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## Comparing Children to the Mentally Retarded: How the Decision in *Atkins v. Virginia* Will Affect the Execution of Juvenile Offenders

### I. INTRODUCTION

On June 6, 1989, the United States Supreme Court announced two important death penalty decisions. One, *Penry v. Lynaugh*, explicitly allowed the continued execution of mentally retarded offenders,<sup>1</sup> and the other, *Stanford v. Kentucky*, allowed the execution of juvenile offenders age sixteen and over.<sup>2</sup> Thirteen years later, on June 20, 2002, the Court in *Atkins v. Virginia*<sup>3</sup> overturned its decision in *Penry v. Lynaugh*.<sup>4</sup> In a six to three decision, it held that the Eighth Amendment<sup>5</sup> prohibited the continued execution of the mentally retarded because such action constituted “cruel and unusual” punishment. This decision furthers the Court’s enduring trend of whittling down possible death penalty candidates and procedures. More importantly, a close examination of the majority opinion reveals several significant reversals of reasoning from similar recent cases. These reversals could have far-reaching effects on the death penalty itself and could soon lead to the exclusion of all juveniles from death penalty eligibility.

This Note will examine the changing face of U.S. Supreme Court decisions on the death penalty, with a particular focus on how those decisions have affected and will potentially affect juvenile death penalties. Part II will explore the many cases that have led up to *Atkins*, focusing on the purported reasoning behind the Court’s decisions and its effect on the death penalty as a whole. Throughout this Note, particular attention will be given to the favorite reasoning of individual justices in an attempt to discern a predictable pattern. Part III focuses on the opinion in *Atkins* itself, emphasizing the detection of differences from the Court’s earlier cases. Part IV focuses on what has happened in the short time since the Court’s decision, concluding that the Court could very soon be

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1. 492 U.S. 302 (1989).

2. *Id.* at 361.

3. 536 U.S. 304 (2002).

4. 492 U.S. at 302.

5. U.S. CONST. amend. VIII.

ripe to outlaw the execution of juvenile offenders. Part IV also examines the ramifications of that possibility. Part V offers a brief conclusion.

## II. UNITED STATES SUPREME COURT CASE HISTORY

Though most of the cases discussed in this section have little to do with the execution of either juvenile offenders or the mentally retarded, they are discussed in order to provide the reader with a brief history of the death penalty over the past three decades. Specific attention is given to the Court's reasoning in an attempt to illustrate the trend of the Court when determining what constitutes cruel and unusual punishment. For this reason, very little attention will be paid to the unnecessary facts of the individual cases or to additional issues brought up on appeal that have no bearing on the Court's determination of the Eighth Amendment issue.

### A. Defining "*Cruel and Unusual*"

"It has been assumed in [Supreme Court] decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous."<sup>6</sup> As the Court explained in *Weems v. United States*, however, "[t]ime works changes, brings into existence new conditions and purposes," and to serve our developing country, the prohibition against cruel and unusual punishment "must be capable of wider application than the mischief which gave it birth."<sup>7</sup> Though the defendant in *Weems* was not in danger of execution, the Court nevertheless undertook an extensive analysis of the meaning of "cruel and unusual" punishment. Eventually, it held that fifteen years hard labor along with the loss of many civil liberties constituted cruel and unusual punishment when applied to the crime of falsifying public and official documents.<sup>8</sup> Ever since this 1910 decision, the definition of "cruel and unusual" took on vast importance in deciding criminal cases. Predicting potential changes in the definition, the *Weems* Court went on to say that the clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."<sup>9</sup> This concept became the foundation of Eighth Amendment analysis and, forty-eight years later, the Court clarified it in *Trop v. Dulles*.<sup>10</sup> Finding that it was cruel and unusual to strip Trop of his

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6. *Furman v. Georgia*, 408 U.S. 238, 241 (1972).

7. 217 U.S. 349, 373 (1910).

8. *See id.* at 357-82.

9. *Id.* at 378.

10. 356 U.S. 86 (1958).

citizenship for maritime desertion, the Court explained that “[t]he [Eighth] Amendment must draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society.”<sup>11</sup>

*B. The Death and Rebirth of the Death Penalty*

In 1972, the Court began in earnest to change the operation of the death penalty under this “cruel and unusual” punishment framework. That year the Court decided *Furman v. Georgia* and placed a moratorium on the death penalty which would continue for five years.<sup>12</sup> Finding that the Georgia death penalty statute was applied unfairly against minority groups, the Court declared such application in violation of the Eighth and Fourteenth Amendments.<sup>13</sup> The Court explained that, though it could not ultimately determine whether the three defendants on appeal were sentenced to death because they were black, it was more concerned with “a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned.”<sup>14</sup> It was troubled by the fact that “[p]eople live or die, dependent on the whim of one man or of [twelve].”<sup>15</sup> The Court, therefore, banned the death penalty until such time as the states could determine a more equal system of justice. Justice Rehnquist, the only current member of the Court who was also on the Court in 1972, joined Chief Justice Burger’s dissent, which fundamentally disagreed that the sentence of death was “unusual” when it had been practiced for so many years.<sup>16</sup>

In the four years immediately following *Furman*, “at least 35 States . . . enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person.”<sup>17</sup> Examining another Georgia death penalty case in 1976, the Court, including Justices Rehnquist and Stevens, explained that

[t]hese recently adopted statutes have attempted to address the concerns expressed by the Court in *Furman* primarily (i) by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence, or (ii) by making the death penalty mandatory for specified crimes. But all of the post-*Furman* statutes

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11. *Id.* at 101 (emphasis added).

12. 408 U.S. 238 (1972).

13. *See id.*

14. *Id.* at 253.

15. *Id.*

16. *Id.* at 379.

17. *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976).

make clear that capital punishment itself has not been rejected by the elected representatives of the people.<sup>18</sup>

It was here that the Court first evidenced a tendency that would continue throughout modern death penalty analysis: it determined the “evolving standards of decency” by reference to state legislatures and jury verdicts.<sup>19</sup> While reinstating the death penalty, the *Gregg* Court also acknowledged that, under current standards of decency, retribution against the offender was a proper use for the death penalty, for “certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.”<sup>20</sup> The following year, the moratorium ended as 1977 witnessed the first state execution in almost ten years.<sup>21</sup>

### *C. Using the Evolving Standards Analysis to Exclude Groups of Offenders*

#### *1. The Justices take sides*

In 1977, the Supreme Court began using the “evolving standards of decency” analysis to exclude entire categories of people and crimes from the reach of the death penalty. In the space of nine years, the Court excluded those who rape adult women,<sup>22</sup> non-violent accomplices of those who murder during the commission of a felony,<sup>23</sup> and the legally insane.<sup>24</sup> In each case, the Court examined several indicators of the

18. *Id.* at 180-81.

19. *See id.*

20. *Id.* at 184.

