (1988), and *infra* notes 166-72 for a complete discussion of *Allen v. State*, 636 So. 2d 494 (Fla. 1994) (*per curiam*).

105. STREIB, *supra* note 15, at ix. Streib is not alone in his assertion that the juvenile death penalty is flawed. In his *Stanford* opinion, Justice Brennan declared that the deterrence rationale for the juvenile death penalty was misplaced, reasoning that juveniles have little fear of death. *Stanford*, 492 U.S. at 404-05 (Brennan, J., dissenting). His dissenting opinion further reflects his outrage at the juvenile death penalty as "nothing more than the purposeless and needless imposition of pain and suffering." *Id.* at 405 (Brennan, J., dissenting) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

forth by proponents of the juvenile death penalty,<sup>106</sup> suggesting that execution may actually be a less effective deterrent than life imprisonment because of the nature of juvenile offenders.<sup>107</sup> Professor Streib also contends that political leaders use the juvenile death penalty as a panacea to teenage violence and crime, hindering the search for a real solution to these problems.<sup>108</sup> Finally, Professor Streib notes that children are treated differently in the juvenile justice system, than adults are treated in the adult justice system.<sup>109</sup>

Although most opponents of the juvenile death penalty look to moral justifications for their opinions, Professor Streib, in his documentation of the premise that children should be afforded special treatment, touches on a state's position with respect to children in other areas of the law. This focus is the basis of the central argument of this Article: a state's *parens patriae* or quasi-parental role toward children is inconsistent with the juvenile death penalty.<sup>110</sup>

#### V. THE STATE AS *PARENS PATRIAE* AND THE BEST INTERESTS OF THE CHILD

In addition to traditional arguments against the juvenile death penalty, the conflict between a state's duty as *parens patriae* to protect children on the one hand, and its role in executing children on the other, provides another reason why there should be no capital punishment of children. One commentator described the concept of *parens*

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106. For a comprehensive analysis of both the retributive and deterrence rationales, see Edward Miller, Note, *Executing Minors and the Mentally Retarded: The Retribution and Deterrence Rationales*, 43 RUTGERS L. REV. 15 (1990). See also Sherri A. Carver, Note, *Retribution—A Justification for the Execution of Mentally Retarded and Juvenile Murderers*, 16 OKLA. CITY U. L. REV. 155 (1991) (defending the retribution theory).

107. Clarence Page, *We Should Outlaw Capital Punishment in Juvenile Cases*, CHI. TRIB., Sept. 30, 1987, (Perspective), at 15. The article quotes Professor Streib:

[Children] do not think like adults. . . . They think in mischievous or evil ways sometimes, but they tend more often than adults to act from impulse, not understanding the consequences of their acts. And if you threaten them with death, they may not know fully what that means, either. They may even be attracted by the idea of death, the sense of flirting with danger. But there is one thing we know: We know they don't like to be locked up. The idea of being cooped up for life scares youngsters. It really scares them.

*Id.*

108. John D. McKinnon, *Can the Law Put a 13-Year-Old in Electric Chair?*, MIAMI HERALD, Oct. 6, 1993, at B1.

109. STREIB, *supra* note 15, at 3.

110. Professor Streib delineates the age of eighteen as the common line between the protected status of children and the punishable status of an adult. STREIB, *supra* note 15, at 20.

*patriae* as:

[D]eclar[ing] the state to be the ultimate guardian of every child. Under this doctrine, with its great emphasis on the correlation of the welfare of the child with the welfare of the state, the state has not only the right, but the duty to establish standards for a child's care.<sup>111</sup>

A state's *parens patriae* authority is based on the premise that children are qualitatively different from adults.<sup>112</sup> Because juveniles are generally presumed not to have the ability to care for themselves, they are subject to the control of their parents and the State through its role as *parens patriae*.<sup>113</sup> In all areas of juvenile law, other than that of juvenile capital punishment, a state carries out its *parens patriae* duty by considering the best interests of the child. Ultimately, the *parens patriae* notion and the best interests of the child standard must be applied in the context of the juvenile death penalty. Because execution

111. Mary V. Dobson, *The Juvenile Court and Parental Rights*, 4 FAM. L.Q. 393, 396 (1970).

The Supreme Court explained the origins of *parens patriae* in *In re Gault*, 387 U.S. 1 (1967):

The phrase was taken from chancery practice, where . . . it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence.

*Id.* at 16 (footnote omitted).

112. In *Thompson*, the Supreme Court explained:

The assemblage of statutes . . . , from both Oklahoma and other States, reflects this basic assumption that our society makes about children as a class; we assume that they do not yet act as adults do, and thus we act in their interest by restricting certain choices that we feel they are not yet ready to make with full benefit of the costs and benefits attending such decision.

487 U.S. at 825 n.23 (plurality opinion). The American Bar Association described the fundamental differences between children and adults as follows: "Our society recognizes that minors are less mature, less experienced, less able to exercise good judgment and self-restraint, more susceptible to environmental influence (both positive and negative), and as a result, less responsible and less culpable in a moral sense than adults." Brief of Amicus Curiae The American Bar Association at 3, *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (No. 86-6169). As Professor Streib contends that "[c]hildren are significantly different from adults and simply cannot be shuttled mindlessly into adult legal processes." STREIB, *supra* note 15, at 3. For a discussion of the evolution of Western society's view of the child's role, see AMERICAN CHILDHOOD: A RESEARCH GUIDE AND HISTORICAL HANDBOOK (J. Hawes & N. Hiner eds., 1985); GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1979); Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569, 575-81 (1992). Professor McMullen's article focuses on the balance between family autonomy and the role of the parent versus state intervention. McMullen, *supra*, at 569. She concludes that assumptions of family autonomy do not always work in the best interests of the child. *Id.* at 598.

113. *Schall v. Martin*, 467 U.S. 253, 265 (1984); *see supra* note 23 and accompanying text.

is not in the best interests of the juvenile offender, a state fails in its *parens patriae* role when it sentences a juvenile to death.

A. *A State's Broad Duty to Protect Children: Juvenile Justice, Custody, and Adoption*

Although this Article cannot discuss every area concerning children and the law, this section provides three examples of proceedings in which children are at issue, and demonstrates a state's role as *parens patriae* in each of those proceedings. This section also explains that the best interests of the child are a primary consideration in each proceeding, supporting the conclusion that the best interests of the child must also be considered in a determination of the validity of the juvenile death penalty.

1. The Juvenile Justice System

The late-nineteenth century Progressive Movement reflected society's changing cultural perspectives on children.<sup>114</sup> The Progressives advocated child centered, rehabilitative policies that reflected the ideological assumptions of positivism.<sup>115</sup> These rehabilitative ideals ushered in the juvenile court movement. The first juvenile justice system was created in Chicago in 1899.<sup>116</sup> By 1925, all but two states had enacted juvenile justice legislation.<sup>117</sup> In 1938, the federal government enacted juvenile justice legislation, known as the Federal Juvenile Delinquency Act.<sup>118</sup>

The Progressives envisioned the juvenile court system as one which would achieve benevolent goals for the child and, in the process, foster a better society.<sup>119</sup> Accordingly, the goals of the juvenile justice system included rehabilitating juveniles and protecting society.<sup>120</sup> The juvenile courts, under states' *parens patriae* authority, emphasized

114. See *supra* note 112 and accompanying text.

115. Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 824 (1988). The author defines positivism as "the effort to identify the antecedent variables that cause crime and deviance—challeng[ing] the classic formulations of crime as the product of conscious free-will choices." *Id.* at 824 (footnote omitted).

116. SAMUEL L. DAVIS, RIGHTS OF JUVENILES § 1.1, at 1-1 (2d ed. 1985); STREIB, *supra* note 15, at 4.

117. *Gault*, 387 U.S. at 14-15; VICTOR L. STREIB, JUVENILE JUSTICE IN AMERICA 6 (1978).

118. Pub. L. No. 666, 52 Stat. 764 (1938). For a cursory look at the beginnings of the juvenile justice system, see SOL RUBIN, LAW OF JUVENILE JUSTICE 1-2 (1976).

119. Feld, *supra* note 115, at 824.

120. Mullin, *supra* note 42, at 164.

treatment of juvenile offenders over punishment.<sup>121</sup>

Commentators have rationalized a state's role as *parens patriae* in the context of the juvenile justice system by suggesting that a state's role is to aid, not to punish, juvenile offenders, because juvenile crime is caused by society's failures.<sup>122</sup> This rationale is consistent with positivism, which attributes criminal behavior to external forces, thus reducing the actor's moral responsibility and consequently focusing on reform, rather than punishment.<sup>123</sup>

The juvenile justice system has changed dramatically over the last century, moving away from progressive ideals, including most notably that of rehabilitation.<sup>124</sup> Nevertheless, the basis of the system remains clear: a state, through its juvenile justice system, must work to protect and to rehabilitate juvenile offenders by balancing the best interests of the juvenile and of society as a whole.<sup>125</sup> Although beyond a precise definition, the best interest of the child standard holds the child's interest "paramount."<sup>126</sup>

121. Feld, *supra* note 115, at 824.

122. Lawrence A. Vanore, Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 IND. L.J. 757, 770-71 (1986). Vanore states: "That the state should take this role is supported by the widely held view that juvenile crime results from environmental factors for which society must share the blame; it is therefore inappropriate to punish youthful transgressors for crimes that are the result of society's failures." *Id.*

123. Feld, *supra* note 115, at 824.

124. See generally Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141 (1984) (containing a historical background of the juvenile justice system).

125. The legislative intent behind the Wisconsin Children's Code, which governs the Wisconsin juvenile justice system, illustrates the State's *parens patriae* role:

(1) (a) To provide judicial and other procedures through which children and all other interested parties are assured fair hearings and their constitutional and other legal rights are recognized and enforced, while protecting the public safety.

....

(2) *The best interests of the child shall always be of paramount consideration*, but the court shall also consider the interest of the parents or guardian of the child . . . and the interests of the public.

WIS. STAT. ANN. § 48.01 (West 1987 & Supp. 1994) (emphasis added). Chapter 48 of the Wisconsin Code also addresses adoption issues. *Id.* § 48.

It has been argued that the juvenile justice system is asked to do what parents, school systems, and communities will not or cannot do. STREIB, *supra* note 15, at 16. This debate is beyond the scope of this analysis, but nonetheless thought provoking.

126. Kirsten Korn, Comment, *The Struggle for the Child: Preserving the Family in Adoption Disputes Between Biological Parents and Third Parties*, 72 N.C. L. REV. 1279, 1319 (1994). The best interests standard developed via the doctrine of *parens patriae*. See generally Lisa M. Fitzgibbon, Note, *Campbell v. Campbell: Requiring Adherence to the Correct Legal Standard in Child Custody Proceedings—The "Best Interest of the Child,"* 45 ME. L. REV. 471 (1993) (explaining the best interests of the child standard as

## 2. Child Custody

Another area of juvenile law in which a state has a *parens patriae* duty is child custody. Specifically, the best interests of the child standard, when used by family court judges to make custody decisions, places a state in a fiduciary role in which it acts for the benefit of the child.<sup>127</sup> As represented by the judge, a state has the right and the duty to control the custody of a minor as it believes appropriate for the child's welfare.<sup>128</sup>

For many years, courts usually granted custody to the mother of a child based on societal roles and stereotypes.<sup>129</sup> It was not until the late 1970s that attitudes regarding custody changed and courts began to use the best interests of the child standard.<sup>130</sup> Four developments led to the adoption of the best interests of the child standard in custody cases: (1) the ascent of no-fault divorce; (2) the entry of women into the labor force; (3) the motivation for legal equality of the sexes; and (4) the attitudinal change toward the father's role in child rearing.<sup>131</sup> These societal developments led to more court discretion when granting custody.<sup>132</sup> Thus, the best interests of the child standard began its evolution.

Because of the transformation in attitudes toward child custody and the consequential change in court decisions concerning custodial placement, legislators amended many state statutes to require courts to consider the best interests of the child.<sup>133</sup> Some of these statutes simply require courts to consider a child's best interests, while others list specific factors courts should consider in making a best interests

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it developed in Maine).

127. A fiduciary is "[a] person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking." BLACK'S LAW DICTIONARY 625 (6th ed. 1990). The best interests of the child standard is the predominant custody standard in most American jurisdictions. See, e.g., Kohl v. Murphy, 767 F. Supp. 895, 903 n.8 (N.D. Ill. 1991) (stating that the major factor in all child custody cases is the best interest of the child); McLaughlin v. Pemsley, 693 F. Supp. 318, 324 (E.D. Pa. 1988), *aff'd*, 876 F.2d 308 (3d Cir. 1989) (noting that most states direct custody considerations to be made in the best interest of the child); *In re D.I.S. for the Adoption of S.A.O.*, 494 A.2d 1316, 1322 (D.C. 1985) (finding that the best interests of the child standard for custody is well established).