21. This first execution, by firing squad, was carried out in Utah on Gary Mark Gilmore on January 17, 1977. The previous year, only 17 days after *Gregg* was decided, Gilmore killed two victims during petty burglaries on adjacent days. His crimes occurred in Orem and Provo, Utah, not far from the campus of Brigham Young University, the host of this Journal. The speed of his execution was due, in part, to his waiver of appeals. Gary Mark Gilmore, *U.S. Executions Since 1976*, Clark County Indiana Prosecutor, at <http://www.clarkprosecutor.org/html/death/US/gilmore001.htm>. His mother filed an application for stay of execution with the U.S. Supreme Court, which granted a temporary stay. Gilmore soon afterwards filed a response, challenging his mother's right to act as “next friend” and indicating his eagerness that the sentence be carried out. The Court terminated his stay December 13, 1976. *Gilmore v. Utah*, 429 U.S. 1012 (1976). His final words were “Let's do it.” Gary Mark Gilmore, *U.S. Executions Since 1976*, Clark County Indiana Prosecutor, at <http://www.clarkprosecutor.org/html/death/US/gilmore001.htm>.

22. *See Coker v. Georgia*, 433 U.S. 584 (1977).

23. *See Enmund v. Florida*, 458 U.S. 782 (1982).

24. *See Ford v. Wainwright*, 477 U.S. 399 (1986). The prohibition against executing the insane extends not only to those who were insane when they committed the murder, but also to those who become insane prior to their execution date. *See id.* at 429 (O'Connor, J., concurring in the result in part and dissenting in part). The test is “whether the condemned man was aware of his conviction and the nature of his impending fate.” *Id.* at 422 n.3 (Powell, J., concurring in part and concurring in the judgment).

modern “standard of decency,” particularly state statutes and the decisions of sentencing juries.

In each of these three landmark decisions, Justice Stevens, Chief Justice Rehnquist, and, for the last two decisions, Justice O’Connor<sup>25</sup> each voted essentially the same way each time. Chief Justice Rehnquist established himself as an advocate of the death penalty. Justice Stevens has unfailingly supported whichever side wanted to abolish part of the death penalty. Justice O’Connor has frequently supported the death penalty—though most often for different reasons than the Chief Justice.

Through these first three exclusionary cases, distinct patterns started to develop. Justice Stevens, joining the majority or plurality vote each time, was quick to determine from legislative enactments, sentencing jury verdicts, and other sources (such as his own judgment)<sup>26</sup> that current standards of decency would preclude the imposition of the death penalty in each case. Conversely, Chief Justice Rehnquist either joined or wrote the dissent each time, strongly preferring to examine only state statutes and sentencing jury verdicts.<sup>27</sup> In each opinion, he focused more on the societal desire for justice in punishment than on which idea might hold the moral “high road.”<sup>28</sup> Justice O’Connor, however, did not seem concerned with what was morally best or with what was best for society’s interests in punishment but focused instead on the more traditionally legal arguments. Though she voted most consistently in favor of the death penalty, she normally voiced her own reasons for

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25. Since a major purpose of this Note is to analyze the possible analysis of the current Court, only the current Justices’ rulings will be evaluated.

26. See *Coker*, 433 U.S. at 597 (“These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”); see also *Enmund*, 458 U.S. at 797 (“Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund.”).

27. It should be pointed out, however, that Chief Justice Rehnquist did join Justice O’Connor’s dissent in *Enmund*, which contained an analysis of whether the death penalty was a proportionate punishment for Enmund’s crimes (and concluded that it was, where evidence showed that he had planned the robbery that resulted in the deaths of the two victims). See *Enmund*, 458 U.S. at 816 (O’Connor, J., dissenting) (“In sum, in considering the petitioner’s challenge, the Court should decide not only whether the petitioner’s sentence of death offends contemporary standards as reflected in the responses of legislatures and juries, but also whether it is disproportionate to the harm that the petitioner caused and to the petitioner’s involvement in the crime.”).

28. See, i.e. *id.* at 606 (Burger, C.J., dissenting). After recounting the facts of the case wherein it is revealed that Coker is already serving life sentences for previous rapes—he escaped from prison to perform the rape at issue in the case—he pointed out that “the Court’s holding assures that petitioner—as well as others in his position—will henceforth feel no compunction whatsoever about committing further rapes as frequently as he may be able to escape from confinement and indeed even within the walls of the prison itself.” *Id.*

doing so.<sup>29</sup> These various differences carried through in the cases that sought to abolish juvenile death penalties and the execution of the mentally retarded.

## 2. *Thompson v. Oklahoma*

Within two years after *Ford v. Wainwright* outlawed the execution of the mentally insane, Justices Scalia and Kennedy had joined the Court. That year, in *Thompson v. Oklahoma*,<sup>30</sup> the Court extended the death penalty prohibition to include offenders who were under sixteen at the time of their offense. Once again, the Justices divided along predictable lines: four Justices (including Justice Stevens) joined the plurality, Justice O'Connor concurred in the result, and three Justices (including Chief Justice Rehnquist and Justice Scalia) dissented.<sup>31</sup>

In *Thompson*, the defendant appealed his conviction for the brutal murder of his former brother-in-law, performed in retaliation for the victim's abuse of his older sister.<sup>32</sup> At the time of the murder, the defendant was only fifteen years old. He had acted in concert with three of his older friends,<sup>33</sup> and all four were eventually sentenced to death.<sup>34</sup>

*a. The plurality opinion.* Writing for the plurality, Justice Stevens examined relevant legislative enactments and jury determinations and "explain[ed] why these indicators of contemporary standards of decency confirm [the plurality's] judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty."<sup>35</sup> In defining cruel and unusual punishment, the plurality emphasized that "whether an action is 'unusual' depends . . .

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29. See, e.g. *Ford*, 477 U.S. at 430-31 (O'Connor, J., concurring in the result in part and dissenting in part) ("In my view . . . the only federal question presented in cases such as this is whether the State's positive law has created a liberty interest and whether its procedures are adequate to protect that interest from arbitrary deprivation. Once satisfied that the procedures were adequate, a federal court has no authority to second-guess a State's substantive competency determination."). Additionally, Justice O'Connor showed an early fondness for invoking a proportionality analysis—designed, simply, to determine whether the punishment fit the crime as well as the personal culpability of each defendant. This becomes significant in cases where her opinions conflict with that of Chief Justice Rehnquist and Justice Scalia, who criticize the use of proportionality analysis as irrelevant and self-serving. See, i.e., *infra* note 69 and accompanying text.

30. 487 U.S. 815 (1988).

31. Justice Stevens wrote the plurality opinion, Justice O'Connor wrote the concurrence, and Justice Scalia wrote the dissent. Justice Kennedy, new to the Court, took no part in the decision. See, generally, *id.*

32. *Id.* at 860 (Scalia, J., dissenting).

33. *Id.*

34. *Id.* at 819.