128. Fitzgibbon, *supra* note 126, at 473.

129. Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 696 (1985).

130. *Id.* at 696-97.

131. *Id.* at 697.

132. Julie A. Stiles, *Nineteenth-Century Child Custody Reform: Maternal Authority and the Development of the "Best Interests of the Child" Standard*, 6 PROB. L.J. 5, 12 (1984).

133. Schepard, *supra* note 129, at 700-01.

determination.<sup>134</sup> Some statutes provide for joint custody if it is in the child's best interest, defining the child's interest in terms of the benefit from an ongoing relationship with both parents.<sup>135</sup> Under other states' statutes, judges examine criteria such as a child's relationship with his or her parents, as well as the child's current adjustment to his or her home.<sup>136</sup> Also, when appropriate, courts will take into consideration the child's reasonable preference.<sup>137</sup> In examining the various factors that comprise a best interests determination, a state takes on the role of a quasi-parent or fiduciary acting on behalf of the child.<sup>138</sup>

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134. Schepard, *supra* note 129, at 700-01. Michigan's Child Custody Act is an example of the latter type of statute. The statute supplies a laundry list of factors that guide a court:

"[B]est interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.

MICH. COMP. LAWS ANN. § 722.23 (West 1992 & Supp. 1994). These factors reflect a court's need to protect the psychological and physical well-being of the child.

135. *See, e.g.*, CAL. FAM. CODE § 3080 (West 1994); CONN. GEN. STAT. ANN. § 46B-56A (West 1986); MASS. GEN. LAWS ANN. ch. 208, § 31 (West 1994); MINN. STAT. ANN. § 518.17 (West 1990 & Supp. 1994).

136. *See, e.g.*, ILL. COMP. STAT. ANN. ch. 750, § 5/602 (West 1992 & Supp. 1994).

137. *See, e.g., id.*; MICH. COMP. LAWS ANN. § 722.23(i) (West Supp. 1994).

138. Judge Cardozo articulated the judge's role in a New York State custody suit: "He acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a 'wise, affectionate, and careful parent' and make provision for the

### 3. Adoption

A state's duty and role as protector, and the best interests of the child standard, permeate adoption law as well as custody law.<sup>139</sup> The best interests standard for adoption is analogous to that of child custody: "The child placement system in the United States is governed by the best interests principle: that intervention and placement or other disposition should be carried out only to further the best interests of the affected child."<sup>140</sup> As in custody cases, trial courts are asked to consider various factors, such as the child's wishes, welfare, health, and relationships with relatives, when making a discretionary determination for the child's welfare and adoption.<sup>141</sup> After termination of

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child accordingly." *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925) (citing *Queen v. Gyngall*, 2 Q.B. Div'1 Ct. 232, 238 (1893)).

139. Note that before the court can apply the best interests of the child standard, the court must first terminate the biological parents' rights by making a finding that the parents relinquished their rights or that they are unfit. Naomi R. Cahn, *Family Bonds: Adoption and the Politics of Parenting*, 61 U. CHI. L. REV. 325, 326 (1994) (book review); see, e.g., WIS. STAT. ANN. § 48.41-.415 (West 1987 & Supp. 1994); see Korn, *supra* note 126, at 1280-81.

140. Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 503 (1984).

141. The Illinois Adoption Act is illustrative. The factors considered by either the guardian ad litem in recommending, or the judge in facilitating, an adoption are as follows:

- (1) the wishes of the child;
- (2) the interaction and interrelationship of the child with the applicant to adopt the child;
- (3) the child's need for stability and continuity of relationship with parent figures;
- (4) the wishes of the child's parent as expressed in writing prior to that parent's execution of a consent or surrender for adoption;
- (5) the child's adjustment to his present home, school and community;
- (6) the mental and physical health of all individuals involved;
- (7) the family ties between the child and the applicant to adopt the child and the value of preserving family ties between the child and the child's relatives, including siblings;
- (8) the background, race, ethnic heritage, behavior, age and living arrangements of the applicant to adopt the child;
- (9) the criminal background check report presented to the court as part of the investigation required under Section 6 of this Act.

ILL. COMP. STAT. ANN. ch. 750, § 50/15.1 (West 1992 & Supp. 1994); see also ILL. COMP. STAT. ANN. ch. 750, § 50/20a (West 1992), which states: "The best interests and welfare of the person to be adopted shall be of paramount consideration in the construction and interpretation of this Act." *Id.*

parental rights,<sup>142</sup> a state assumes a parental role by making determinations for the welfare and best interests of the child.

The next section of this Article discusses the significance of a state's *parens patriae* role in each of the above proceedings and identifies three absolutes which result from the use of the best interests of the child standard. These absolutes, in turn, form the basis for this Article's thesis that a state's role as *parens patriae* is inconsistent with its imposition of the juvenile death penalty.

*B. The Significance of a State's Broad Parens Patriae Role and the Use of the Best Interests of the Child Standard*

A state's *parens patriae* role and consideration of the best interests of the child permeate all areas of the law that affect children, including the juvenile justice system, custody, adoption, and other areas beyond the scope of this Article.<sup>143</sup> This broad use of a state's *parens patriae* authority, coupled with the best interests of the child standard, make clear the following absolutes.

First, the law recognizes that children are different from adults. For example, the Supreme Court noted in *Bellotti v. Baird*<sup>144</sup> that children are more vulnerable than adults; that they have a greater need for concern, sympathy, and attention; and that they lack experience, perspective, and judgment.<sup>145</sup> Generally, a state may limit the freedom of children because of this lack of experience, perspective, and judgment.<sup>146</sup>

Second, due to children's inability to make mature decisions, a state, in its role as *parens patriae*, assumes the parental responsibility of protecting children.<sup>147</sup> In this quasi-parental role, a state determines

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142. Termination of parental rights can be voluntary, *see, e.g.*, WIS. STAT. ANN. § 48.41 (West 1987 & Supp. 1994) (providing conditions upon which parents can voluntarily terminate their parental rights), or imposed by the State. Involuntary termination of parental rights is a separate area of children's law in the context of child abuse and neglect cases. *See* Scott A. Cannon, Comment, *Finding Their Own "Place to Be:" What Gregory Kingsley's and Kimberly Mays' "Divorces" From Their Parents Have Done for Children's Rights*, 39 LOY. L. REV. 837, 853-56 (1994) (stating that most cases of involuntary termination of parental rights are brought by the State, a guardian, or foster parents, and outlining Florida's involuntary termination law).

143. *See, e.g.*, Indian Child Welfare Act, Pub. L. No. 95-608, § 102(f), 92 Stat. 3072 (1978) (codified as amended at 25 U.S.C. § 1912(f) (1988)); UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 9B U.L.A. 381 (1968); REVISED UNIFORM GIFTS TO MINORS ACT § 4(b)(c), 8A U.L.A. 375 (1966).

144. 443 U.S. 622 (1979) (plurality opinion).

145. *Id.* at 635 (plurality opinion).

146. *Id.* (plurality opinion).

147. "The state has a legitimate interest under its *parens patriae* powers in providing

the welfare, treatment, and rehabilitation of a child in the juvenile justice system<sup>148</sup> and the placement of children in the context of custody and adoption proceedings.<sup>149</sup> In short, a state protects and cares for children in every area of juvenile law, other than juvenile capital punishment.

Third, a state's *parens patriae* role is ultimately linked to the best interests of the child standard. Although this standard has met many valid criticisms,<sup>150</sup> the concept of the child's best interests in the context of the juvenile justice system, custody, and adoption, nevertheless, establishes a framework for analyzing a state's role in protecting juveniles in general. In all areas of the law, children's interests stand foremost and are balanced against society's other interests, except when the child is a perpetrator of an "adult" capital crime.

The following section analyzes and criticizes the juvenile death penalty and its justifications as conflicting with the best interests of the child standard. This analysis will show that a state contradicts its parental role by sentencing children to death. The section then pro-

care to its citizens who are unable . . . to care for themselves . . . ." *Addington v. Texas*, 441 U.S. 418, 426 (1979).

148. See *supra* part V.A.1.

149. See *supra* part V.A.2-3.

150. Even though many custody and adoption statutes prescribe distinct criteria for making a best interests determination, see *supra* notes 133-38, 141 and accompanying text, the best interests of the child standard has been criticized as being vague and general. See Howard, *supra* note 140, at 503. The standard is also criticized for giving courts insufficient guidance. See generally GOLDSTEIN ET AL., *supra* note 112 (asserting that the law's incapacity to supervise interpersonal relationships and inability to predict future occurrences limits the effectiveness of the best interests standard in legal decisionmaking); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984) (arguing that the best interests standard does not give courts sufficiently concrete guidance). Furthermore, the standard has also been criticized for giving judges too much discretion. Sanford N. Katz, *Foster Parents Versus Agencies: A Case Study in the Judicial Application of "The Best Interests of the Child" Doctrine*, in THE RIGHTS OF CHILDREN, EMERGENT CONCEPTS IN LAW AND SOCIETY 244, 254 (Albert E. Wilkerson ed., 1973). Katz states:

[T]he doctrine has no absolute definition. Nor is there uniformity in the results of the cases in which the doctrine has been applied. In general, all that can be said is that, as the doctrines of "bona fide purchaser" in the law of real property and "good faith" in negotiable instruments, so "the best interests of the child doctrine" is a mandate from the legislature, directing the judge to use his discretion in making a disposition.

*Id.* at 254 (footnote omitted). Other critics assert that uniform standards and procedures are needed to evaluate the interests of all parties involved, including, but not limited to, the child's. See, e.g., Korn, *supra* note 126, at 1280 n.8. A detailed examination of the various criticisms of the best interests of the child standard is beyond the scope of this analysis.

poses that both state legislatures and the Supreme Court use the best interests of the child standard in evaluating the juvenile death penalty.

*C. The Juvenile Death Penalty and a State's Role  
in Protecting Children*

A state's *parens patriae* obligations require it to protect its youths. A state's authority to sentence children to death, completely contravenes its role as protector of children and its duty to consider the best interests of the child. The cases of Paula Cooper, Paul Magill, and Jerome Allen demonstrate the conflict between a state's duty to protect children and its role in executing them.

In May 1985, Paula Cooper, at age seventeen, became the youngest female sentenced to death since 1892.<sup>151</sup> Cooper was one of four youths charged in the stabbing murder of a Bible teacher in Gary, Indiana;<sup>152</sup> she was only fifteen years old when the crime was committed.<sup>153</sup> Cooper's case received worldwide attention. Most notably, more than one million people in Italy participated in a campaign to save Cooper by collecting signatures, writing letters, and demonstrating at the United States Embassy in Rome.<sup>154</sup>

Furthermore, although Cooper's sentencing judge opposed the death penalty in general, he nevertheless sentenced her to death.<sup>155</sup> According to Lake County, Indiana Judge James Kimbrough, sentencing Cooper was the hardest act he had ever done as a judge, and he did so only because the law required the death penalty under the circumstances of the case.<sup>156</sup> One commentator noted the judge's reaction: "Just 30 years ago, he explained at Cooper's trial, the

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151. Sharon Cohen, *Because of Her Age, Many View Her as a Cause Celebre, Indiana Girl, 17, One of 35 Awaiting Execution*, L.A. TIMES, Jan. 18, 1987, at 6.

152. *Id.*

153. *Id.*

154. Amy Linn, *Should We Kill Our Children? The Death Penalty Debate*, PHILA. INQUIRER, Oct. 4, 1987, (Magazine), at 12. One letter from Italy stated the following to Governor Robert Orr of Indiana:

We cannot comprehend how people of a democratic, free and independent nation—who have fought and continue to fight with courage and self-denial for the democracy, freedom and independence of other people; who, after the atrocities of World War II and Nazi concentration camps had the strength to forgive their enemies, will not grant one of its children a chance to make amends.