35. *Id.* at 822-23 (footnotes omitted).

upon the frequency of its occurrence or the magnitude of its acceptance.”<sup>36</sup>

Instead of delving immediately into the frequency or acceptance of the death penalty as applied to juveniles under sixteen, the plurality first emphasized the legal ways in which children differ from adults.<sup>37</sup> The plurality then concluded that society assumes that the average juvenile “is not quite ready to take on the fully rational and considered task of shaping his or her own life.”<sup>38</sup> According to the plurality, these basic assumptions lead to the conclusion that “it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent, who may be deterred by the harshest of sanctions and toward whom society may legitimately take a retributive stance.”<sup>39</sup>

With this basic analysis in place, the plurality then continued with its analysis of the current standard of decency by playing the ever popular numbers game. At the outset, it excluded any state in which the death penalty has been completely prohibited, along with the nineteen states which had not declared any minimum age for capital punishment eligibility “because they do not focus on the question of where the chronological age line should be drawn.”<sup>40</sup> Out of the remaining eighteen states, the plurality noted that “all of them require that the defendant have attained at least the age of sixteen at the time of the capital offense.”<sup>41</sup> Thus, with the backing of eighteen states,<sup>42</sup> the plurality found that the national consensus forbade the execution of children who were under sixteen at the time their crime was committed.<sup>43</sup>

The plurality next looked to the opinions of professional organizations and the laws of other nations for guidance, ultimately deducing that their decision was “consistent with the views that have

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36. *Id.* at 822 n.7.

37. *Id.* at 825 n.23. (Citing juveniles’ eligibility limitations on the right to vote, hold office, marry without parental consent, and ability to purchase alcohol, cigarettes, or pornographic materials).

38. *Id.*

39. *Id.*

40. *Id.* at 829. In later cases, however, Justice Stevens and others *do* count those states which do not have a death penalty as states wherein certain defendants, technically, could not be executed. See discussion *infra* Parts II.D-III.

41. *Id.*

42. Apparently, the only states that turned up for the polls were those who had specifically dealt with such youthful offenders in their statutes.

43. In response to the math of the dissent, the plurality also points out that if you were to count the nineteen states that technically allow the execution of fifteen-year-old offenders as votes against the result here, there are still thirty-two states where such an execution would be impermissible—either because the state had banned the death penalty entirely or because they had specifically disallowed executing juvenile offenders of fifteen and under. *Id.* at 829 n.29.



been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.”<sup>44</sup> Turning then to jury results, the plurality estimated that between eighteen and twenty juvenile offenders who were under the age of sixteen at the time of their offense had been executed during the twentieth century—the last execution occurring in 1948.<sup>45</sup> Each piece of evidence compiled by the plurality supports the idea that, according to professional organizations, other nations, and American juries, the current standard of decency forbids the execution of fifteen-year-old offenders.

Finally, the plurality consulted its own judgment on the questions of “whether the juvenile’s culpability should be measured by the same standard as that of an adult, and . . . whether the application of the death penalty to this class of offenders measurably contributes to the social purposes that are served by the death penalty.”<sup>46</sup> Examining each element, the plurality relied upon various studies that examine the psychological differences between juveniles and adults.<sup>47</sup> Finding that teens are less culpable than adults, the plurality explained that

[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.<sup>48</sup>

As to the question of whether administering the death penalty to fifteen-year-old offenders serves the dual purposes of the death penalty,<sup>49</sup> the plurality held that not only is retribution “inapplicable to the execution of a 15-year-old offender,” but that “the deterrence rationale is equally unacceptable.”<sup>50</sup> Ultimately, the plurality declared the execution of fifteen-year-old offenders to be fundamentally unconstitutional in light

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44. *Id.* at 830.

45. *See id.* at 832.

46. *Id.* at 833 (quotations omitted).

47. *See id.* at 835.

48. *Id.*

49. Retribution and deterrence are the dual purposes of the death penalty. *See id.* at 837.

50. *Id.* Specifically, the plurality reasoned that “[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent. And, even if one posits such a cold-blooded calculation by a 15-year-old, it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century.” *Id.* at 837-38.

of the evolving standards of morality that determined what was currently cruel and unusual.

*b. O'Connor's concurrence.* Concurring in the decision to reverse but calling the judgment of the plurality too broad, Justice O'Connor provided an alternative analysis—complete with a unique result.<sup>51</sup> Concluding that “a national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist,” she was still “reluctant to adopt this conclusion as a matter of constitutional law without better evidence than we now possess.”<sup>52</sup> Declaring that the plurality’s reliance on bare conviction records is misleading, she asserted that, without more detailed statistics, the records do not truly reflect a greater reluctance of juries to pass the sentence of death upon fifteen-year-old offenders than upon their adult counterparts.<sup>53</sup> She also admitted that the legal effect of the statutes of the nineteen states that do not specifically forbid the execution of fifteen year old offenders could stand as an obstacle to concluding that a national consensus exists.<sup>54</sup> Additionally, though she granted the idea “that adolescents are generally less blameworthy than adults who commit similar crimes,” she could not agree that “all 15- year-olds are incapable of the moral culpability that would justify the imposition of capital punishment.”<sup>55</sup> Nor did she agree with the plurality “that 15-year-olds as a class are inherently incapable of being deterred from major crimes by the prospect of the death penalty.”<sup>56</sup> She would rather have left that decision up to the elected officials.<sup>57</sup>

Nevertheless, Justice O'Connor concurred in the result because of the good possibility that there *was* a national consensus on the matter. Rather than completely ban the executions of fifteen-year-old offenders, however, she proposed that such executions be banned only in those states where the legislatures have not specifically set a minimum age.<sup>58</sup> Countering the dissent’s attack on this plan, she qualified it by reasoning that “[i]n this case, there is significant affirmative evidence of a national consensus forbidding the execution of defendants who were below the

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51. *See id.* at 848-59.

52. *Id.* at 848-49.

53. Specifically, Justice O'Connor cites the plurality’s failure to provide statistics on how many fifteen-year-olds were legally eligible for the death penalty and did not receive it due to prosecutorial discretion or jury decisions. *See id.* at 853.

54. *See id.* at 852.

55. *Id.* at 853.

56. *Id.*

57. *See id.* at 854.

58. *See id.* at 857-58.

age of 16 at the time of the offense,”<sup>59</sup> and she was worried that the legislatures which had not specified a minimum age for capital punishment could be surprised when simply certifying a fifteen-year-old as an adult also rendered him or her eligible for the death penalty.<sup>60</sup>

c. *Scalia’s dissent.* In his dissent, joined by Chief Justice Rehnquist, Justice Scalia focused more on the process that was used to certify Thompson to be tried as an adult in the first place.<sup>61</sup> Citing the psychologist’s recommendation that the juvenile justice system could not help him,<sup>62</sup> the dissent pointed out that his transfer to the adult system was correct and that the jury’s decision to execute was made after the defense was allowed to argue his youthfulness as a mitigating factor.<sup>63</sup> Examining the statutes that allow for juveniles to be transferred to the adult system, the dissent pointed out that the age of transfer was being lowered nationwide instead of raised and that, once in the adult system, they could constitutionally be punished as adults.<sup>64</sup>

The dissent also had its own way of counting the votes; like the plurality, it excluded from the count any state that did not allow the death penalty (reasoning that the issue did not exist for them) but included in the count in favor of executing fifteen-year-old offenders the nineteen states that “have determined that no minimum age for capital punishment is appropriate.”<sup>65</sup> According to the dissent, therefore, the majority of the states “for whom the issue exists . . . are of the view that death is not different insofar as the age of juvenile criminal responsibility is concerned.”<sup>66</sup> Counting the jury verdicts differently as well, the dissent pointed out that, though they had not been executed yet, five defendants in five different states all *under* the age of fifteen were sentenced to death between 1984 and 1986.<sup>67</sup>

Responding to the other aspects of the plurality’s opinion, the dissent attacked all reasoning which departed from a strict analysis of state

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59. *Id.* at 858 n.\*.

60. Specifically, she was worried that Oklahoma and other states like it had not “give[n] the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility.” *Id.* at 857.

61. *Id.* at 861-62 (Scalia, J., dissenting).

62. *See id.* Her testimony included an estimation that “Thompson understood the difference between right and wrong but had an antisocial personality that could not be modified by the juvenile justice system.” *Id.* at 862. She further testified that “Thompson believed that because of his age he was beyond any severe penalty of the law, and accordingly did not believe there would be any severe repercussions from his behavior.” *Id.*

63. *Id.*

64. *See id.* at 865. The dissent seems to assume that whatever result came from the statute must have been intended by the state legislature.

65. *Id.* at 867-68.

66. *Id.* at 868.

67. *See id.* at 869.

statutes and jury verdicts, claiming that the “societal consensus discernible in legislation . . . is assuredly all that is relevant.”<sup>68</sup> Though it concedes that the Supreme Court must ultimately judge what is constitutional, the dissent argues that their judgments must be confined to deciding what was originally forbidden or must conform to the “national society[’s]” idea of the evolving standard of decency.<sup>69</sup>

The dissent focused on the enactments of the state legislatures and, in part, on the verdicts of sentencing juries to determine the evolving standard of decency. All other sources of analysis, it believed, were inappropriate to decide the question.

*D. The Tide Turns: The Court Declines to Exclude Further Groups*

The year after *Thompson*, on June 6, 1989, the Supreme Court released two decisions. Both decisions refused to exclude the latest group of hopefuls from death penalty eligibility.<sup>70</sup> In each case, the issues are similar, the relevant evidence is gleaned from similar sources, and most of the Justices vote essentially the same as they did in *Thompson*. This time, however, Justices O’Connor and Kennedy tipped the balance of the Court so that Justices Rehnquist and Scalia came out in the majority.

*1. Stanford v. Kentucky: executing sixteen- and seventeen-year-old offenders*

In *Stanford v. Kentucky*, Kevin Stanford and Heath Wilkins sought to abolish the death penalty entirely for juvenile offenders by extending the prohibition to include those who committed crimes “at 16 or 17 years of age.”<sup>71</sup> The two defendants listed in the appeal, Stanford and Wilkins, were each convicted of various crimes committed while they were

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68. *Id.* at 868. The dissent particularly dislikes the idea that other countries could possibly have a say in what United States morals ought to be, arguing “[t]hat 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, even if that position contradicts the uniform view of the rest of the world.” *Id.* at 868 n.4.

69. *See id.* at 873. The dissent goes on to say that something is not unconstitutional because it is “out of accord with the perceptions of decency, or of penology, or of mercy, entertained—or strongly entertained, or even held as an ‘abiding conviction’—by a majority of the small and unrepresentative segment of our society that sits on this Court.” *Id.* Along with its attack on the judgment of the plurality, the dissent also criticizes its analysis of the importance of the legal differences between juveniles and adults, concluding that “[i]t is surely constitutional for a State to believe that the degree of maturity that is necessary fully to appreciate the pros and cons of smoking cigarettes, or even of marrying, may be somewhat greater than the degree necessary fully to appreciate the pros and cons of brutally killing a human being.” *Id.* at 871 n.5.

70. *See Stanford v. Kentucky*, 492 U.S. 361 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989). *Stanford* is discussed first, though it follows *Penry* in the reporter.

71. *Stanford*, 492 U.S. at 364-65.

seventeen and sixteen, respectively. Both were sentenced to death.<sup>72</sup> On appeal, the two defendants each claimed that executing those who were under eighteen at the time of their offense constituted cruel and unusual punishment prohibited by the Eighth Amendment.<sup>73</sup> As in *Thompson*, the Justices voted along predictable lines and used the same analysis to support their positions.

a. *Scalia's plurality opinion.* Joined by the Chief Justice and Justice Kennedy, Justice Scalia repeated each of the arguments he used in his *Thompson* dissent. He rejected outright any idea that other nations or the Justices' own conceptions of decency had any relevance on the question.<sup>74</sup> As in *Thompson*, he discounted the relevance of other legal age limits<sup>75</sup> along with the conclusions of opinion polls, interest groups, and professional associations.<sup>76</sup> Likewise refusing to perform a proportionality analysis<sup>77</sup> (which would only help to determine the Justice's own conceptions of decency), he scoffed at the dissent's reliance on "socioscientific" evidence to support their conclusion that the death penalty is inappropriate for sixteen- and seventeen-year-olds.<sup>78</sup>

Concluding, therefore, that the votes of state legislatures and jury verdicts are the only relevant evidence for analysis, Justice Scalia, as in *Thompson*, again counted only "the 37 States whose laws permit capital punishment."<sup>79</sup> Finding that only twelve (32%) of the states declined to

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72. See *id.* at 365-67 (Stanford kidnapped his neighbor from the gas station where she worked, robbed the store, raped her, sodomized her, then shot her in the face because she knew him and could recognize him. Wilkins, after a long history of juvenile offenses, repeatedly stabbed a mother of two who was working behind the counter of the store he robbed.).

73. *Id.* at 368 ("Wilkins would have us define juveniles as individuals 16 years of age and under; Stanford would draw the line at 17.").

74. See *id.* at 369-71; see also *id.* at 379 (To say that the Justices must ultimately judge the issue "is to replace judges of the law with a committee of philosopher-kings.").

75. *Id.* at 374-75 ("These laws set the appropriate ages for the operation of a system that makes its determinations in gross, and that does not conduct individualized maturity tests for each driver, drinker, or voter. The criminal justice system, however, does provide individualized testing . . . and one of the individualized mitigating factors that sentencers must be permitted to consider is the defendant's age.").

76. *Id.* at 377 ("A revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved.").

77. Proportionality examines whether the punishment fits the crime as well as the defendant's personal culpability.

78. The "socioscientific" evidence he referred to purported to show that sixteen- and seventeen-year-olds have less developed cognitive skills, are less mature and responsible, and do not fear death, and are therefore not only less morally blameworthy but are also less likely to consider the possibility of a death sentence before killing. See *id.* at 377-78 (basing his determination of irrelevance on the idea that, until it can be shown that *no* sixteen- or seventeen-year-old is culpable or deterred, the death penalty should not be banned for all).