*Id.*

155. Cohen, *supra* note 151, at 6.

156. Linn, *supra* note 154, at 12. "There was a tremendous personal conflict," stated Judge Kimbrough, "I felt I really had no alternative." Cohen, *supra* note 151, at 6 (quoting Judge Kimbrough).

majority of Americans considered executions barbaric. But now 'they want justice. And justice to them means death.'"<sup>157</sup>

Judge Kimbrough's reluctance to sentence Cooper reflects the conflict between a state's *parens patriae* role and its role in carrying out the juvenile death penalty. In most situations involving juveniles, the judge acts as protector or quasi-parent.<sup>158</sup> Judge Kimbrough, however, acted as an executioner when he sentenced Cooper under Indiana's death penalty statute. It is this contradiction, a state on the one hand protecting the child, and on the other hand sentencing a child to death, that makes the juvenile death penalty inconsistent with a state's duty toward children. Ultimately, the Indiana Supreme Court held the execution of a fifteen-year-old to be cruel and unusual punishment and overturned Paula Cooper's death sentence.<sup>159</sup>

Another case that depicts the inconsistency between a state's use of the juvenile death penalty and its duty to safeguard its youths is that of Paul Magill. Magill was sentenced to death in Florida for rape and murder when he was seventeen years old.<sup>160</sup> Magill spent the next eleven years living in maximum security on Florida's death row.<sup>161</sup> In May 1988, a federal appeals court ordered a resentencing hearing,<sup>162</sup>

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157. Linn, *supra* note 154, at 12 (quoting Judge Kimbrough).

158. *See supra* part V.A.

159. *Cooper v. State*, 540 N.E.2d 1216, 1221 (Ind. 1989). During the time between Cooper's death sentence and her appeal to the Indiana Supreme Court, the Indiana statutory scheme changed, establishing sixteen as the minimum age for imposing the death penalty. *Id.* at 1219. The fact that Paula Cooper fell into this time gap was one of the factors the court used in making its determination. *Id.* at 1219-20.

160. Don Colburn, *Growing Up on Death Row; Should Juvenile Killers be Executed? The Story of Paul Magill*, WASH. POST, July 19, 1988, (Health), at Z12. The statutory scheme in Florida consists of a bifurcated trial, in which the determination of the defendant's guilt and his penalty are separate proceedings. FLA. STAT. ANN. § 921.141 (West 1985 & Supp. 1995). At the sentencing portion, the jury deliberates and gives an advisory sentence, which the court may accept or reject. *Id.* § 921.141(2), (3) (West 1985).

161. Colburn, *supra* note 160, at Z12.

162. *Magill v. Dugger*, 824 F.2d 879, 896 (11th Cir. 1987). During the determination of guilt phase of the trial, Paul Magill's lawyer failed to prepare Magill for direct or cross-examination and met with Magill for the first time 15 minutes before the trial started. *Id.* at 887; *see supra* note 160 for an explanation of the Florida criminal trial scheme. Magill had a different attorney during the penalty phase, who failed to present available, potentially mitigating evidence. *Magill*, 824 F.2d at 889. The federal appeals court concluded that the deficient representation of counsel during the guilt phase was not so egregious as to require overturning the conviction. *Id.* at 888. The court vacated Magill's death sentence, however, and granted a new sentencing hearing due to the ineffective assistance of counsel at the guilt *and* penalty phases, along with the advisory jury's failure in considering nonstatutory mitigating factors. *Id.* at 890, 896.

and a new jury recommended life in prison.<sup>163</sup> The judge, who had originally sentenced Magill to death, followed the new jury's life imprisonment recommendation.<sup>164</sup>

The most striking facet of this account is that Paul Magill spent over eleven years on death row. According to one author, Magill literally grew up there.<sup>165</sup> While courts in other areas of juvenile law must decide children's issues relative to their best interests, the *Magill* court, acting pursuant to Florida law, caused a child to grow up on death row. Such action is the antithesis of the action a state should take as the protector of children and illustrates another inherent flaw in the juvenile death penalty.

Another revealing case in which the application of the juvenile death penalty contravened with a state's parental role is that of Jerome Allen. Sixteen-year-old Allen was convicted of murdering a service station manager.<sup>166</sup> A Florida jury recommended the death penalty by a seven-to-five vote, and the trial judge accepted the recommendation.<sup>167</sup> According to family members who testified at the trial, Allen had a troubled childhood and had previously been committed to the county juvenile detention center.<sup>168</sup> The trial judge apparently took many of these factors into consideration, but nevertheless imposed the death penalty.<sup>169</sup>

This case poses the puzzle of how a state could, at one point in Jerome Allen's troubled life, take steps to rehabilitate him through the juvenile justice system, and then, within months, sentence him to death. This leap from the juvenile justice system to death row is illogical at best: How can a civilized society promote the welfare and

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163. See Margaret L. Usdansky & Jon Wilson, *Killer Wins Judicial Reprieve*, ST. PETERSBURG TIMES, May 7, 1988, at 1.

164. *Id.*

165. Colburn, *supra* note 160, at Z12.

166. *Allen v. State*, 636 So. 2d 494, 496 (Fla. 1994) (per curiam); see Lynne Bumpus-Hooper, *16-Year-Old with Troubled Past Becomes Youngest on Death Row*, ORLANDO SENTINEL TRIB., Oct. 26, 1991, at A1. Allen was fifteen-years-old at the time of the murder. *Id.*

167. *Allen*, 636 So. 2d at 496. See *supra* note 160 for an explanation of the Florida statutory scheme.

168. *Allen*, 636 So. 2d at 496; see Bumpus-Hooper, *supra* note 166, at A1. Allen had been committed to the juvenile detention center for retail theft, battery, and possession of a short-barrel shotgun. Bumpus-Hooper, *supra* note 166, at A1. In addition, according to testimony at the sentencing hearing, Allen's father violently attacked him on occasion. *Allen*, 636 So. 2d at 496. Allen also was diagnosed as suffering from emotional problems, had an Intelligence Quotient of 77, and claimed that he talked to his dead grandmother. *Id.*; see also McKinnon, *supra* note 108, at B5. Furthermore, Allen's uncle was on death row. Bumpus-Hooper, *supra* note 166, at A1.

169. *Allen*, 636 So. 2d at 496.

rehabilitation of children at one moment, and execute them the next? The contradiction works against the traditional role of a state as protector of children.