79. *Id.* at 370.

impose capital punishment on offenders under eighteen<sup>80</sup> and that an additional three states (for a total of fifteen or 40.5%) refused to impose it on offenders under the age of seventeen,<sup>81</sup> Justice Scalia concluded that “[t]his does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual.”<sup>82</sup> Summarizing the previous rulings of the Court, he pointed out the following facts: (1) the death penalty was struck down as a punishment for rape because “Georgia was the *sole* jurisdiction that authorized such a punishment,”<sup>83</sup> (2) capital punishment for a non-violent accomplice was struck down because *only eight* states authorized it, and (3) the insane were excluded from capital punishment because *no* state permitted it.<sup>84</sup> With only 40.5% of states banning the execution of sixteen-year-old offenders and only 32% of states banning the execution of seventeen-year-old offenders, Justice Scalia (and, with him, the plurality) found insufficient statutory evidence of a national consensus against the juvenile death penalty.<sup>85</sup>

Examining briefly the evidence of jury verdicts, Justice Scalia found it of little significance that few juvenile offenders were sentenced to death, that they accounted for only 2% of executions between 1642 and 1986, or that “the last execution of a person who committed a crime under 17 years of age occurred in 1959.”<sup>86</sup> Explaining that any discrepancy can be easily understood by the fact that a far smaller percentage of capital crimes are committed by juveniles, he went on to say that even if “a substantial discrepancy exists, that does not establish the requisite proposition that the death sentence for offenders under 18 is categorically unacceptable to prosecutors and juries.”<sup>87</sup> Until all or most juries find such a sentence to be “categorically unacceptable,” he argued, they should be left with the possibility of imposing it after consideration of the individual offender.<sup>88</sup>

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80. These states included California, Colorado, Connecticut, Illinois, Maryland, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Oregon, and Tennessee. *Id.* at 370 n.2.

81. These three states were Georgia, North Carolina, and Texas. *Id.*

82. *Id.* at 370-71. Unmentioned in his analysis are the nineteen states he counted in *Thompson* which set no minimum age limit. By examining his analysis, however, it is clear he counts them among those states that do not ban the death penalty for juvenile offenders.

83. *Id.* at 371; *see also* *Coker v. Georgia*, 433 U.S. 584, 95-96 (1977).

84. *Stanford*, 492 U.S. at 371.

85. He specifically points out that it is the burden of the petitioners to establish a national consensus *against* the juvenile death penalty, and not the burden of the states to establish a consensus *for* it. *See id.* at 373.

86. *See id.* 373-74.

87. *Id.* at 374.

88. *Id.*

b. *O'Connor's concurrence: championing the proportionality analysis.* Though Justice O'Connor appeared to agree with the plurality's vote counting,<sup>89</sup> she did not agree with the estimation that a proportionality analysis was improper.<sup>90</sup> She felt, as she expressed in *Thompson*, that "age-based statutory classifications" were relevant to the analysis.<sup>91</sup> She specifically stated that, "[i]n [her] view, this Court does have a constitutional obligation to conduct proportionality analysis," even though she felt that *these* cases could not be resolved through it.<sup>92</sup>

She did not, however, take the time to explain how proportionality evidence should be weighted when deciding the evolving standard of decency. She declared that "although I do not believe that these particular cases can be resolved through proportionality analysis, I reject the suggestion that the use of such analysis is improper as a matter of Eighth Amendment jurisprudence."<sup>93</sup> More helpful, perhaps, would have been an explanation about how proportionality would affect the analysis in another case where, in her opinion, it *could* help resolve the issue. The tenor of her opinion almost suggests that, though there was clearly no evidence of a national consensus in 1989, proportionality may be used to tip the balance when the counted votes of the state statutes fall closer together.<sup>94</sup>

c. *Dissent: different numbers and proportionality.* Written by the late Justice Brennan and joined by three members of the Court, including Justice Stevens, the dissent brought all the evidence examined by the *Thompson* plurality to bear in concluding that, like the execution of offenders under the age of fifteen, executing sixteen- and seventeen-year-old offenders is cruel and unusual punishment.<sup>95</sup> Counting the votes differently,<sup>96</sup> the dissent included not only those fifteen states which exclude the execution of sixteen- and/or seventeen-year-olds, but also those states which do not authorize capital punishment at all. With those numbers, the dissent concluded that "it appears that the governments in fully 27 of the States have concluded that no one under 18 should face

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89. She finds that "it is sufficiently clear that no national consensus forbids the imposition of capital punishment on 16- or 17-year-old capital murderers." *Id.* at 381.

90. She does not, however, engage in proportionality analysis herself in this case. *See id.* at 382.

91. *Id.*

92. *Id.*

93. *Id.* at 382.

94. *Id.* at 380-382.

95. *See id.* at 383-405 (Brennan, J., dissenting).

96. Not only does the dissent count them differently from the plurality, but it also counts them differently from *Thompson's* plurality: *Stanford's* dissent included outright the states which have outlawed the death penalty entirely, while *Thompson's* plurality only pointed them out as a reaction to the numbers of the dissent. *See supra* note 40 and accompanying text.

the death penalty” and that “a total of 30 States . . . would not tolerate the execution of petitioner Wilkins.”<sup>97</sup> The dissent’s numbers demonstrate that 53% of the states (including the District of Columbia)<sup>98</sup> would not execute Stanford and 59% would not execute Wilkins. The dissent also mentioned that South Dakota should be counted as well, since it had not sentenced anyone to death since *Furman* was decided thirteen years before,<sup>99</sup> and it excluded the other eighteen of the nineteen states which had not set a minimum age and, therefore, had not considered the question.<sup>100</sup>

Concerning the other evidence of a national standard, the dissent was considerably more liberal than the plurality, considering not only jury verdicts,<sup>101</sup> but the very “ethicosscientific” evidence<sup>102</sup> scoffed at by the plurality, the views of professional organizations<sup>103</sup> and other nations.<sup>104</sup> The court also engaged in the proportionality analysis championed by Justice O’Connor. Not surprisingly, they found that jury verdicts imposing the death penalty on juveniles were rare, consisting of only 2.3% of all death sentences imposed during 1982-1988.<sup>105</sup> In their proportionality analysis, the dissent focused on ethicosscientific evidence indicating that juveniles do not function at an adult level of culpability<sup>106</sup>

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97. *Stanford*, 492 U.S. at 384.

98. *Id.*

99. *See id.* at 384 n.1. Though South Dakota still has not executed anyone, they do have five inmates currently on death row, indicating that the dissent would have been including them prematurely among the list of states that had abandoned the death penalty. South Dakota does not, however, have any juveniles on death row, though they do not specify any minimum age in their law. *See* Death Row U.S.A. Winter 2003, NAACP Legal Defense and Educational Fund, Inc., available at <http://www.deathpenaltyinfo.org/DEATHROWUSARecent.pdf>.

100. *Stanford*, 492 U.S. at 385.

101. Importantly, the dissent points out that most capital sentencing juries exclude those “who oppose capital punishment—a fact that renders capital jury sentences a distinctly weighted measure of contemporary standards.” *Id.* at 387 n.3 (citation omitted).

102. *Id.* at 383.

103. “Where organizations with expertise in a relevant area have given careful consideration to the question of a punishment’s appropriateness, there is no reason why that judgment should not be entitled to attention as an indicator of contemporary standards. There is no dearth of opinion from such groups that the state-sanctioned killing of minors is unjustified.” *Id.* at 388.