The Florida Supreme Court has since vacated Jerome Allen's death sentence.<sup>170</sup> The court held that imposing the death penalty on a child who committed a crime while under the age of sixteen violates the Florida Constitution proscription against cruel or unusual punishment.<sup>171</sup> Mark Oliver, the director of the Children's Advocacy Center at Florida State University College of Law, described the Florida Supreme Court's decision in *Allen* as a "mandate to prosecutors" to stop wasting their time and taxpayer money by pursuing juvenile capital punishment.<sup>172</sup>

It is important to recognize that this Article does not intentionally avoid the issue of the serious nature of the crimes committed by some juveniles. Paula Cooper and her accomplices stabbed a woman thirty-three times and took ten dollars and the victim's car.<sup>173</sup> According to one article, Cooper's parents refused to visit her after her conviction, and many in her hometown "would like to fry her, and the sooner the better."<sup>174</sup> Paul Magill held up a convenience store clerk, abducted her, raped her, and later shot her in the head and chest.<sup>175</sup> Jerome Allen was found guilty of first-degree murder, armed robbery, possession of a short-barreled shotgun, and grand theft automobile,<sup>176</sup> and showed uncanny stoicism during his trial.<sup>177</sup> As Allen's prosecuting attorney asserted: "If ever a juvenile deserved the death penalty, Jerome Allen does."<sup>178</sup> This Article does not dispute the seriousness of these crimes. What is disputed, however, is the consistency and rationality of the juvenile death penalty, especially as compared to other areas of juvenile law.

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170. *Id.*

171. *Id.* at 497. The Florida Constitution prohibits "cruel or unusual" punishment unlike the United States Constitution which prohibits "cruel and unusual." See FLA. CONST. art. 1, § 17. The Florida Supreme Court interprets this to mean that alternatives were intended. *Allen*, 636 So. 2d at 497 n.5.

172. Lynne Bumpus-Hooper, *Court Reverses Death Penalty for Teen: In 50 Years Florida Has Not Executed Someone Who Was Under 16 When They Committed A Crime*, ORLANDO SENTINEL, Mar. 25, 1994, (Local and State), at C1.

173. *Cooper v. State*, 540 N.E.2d 1216, 1217 (Ind. 1989).

174. Linn, *supra* note 154, at 12.

175. *Magill v. Dugger*, 824 F.2d 879, 880 (11th Cir. 1987); Colburn, *supra* note 160, at Z12.

176. *Allen*, 636 So. 2d at 495.

177. Bumpus-Hooper, *supra* note 166, at A1.

178. Bumpus-Hooper, *supra* note 172, at C1.

The accounts of Cooper, Magill, and Allen provide insight into the results of juvenile death penalty statutes. The conflict between state legislatures promulgating protective statutes for their youth and instituting the juvenile death penalty is a somber paradox. Further, as evidenced by the *Thompson* and *Stanford* decisions, the Supreme Court considers legislative enactments as indicia of public sentiment and, thus, rationalizes the imposition of the juvenile death penalty via the "evolving standards of decency" test.<sup>179</sup> Therefore, the importance of such statutes cannot be understated. Legislatures should recognize the inconsistency between enacting laws protecting children and allowing death penalty statutes to encompass children. In all areas of the law affecting children, state legislatures need to take into consideration the subject of their legislation.

Therefore, legislatures must reevaluate the imposition of death on children in the context of this paradox. Criteria truly indicative of our society's evolving standards of decency must be considered when promulgating death penalty statutes that include children. In proposing more accurate criteria for state legislatures, Professor Streib asserts that, "any legislative body should consider a wide range of criminological, jurisprudential, and political factors in deliberations concerning the juvenile death penalty issue for their statute and jurisdiction."<sup>180</sup> Drawing from this assertion, state legislatures must also consider a state's *parens patriae* duty and the best interests of the child in determining whether the juvenile death penalty is an appropriate response to juvenile crime.

The United States Supreme Court must also readdress the constitutionality of state juvenile death penalty legislation considering the state's *parens patriae* duty.<sup>181</sup> Justice Scalia, writing for the dissent in *Thompson v. Oklahoma*,<sup>182</sup> and for the majority in *Stanford v. Kentucky*,<sup>183</sup> primarily focused his assessment of society's evolving standards of decency in relation to the juvenile death penalty on a consideration of state legislation on the subject.<sup>184</sup> A sound approach

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179. See *supra* notes 71-79 and accompanying text.

180. Victor L. Streib, *Excluding Juveniles from New York's Impendent Death Penalty*, 54 ALB. L. REV. 625, 673 (1990).

181. See *supra* part III.B.

182. 487 U.S. 815, 859 (1988) (Scalia, J., dissenting). For a discussion of *Thompson*, see *supra* notes 71-74 and accompanying text.

183. 492 U.S. 361 (1989) (plurality opinion). See *supra* notes 75-79 and accompanying text for a discussion of *Stanford*.

184. *Thompson*, 487 U.S. at 865-68 (Scalia, J., dissenting); *Stanford*, 492 U.S. at 370-73 (plurality opinion). Justice Scalia specifically rejected the use of criteria such as "public opinion polls, the views of interest groups, and the positions adopted by

to gauging society's contemporary values, and consequently, the constitutionality of the juvenile death penalty, must also incorporate a state's *parens patriae* role and the best interests of the child standard. Evaluating the "evolving standards of decency"<sup>185</sup> in the context of the juvenile death penalty requires an analysis of juvenile law and its treatment of youths. Such an analysis shows that the public, through the state legislatures, requires courts to consider the child's best interests in every other area of juvenile law. The juvenile death penalty is unconstitutional because it contradicts public opinion as manifested in juvenile law by excluding a state's *parens patriae* role and consideration of the best interests of the child.

## VI. CONCLUSION

This analysis has established certain premises. First, in all areas of the law, children are treated differently from adults. This notion is grounded on basic presumptions our society makes about juveniles: they are less mature, less able to make sound judgments, and more prone to environmental influences than adults.<sup>186</sup> Second, a state via its role as *parens patriae* has the responsibility to protect children by considering their best interests in all areas of the law. Consequently, the execution of children conflicts with a state's protective role and duty. To remedy this conflict, state legislatures must enact legislation that reflects a state's protective role and abolishes the juvenile death penalty.

Specifically, as Professor Streib articulates, criminological, jurisprudential, and political factors should be taken into consideration when promulgating state juvenile death penalty statutes.<sup>187</sup> As this analysis indicates, a state's *parens patriae* role and the best interests of the child should also be factored into the constitutional and legislative analyses as indicators of society's evolving standards of decency.

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various professional associations." *Stanford*, 492 U.S. at 377 (plurality opinion). Justice Scalia's rejection of these criteria is alarming. It is such criteria that are truly indicative of the American public's consensus of the juvenile death penalty. These indicia of public opinion reflect the "evolving standards of decency" set forth by *Trop v. Dulles*, 356 U.S. 86, 101 (1958), and were utilized by the plurality in *Thompson*. See *supra* notes 71-74 and accompanying text.

185. The Court has been criticized for not actually applying the "evolving standards of decency" determination in the first instance. Dominic J. Riccotta, *Eighth Amendment—The Death Penalty for Juveniles: A State's Right or a Child's Injustice?*, 79 J. CRIM. L. & CRIMINOLOGY 921, 939 (1988).

186. See *supra* note 112.

187. Streib, *supra* note 180, at 673.

Further, the United States Supreme Court should recognize the special treatment of children in all other areas of law and consider this a reflection of society's evolving standards of decency. States which factor the *parens patriae* role into the juvenile death penalty analysis would be compelled to conclude that the constitutionality of the juvenile death penalty stands on shaky ground.

Unfortunately, a national consensus and a standard for the constitutionality of the juvenile death penalty remains elusive. Although the Supreme Court has determined that juvenile capital punishment statutes and sentencing juries are sufficient "objective" indicia of public opinion,<sup>188</sup> this is hardly the case. Actually, various indicators of public sentiment point to the proposition that the majority of Americans are against the juvenile death penalty.<sup>189</sup> Justice Marshall argued that punishment that is morally unacceptable or against popular sentiment is considered invalid.<sup>190</sup>

As evidenced by shocking cases like Yummy Sandifer's, our society is focusing on juvenile crime and violence and searching for a solution.<sup>191</sup> Executing our youths is not the answer. As a society, we must consider the ramifications of killing our youths in relation to the protective nature of other areas of juvenile law and our duty as a society to protect our children. Imposing the death penalty on America's youths will not solve the inherent problems of our modern, and yes, violent society. We must look beyond the easy answers and search for a true solution to the growing violence surrounding our youths.

Ultimately, we must reach a standard of juvenile capital punishment that truthfully reflects society's wishes and interests, while maintaining consistency with other areas of juvenile law. The best interests of the

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188. *Stanford*, 492 U.S. at 377 (plurality opinion).

189. STREIB, *supra* note 15, at 30-34. *Allen v. State*, 636 So. 2d 494 (Fla. 1994) (per curiam), gives opponents of the juvenile death penalty some hope in what might be a trend. The Florida Supreme Court articulated the arbitrariness of the imposition of this punishment: "We cannot countenance a rule that would result in some young juveniles being executed while the vast majority of others are not, even where the crimes are similar." *Id.* at 497 (footnote omitted). By explaining that the death penalty is rarely imposed on children under sixteen years of age, the court alluded to the fact that public sentiment is against the juvenile death penalty and juries are reluctant to impose it. *Id.* Ironically, these are the two criteria that Justice Scalia relied upon in *Stanford* when gauging public consensus against the death penalty for juveniles. *Stanford*, 492 U.S. at 361. *But see supra* notes 92-96 and accompanying text for sources which contend that public opinion favors the death penalty for children.

190. *Furman v. Georgia*, 408 U.S. 238, 332 (1972) (Marshall, J., concurring).

191. *See supra* notes 1-10 and accompanying text.

child standard, derived from a state's role as *parens patriae*, if not dispositive, is a starting point for such an inquiry.

## APPENDIX A

## STATE DEATH PENALTY LAWS

- Alabama: ALA. CODE § 12-15-34 (1994) (allowing transfer of juveniles at least fourteen years old to adult courts); ALA. CODE § 12-15-34.1(a)(1) (1994) (automatically waiving jurisdiction of the juvenile court for a person who has reached the age of sixteen and who committed a capital offense); ALA. CODE § 13A-5-51(7) (1994) (providing that the age of the defendant may be a mitigating factor in sentencing).
- Arizona: ARIZ. REV. STAT. ANN. § 13-703(G)(5) (1993) (providing no minimum age for imposition of the death penalty).
- Arkansas: ARK. CODE ANN. § 9-27-318 (Michie 1987 & Supp. 1993) (allowing transfer to adult court at fourteen for a capital murder offense).
- California: CAL. PENAL CODE § 190.3 (West 1988) (defining circumstances under which a defendant may be subject to the death penalty); CAL. PENAL CODE § 190.5(a) (West 1988 & Supp. 1995) (providing eighteen as the minimum age for imposition of the death penalty).
- Colorado: COLO. REV. STAT. ANN. §§ 16-11-802(1)(a), (4)(a) (West Supp. 1994) (providing eighteen as the minimum age for imposition of the death penalty).
- Connecticut: CONN. GEN. STAT. ANN. § 53a-46a(g)(1) (West 1994) (providing eighteen as the minimum age for imposition of the death penalty).
- Delaware: DEL. CODE ANN. tit. 11, § 4209(c) (1987 & Supp. 1994) (providing no minimum age for imposition of the death penalty).

- Florida: FLA. STAT. ANN. §§ 921.141(6)(g), 921.142(7)(f) (West 1985 & Supp. 1995) (providing no minimum age for imposition of the death penalty).
- Georgia: GA. CODE ANN. § 17-9-3 (1990) (providing seventeen as the minimum age for imposition of the death penalty); GA. CODE ANN. § 17-10-30(b) (1990) (providing for consideration of mitigating factors in sentencing).
- Idaho: IDAHO CODE § 19-2515(c) (1987) (providing no minimum age for imposition of the death penalty).
- Illinois: ILL. COMP. STAT. ANN. ch. 720, § 5/9-1(b) (West 1992) (requiring the defendant to have reached the age of eighteen before imposing a sentence of death).
- Indiana: IND. CODE ANN. § 35-50-2-3(b) (West Supp. 1994) (requiring a defendant to have reached the age of sixteen before imposing the death penalty); IND. CODE ANN. § 35-50-2-9(c)(7) (West Supp. 1994) (establishing that the defendant's youth is a mitigating factor).
- Kansas: KAN. STAT. ANN. § 21-4622 (Supp. 1994) (prohibiting the execution of any defendant who was less than eighteen years of age at the time of the crime).
- Kentucky: KY. REV. STAT. ANN. § 532.025(2)(b)(8) (Michie/Bobbs-Merrill 1990) (providing that the defendant's youth at the time of the crime is a mitigating factor); KY. REV. STAT. ANN. § 640.040(1) (Michie/Bobbs-Merrill 1990 & Supp. 1994) (prohibiting the death penalty for defendants who have not reached the age of sixteen).