104. “Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis. Many countries, of course—over 50, including nearly all in Western Europe—have formally abolished the death penalty, or have limited its use to exceptional crimes such as treason . . . Twenty-seven others do not in practice impose the penalty. Of the nations that retain capital punishment, a majority—65—prohibit the execution of juveniles.” *Id.* at 389 (citations omitted).

105. *Id.* at 387. The Court also points out that, though 1.8% of arrested adults are sentenced to death, only .5% of arrested juveniles are. *Id.*

106. *Id.* at 395 (“Adolescents ‘are more vulnerable, more impulsive, and less self-disciplined than adults,’ and are without the same ‘capacity to control their conduct and to think in long-range terms.’” (quoting Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 7 (1978)). “They are particularly impressionable and subject



and concluded from this that the dual punishment purposes of retribution and deterrence could not be served: retribution could not be served because it is useless to take retribution on someone who is not culpable, and deterrence could not be served because juveniles do not think about the possibility of execution before they act.<sup>107</sup> Specifically rebutting the idea that only those juveniles who actually do function at the adult level of thinking are executed (because defendants are sorted out and individually considered during the criminal process), the dissent pointed out that:

A jury is free to weigh a juvenile offender's youth and lack of full responsibility against the heinousness of the crime and other aggravating factors—and, finding the aggravating factors weightier, to sentence even the most immature of 16- or 17-year olds to be killed. By no stretch of the imagination, then, are the transfer and sentencing decisions designed to isolate those juvenile offenders who are exceptionally mature and responsible, and who thus stand out from their peers as a class. It is thus unsurprising that individualized consideration at transfer and sentencing has not in fact ensured that juvenile offenders lacking an adult's culpability are not sentenced to die. Quite the contrary. Adolescents on death row appear typically to have a battery of psychological, emotional, and other problems going to their likely capacity for judgment and level of blameworthiness.<sup>108</sup>

Along this line, the dissent also highlighted the psychological profiles of both Stanford and Wilkins, each of whom had multiple psychological and social problems. Wilkins had these problems even to the extent that he was found incompetent to waive his right to counsel.<sup>109</sup>

By analyzing the dissent's arguments, it seems clear that though they held that the majority of states were against juvenile executions, their main drive came from their proportionality analysis and the examination of evidence deemed questionable by the majority. There is no wonder why they were always on opposite sides of the issue.

## 2. *Penry v. Lynaugh: addressing mentally retarded executions*

The same day *Stanford* was announced, the Court also announced its decision on *Penry v. Lynaugh*, a case in which petitioner Johnny Penry

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to peer pressure, and prone to 'experiment, risk-taking and bravado.'" *Id.* (quoting Task Force 3.). "They lack 'experience, perspective, and judgment.'" *Id.* (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).).

107. *See id.* at 404-05.

108. *Id.* at 397-98.

109. *See id.* at 401-02 ("It would be incredible to suppose, given this psychiatrist's conclusion and his summary of Wilkins' past, set out in the margin, that Missouri's transfer and sentencing schemes had operated to identify in Wilkins a 16-year old mature and culpable beyond his years.").

had sought to exclude the mentally retarded from death penalty eligibility.<sup>110</sup> Justice O'Connor wrote the opinion of the court, in which she was joined in only two parts by the full court.<sup>111</sup> The rest of her opinion was joined in two parts by *Stanford's* dissent,<sup>112</sup> in two different parts by *Stanford's* plurality,<sup>113</sup> and by no one for a final part.<sup>114</sup> To further complicate matters, there are three separate opinions concurring in part and dissenting in part, joined at various points by each of the other eight members of the Court. Though this opinion is structurally quite different from *Stanford's* opinion, its analytical similarities are striking.

a. *Analyzing cruel and unusual punishment.*<sup>115</sup> Examining state legislative decisions and the actions of sentencing juries as "[t]he clearest and most reliable objective evidence of contemporary values," the Court engaged in the same vote-counting exercise mentioned earlier in this Note.<sup>116</sup> In their examination, however, the Court found that only one state, Georgia, currently banned the execution of retarded persons and that just one other state, Maryland, had enacted a similar statute which would take effect later that year.<sup>117</sup> Deciding that two state statutes did not provide enough evidence of a national consensus on the issue, the Court concluded that none existed.<sup>118</sup>

What is surprising is that the Justices who joined Justice O'Connor for this Part (Part II-B) (Justices Brennan, Marshall, Blackmun, and Stevens) constituted the entire dissent from *Stanford*. Though one would have expected the justices from the *Stanford* plurality (Chief Justice Rehnquist and Justices White, Scalia, and Kennedy) to have joined Justice O'Connor here, they did not. A possible explanation for their absence, however, is found in the Part's analysis of opinion polls and the opinions of professional organizations—evidence sources the *Stanford* plurality specifically defined as irrelevant. Though the Court found that

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110. 492 U.S. 302 (1989).

111. *Id.* at 307-13, 329-30 (Parts I and IV-A, respectively: Part I describes the story and history of the case and Part IV-A describes the Court's decision that *Penry's* holding would apply retroactively to defendants on collateral review).

112. *Id.* at 314-19, 319-28 (Parts II-B and III, respectively: Justices Brennan, Marshall, Blackmun, and Stevens joined Justice O'Connor in her analysis of cruel and unusual punishment and whether the Court's ruling constituted a "new rule" (concluding that it did not)).

113. *Id.* at 313-14, 330-35 (Parts II-A and IV-B, respectively: Chief Justice Rehnquist and Justices White, Scalia, and Kennedy joined Justice O'Connor in her analysis of finality concerns and general "new rule" retroactivity).

114. *Id.* at 335-40 (Part IV-C, which contains her proportionality analysis.)

115. *Id.* at 314-19 (Part II-B).

116. *Id.* at 331, 334.

117. *Id.* at 334.

118. *Id.*

even with the polls and professional opinions there was insufficient evidence to find a national consensus,<sup>119</sup> their very presence in this part of the opinion could explain the *Stanford* plurality's absence. The apparent discrepancy of the *Stanford* dissent voting against itself is also explained later in the opinion: each of them wrote or joined an opinion concurring in part and dissenting in part, expressing their view that the executions should be banned anyway.<sup>120</sup>

b. *Justice O'Connor engages in an unpopular proportionality analysis.* True to her word in her *Stanford* concurrence, O'Connor offered a proportionality analysis.<sup>121</sup> In examining culpability, she reviewed the arguments advanced by Penry and his various *amici*.<sup>122</sup> They argued that cognitive impairment, diminished moral reasoning and impulse control, and inability to understand cause and effect combine to position the mentally retarded below the culpability level required for capital punishment and therefore beyond the reach of retributive purposes.<sup>123</sup> She found, however, that "[she] cannot conclude that all mentally retarded people of Penry's ability—by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility—inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty."<sup>124</sup> With that finding, and after rejecting Penry's request that the Court focus on his "mental age,"<sup>125</sup> she concluded with her opinion that, "[w]hile a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society,' there is insufficient evidence of such a consensus today."<sup>126</sup>

c. *Brennan's opinion (concurring in part, dissenting in part).* Joined by Justice Marshall, Justice Brennan's own proportionality analysis yielded the opposite result.<sup>127</sup> Maintaining that the defects of the mentally retarded always limit his or her culpability to the point that the death penalty is disproportionate to blameworthiness, he would therefore find it

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119. *See id.* at 335.