- Louisiana: LA. CODE CRIM. PROC. ANN. art. 905.5(f) (West 1984) (providing that the defendant's youth at the time of the crime is a mitigating factor); LA. CHILDREN'S CODE ANN. art. 305 (West 1984) *as amended by* Act of July 6, 1994, 1994 La. Sess. Law Serv. 15 (West) (requiring a juvenile to be transferred to adult court when he or she has reached the age of fifteen and there is probable cause to believe that he or she committed first or second degree murder).
- Maryland: MD. CODE ANN., CRIM. LAW § 412(f) (1992) (prohibiting the death penalty for children under the age of eighteen years old); MD. CODE ANN., CRIM. LAW § 413(g)(5) (Supp. 1994) (providing that the defendant's youth at the time of the crime is a mitigating factor).
- Mississippi: MISS. CODE ANN. § 43-21-157(1) (Supp. 1994) (allowing any child who has reached the age of thirteen to be transferred to adult court); MISS. CODE ANN. § 99-19-101(6)(g) (1994) (providing that the defendant's youth at the time of the crime is a mitigating factor). The Department of Justice notes that the Mississippi Attorney General's office recognizes that the effective age for imposition of the juvenile death penalty is sixteen, as set by the U.S. Supreme Court, *see* BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, BULLETIN, CAPITAL PUNISHMENT 6 (1993).
- Missouri: MO. ANN. STAT. § 565.020 (Vernon Supp. 1994) (prohibiting the death penalty for adolescents who are under the age of sixteen); MO. ANN. STAT. § 565.032(3)(7) (Vernon Supp. 1994) (providing that the defendant's youth at the time of the crime is a mitigating factor).

- Montana: MONT. CODE ANN. § 46-18-304(7) (1989) (providing that defendant's age, if under eighteen, is a mitigating factor); MONT. CODE ANN. § 46-18-305 (1993) (allowing the death penalty only if there are "no mitigating circumstances sufficiently substantial to call for leniency").
- Nebraska: NEB. REV. STAT. § 28-105.01 (1989) (prohibiting the death penalty for persons under eighteen years of age); NEB. REV. STAT. § 29-2523(2)(d) (1989) (providing that the defendant's youth at the time of the crime is a mitigating factor).
- Nevada: NEV. REV. STAT. ANN. § 176.025 (Michie 1992) (prohibiting the death penalty for persons under sixteen years of age); NEV. REV. STAT. ANN. § 200.035(6) (Michie 1992) (providing that the defendant's youth at the time of the crime is a mitigating factor).
- New Hampshire: N.H. REV. STAT. ANN. § 630:5(VI)(d) (Supp. 1994) (providing age as a mitigating factor in sentencing, but prohibiting the death penalty for persons under eighteen years of age).
- New Jersey: N.J. STAT. ANN. § 2C:11-3(g) (West Supp. 1994) (prohibiting the death penalty for a juvenile tried as an adult); N.J. STAT. ANN. § 2C:11-3(c)(5)(c) (West Supp. 1994) (providing that the defendant's age is a mitigating factor in sentencing).
- New Mexico: N.M. STAT. ANN. § 31-18-14(A) (Michie 1994) (prohibiting the death penalty for persons who have not yet reached the age of majority); N.M. STAT. ANN. § 31-20A-6(I) (Michie 1994) (providing that age is a mitigating factor in sentencing).

- North Carolina: N.C. GEN. STAT. § 14-17 (Supp. 1994) (prohibiting the death penalty for persons under the age of seventeen unless the person was incarcerated for murder when the subsequent murder occurred); N.C. GEN. STAT. § 15A-2000(f)(7) (Supp. 1994) (providing that age is a mitigating factor in sentencing).
- Ohio: OHIO REV. CODE ANN. § 2929.03(D)(1) (Anderson 1993) (prohibiting the death penalty for persons under the age of eighteen); OHIO REV. CODE ANN. § 2929.04(B)(4) (Anderson 1993) (providing that the defendant's youth at the time of the crime is a mitigating factor).
- Oklahoma: OKLA. STAT. tit. 10, § 1104.2(A) (Supp. 1995) (providing that any person sixteen or seventeen years of age charged with murder will be considered an adult).
- Oregon: OR. REV. STAT. § 161.620 (Supp. 1994) (requiring the defendant to have reached the age of eighteen before imposition of the death penalty); OR. REV. STAT. § 163.150(1)(c)(A) (Supp. 1994) (providing that age is a mitigating factor).
- Pennsylvania: 42 PA. CONS. STAT. ANN. § 9711(e)(4) (1982) (providing that age is a mitigating factor, but not establishing a minimum age for imposition of the death penalty).
- South Carolina: S.C. CODE ANN. § 16-3-20(C)(b)(7) (Law. Co-op. Supp. 1993) (providing that age is a mitigating factor, but not establishing a minimum age for imposition of the death penalty).
- South Dakota: S.D. CODIFIED LAWS ANN. § 23A-27A-1 (Supp. 1994) (providing no minimum age for imposition of the death penalty).

- Tennessee: TENN. CODE ANN. § 37-1-134(a)(1) (Supp. 1994) (prohibiting the death penalty for juveniles transferred from juvenile to adult court); TENN. CODE ANN. § 39-13-204(j)(7) (Supp. 1994) (providing that the defendant's age is a mitigating factor).
- Texas: TEX. CRIM. PROC. CODE ANN. § 2(e) (West Supp. 1995) (providing that age is a mitigating factor); TEX. PENAL CODE ANN. § 8.07(d) (West 1994) (prohibiting the death penalty for persons under seventeen years of age).
- Utah: UTAH CODE ANN. § 76-3-207(3)(e) (Supp. 1994) (providing that youth is a mitigating factor, but not establishing a minimum age for imposition of the death penalty).
- Virginia: VA. CODE ANN. § 16.1-269.1 (Michie Supp. 1994) (allowing transfer to adult court when the defendant is at least fourteen).
- Washington: WASH. REV. CODE ANN. § 10.95.070(7) (West Supp. 1995) (providing that age is a mitigating factor in sentencing, but not establishing a minimum age for imposition of the death penalty).
- Wyoming: WYO. STAT. § 6-2-101(b) (Supp. 1994) (prohibiting the death penalty for children under the age of sixteen).