120. *See infra*. Part II.D.2.c-d.

121. *Penry*, 492 U.S. at 335-40 (Part IV-C). However, since the *Stanford* plurality shuns proportionality and *Stanford's* dissent dislikes her conclusions, she is alone in this part of the opinion.

122. *See, generally, id.*

123. *Id.* at 336-37.

124. *Id.* at 338.

125. Specifically, she held that mental age was too hard to calculate and that there was no finding of Penry's mental age below. *See id.* at 339-40.

126. *Id.*

127. *Id.* at 341-349 (Brennan, J., concurring in part and dissenting in part).

unconstitutional.<sup>128</sup> In an argument similar to that found in *Stanford*'s dissent, he maintained that individualized consideration "fails to ensure that [exceptionally responsible mentally retarded persons] are the only mentally retarded offenders who will be picked out to receive a death sentence."<sup>129</sup> This is because, as the *Stanford* dissent pointed out, "[t]he sentencer is free to weigh a mentally retarded offender's relative lack of culpability against the heinousness of the crime and other aggravating factors and to decide that even the most retarded and irresponsible of offenders should die."<sup>130</sup> Justice Brennan also applied mentally retarded persons' lack of culpability to the goals of punishment and concluded that neither goal is served by executing the mentally retarded.<sup>131</sup> Because they are not culpable, retribution is not served by executing them, and because they can not anticipate consequences, the threat of capital punishment will not deter them.<sup>132</sup>

*d. Stevens' opinion (concurring in part, dissenting in part).* Joined by Justice Blackmun, Justice Stevens simply stated that the execution of the mentally retarded should be unconstitutional in light of the arguments advanced by the American Association on Mental Retardation.<sup>133</sup> He did not elaborate beyond that.

*e. Scalia's opinion (concurring in part, dissenting in part).* Joined by Chief Justice Rehnquist and Justices White and Kennedy, the part of Justice Scalia's opinion that relates to the Eighth Amendment spoke mainly of his disapproval of Justice O'Connor's proportionality analysis. Referring to his reasoning in *Stanford*, he maintained that "if an objective examination of laws and jury determinations fails to demonstrate society's disapproval of it, the punishment is not unconstitutional even if out of accord with the theories of penology favored by the Justices of this Court."<sup>134</sup>

Thus, through decades of debate and multiple changes in the Court itself, we are left with the same two (sharply divided) branches of analysis we started with: 1) counting the votes; and 2) performing a proportionality analysis. One half of the Court only counts votes from

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128. *Id.* at 346.

129. *Id.*

130. *Id.* at 347.

131. *See id.* at 348-49.

132. *Id.*

133. *See id.* at 350 (Stevens, J., concurring in part and dissenting in part). *See also id.* at 336-37 ("The AAMR and other groups working with the mentally retarded agree with Penry. They argue as *amici* that all mentally retarded people, regardless of their degree of retardation, have substantial cognitive and behavioral disabilities that reduce their level of blameworthiness for a capital offense. . . . mentally retarded people cannot act with the level of moral culpability that would justify imposition of the death sentence." (citations omitted)).

134. *Id.* at 351.

statutes; the other half also looks at polls, professional organizations, and other nations for guidance. Similarly, one half discounts proportionality entirely, while the other seems to prefer it even to vote counting.<sup>135</sup> Thirteen years later, this division would play out dramatically as the Supreme Court overturned *Penry* in deciding *Atkins v. Virginia* on June 20, 2002.<sup>136</sup>

### III. *ATKINS V. VIRGINIA*: OVERTURNING THIRTEEN-YEAR-OLD LAW

Around midnight on August 16, 1996, Eric Nesbitt was abducted, robbed, taken to an automatic teller machine, and forced to withdraw additional cash. He was then taken to an isolated area where he was shot eight times and killed.<sup>137</sup> Of the two perpetrators of this crime, each said the other shot Nesbitt, but only one, William Jones, was believed.<sup>138</sup> The other, Daryl Atkins, was mentally retarded.<sup>139</sup> During the court proceedings that followed, Atkins was sentenced to death.<sup>140</sup> The Virginia State Supreme Court affirmed, ruling that his low IQ score was insufficient grounds to commute his sentence.<sup>141</sup>

The U.S. Supreme Court granted certiorari, and, in a 6-3 decision, the majority of the Court voted to overturn *Penry* and declared that further executions of mentally retarded persons were unconstitutional because they violated the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>142</sup> Though the arguments advanced on either side of this decision are not much different from those advanced on the various sides of the cases that went before, the reasoning that prevailed could predict future rulings of the Court in a potential reexamination of *Stanford* as well.

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135. This is demonstrated by Justices Brennan, Marshall, Blackmun, and Stevens, who, though they candidly admitted that no count of the vote yielded a national consensus, yet opined that it was unconstitutional to execute the mentally retarded. See *infra* Part II.D.2.a,c-d.

136. 536 U.S. 304 (2002).

137. *Id.* at 307.

138. *Id.*

139. *Id.* at 308.

140. *Id.* at 309. Actually, he was sentenced to death twice—the first jury used a misleading verdict form. At each hearing, the state psychologist testified that Atkins was *not* mentally retarded. See *id.*

141. See *id.* at 310.

142. *Id.* at 306-07, 321.

*A. Atkins' Majority: No Excessive Punishments*

The majority (written by Justice Stevens and joined by Justices O'Connor, Souter, Ginsberg, Breyer, and Kennedy)<sup>143</sup> interpreted the Eighth Amendment to forbid not just cruel and unusual punishments but excessive punishments as well.<sup>144</sup> Examining state statutes, the opinions of professional organizations, and finally presenting a proportionality analysis, the justices in the majority concluded that the evolving standards of decency, as well as their own considered judgments, forced the conclusion that the execution of mentally retarded persons was unconstitutional.<sup>145</sup>

*1. Counting the votes*

Paying little attention to the now thirteen states (including the District of Columbia) that banned the death penalty entirely, the majority pointed out that twenty-one states (and the federal government) had passed,<sup>146</sup> or had almost passed,<sup>147</sup> legislation banning (most with some qualifications) the execution of mentally retarded persons.<sup>148</sup> Assuming that the final three would eventually finalize their laws, it meant that twenty-one states out of the thirty-eight (55%) which had a death penalty banned or would soon ban the execution of the mentally retarded. Looking nationwide, if the states with no death penalty were included, it would mean that 66% of all states would not execute the mentally retarded.

Despite these numbers, however, the majority was quick to point out “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change” that is telling of a national standard.<sup>149</sup> Interpreting this direction of change to mean that American society had now determined that mentally retarded persons are “categorically less culpable than the average criminal,” the majority also pointed out that of the legislatures which had considered the question, all

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143. *Id.* at 306. Justices Souter, Thomas, Ginsberg, and Breyer are all new to the Court, but they replace in equal proportion members of the plurality and dissent on each of the last three cases discussed above.

144. *Id.* at 311.

145. *See generally id.* at 306-321.

146. Including Kentucky(1), Tennessee(2), Georgia(3), Maryland(4), New Mexico(5), Arkansas(6), Colorado(7), Washington(8), Indiana(9), Kansas(10), New York(11), Nebraska(12), South Dakota(13), Arizona(14), Connecticut(15), Florida(16), Missouri(17), and North Carolina(18). *Id.* at 314-15.

147. “The Texas Legislature unanimously adopted a similar bill, and bills have passed at least one house in . . . Virginia and Nevada.” *Id.* at 315.

148. *See id.* at 314-15.

149. *Id.* at 315.

had voted in favor of the prohibition.<sup>150</sup> Further, the Court looked to the infrequency of the execution of the mentally retarded even in states that allow it, citing only five executed prisoners with a known IQ of less than seventy in the thirteen years since *Penry*.<sup>151</sup> With this evidence, the majority had no problem finding a national consensus that the execution of mentally retarded persons was cruel and unusual.

## 2. Proportionality

The majority continued from vote counting to an examination of proportionality, indicating its further support of the idea that numbers are not all that is important. In considering whether the execution of the mentally retarded serves either of the penological purposes of retribution or deterrence, the Court looked at the laws of other nations, the opinions of professional and religious organizations, opinion polls, and their own judgment.<sup>152</sup> The majority's conclusion, based mainly on professional definitions of mental retardation,<sup>153</sup> is that, because of their impairments, mentally retarded persons' culpability for their actions is diminished.<sup>154</sup>

Having found a lower culpability, the majority next found that such diminished culpability negates the states' interest in retribution.<sup>155</sup> Pointing out that even the average murderer is insufficiently culpable to justify execution without aggravating factors, the majority maintained that "the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."<sup>156</sup> Deterrence, "predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct,"<sup>157</sup> was also reasoned to be a useless goal when dealing with the mentally retarded because their lower functioning skills "make it less likely that they can process the

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150. *Id.* at 315-16.

151. *Id.* at 316.

152. *See id.* at 316 n.21 ("Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue."); *see also id.* at 313 ("[I]n cases involving a consensus, our own judgment is 'brought to bear,' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators." (citation omitted)).

153. *Id.* at 309 n.3 ("The American Association of Mental Retardation (AAMR) defines mental retardation as follows: 'Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.'" (quoting Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed.1992))).

154. *Id.* at 318.

155. *See Atkins*, 536 U.S. at 319.

156. *Id.*

157. *Id.* at 320.

information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.”<sup>158</sup>

The majority also justified a rule against executing the mentally retarded based on the idea that they are disadvantaged at trial because of their mental impairments.<sup>159</sup> Citing false confessions, a lowered ability to make a persuasive showing of mitigating factors, the possibility that they may be less able to assist their counsel at trial, the fact that they are generally poor witnesses, and a demeanor that may create the impression of a lack of remorse, the majority concluded that mentally retarded defendants face a special risk of wrongful execution—especially when the jury decides that their retardation creates a greater risk of “future dangerousness.”<sup>160</sup>

In summary, the majority voted to ban the execution of the mentally retarded not only because of the number of state legislatures that had already done so, but also because, in their estimation, the culpability of the mentally retarded offender does not reach the level of the normal adult murderer. Acknowledging, however, that there was no consensus on what the definition of “mentally retarded” is, the justices left that question for the states to determine. The ruling of the Court merely forbids the states from executing anyone who falls within their own definition.<sup>161</sup>

### *B. Atkins' Dissent*

Of the three Justices in the dissent (Chief Justice Rehnquist and Justices Scalia and Thomas), two wrote separate opinions which were joined by all three. They are discussed together because, though they emphasize different things, their theme is the same (and familiar): the majority counted the votes wrong and state legislatures are the only reliable source of information on the issue.

#### *1. Counting the votes*

Justice Scalia's dissent was quick to point out that eighteen states, not twenty-one (the majority's count), had statutes in effect that banned the execution of the mentally retarded, a total of only 47% of all death penalty states.<sup>162</sup> He next pointed out that only seven of those states (18%) banned the execution of mentally retarded persons to the extent

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158. *Id.*

159. *Id.* at 320-21.

160. *Id.*

161. *Id.* at 317.

162. *Id.* at 342.



imposed by the majority—since eleven of the eighteen included some sort of qualification on the injunction.<sup>163</sup> Even more, Justice Scalia criticized the Court for its disregard of the fact “that the legislation of all 18 States it relies on is still in its infancy,” since the oldest was only fourteen years old.<sup>164</sup> To the majority’s contention that it was the *direction* of the change that was more telling, Justice Scalia noted that up until fourteen years ago *no* state had a statute banning the execution of the mentally retarded.<sup>165</sup> Thus, there was only one direction state legislation *could* have changed.<sup>166</sup> Chief Justice Rehnquist agreed, calling the majority’s decision “a *post hoc* rationalization for the majority’s subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency.”<sup>167</sup>

## 2. *Forbidding proportionality tests and other sources*

The Chief Justice and Justice Scalia chaffed at any mention that sources other than state legislative decisions could be relevant to the question. Chief Justice Rehnquist wrote separately “to call attention to the defects in the Court’s decision to place weight on foreign laws, the views of professional and religious organizations, and opinion polls in reaching its conclusion.”<sup>168</sup> Calling the legislatures more suited than the courts at deciding the moral considerations of the people, he likewise attacked the use of opinion polls, religious organizations, and the rest as things that “the elected representatives of a State’s populace have not deemed . . . persuasive enough to prompt legislative action.”<sup>169</sup> Justice Scalia gave this same analysis “the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus.’”<sup>170</sup>

Attacking the use of proportionality, the dissenting justices generally objected that the Court should not substitute its own judgment for that of the American people’s legislative enactments.<sup>171</sup> Calling such substitution “arrogance,”<sup>172</sup> Justice Scalia also maintained that the Eighth Amendment did not forbid excessive punishments and upheld the idea

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163. *Id.*

164. *Id.* at 344.

165. *Id.* at 344-45.

166. *Id.* at 345 (“[T]o be accurate the Court’s ‘consistency-of-the-direction-of-change’ point should be recast into the following unimpressive observation: ‘No State has yet undone its exemption of the mentally retarded, one for as long as 14 whole years.’”).

167. *Id.* at 322.

168. *Id.*

169. *Id.* at 326.

170. *Id.* at 347.

171. *See id.* at 341, 348.

172. *Id.* at 348.

that it is the role of sentencing juries, not the courts, to determine the appropriate punishment for a certain defendant.<sup>173</sup>

Some of Justice Scalia's most persuasive arguments, however, come in his attack on the majority's assessment of deterrence. He criticized the majority's idea that when a law does not work for everyone, it should not apply to anyone: "[S]urely, the deterrent effect of a penalty is adequately vindicated if it successfully deters many, but not all, of the target class. Virginia's death penalty, for example, does not fail of its deterrent effect simply because *some* criminals are unaware that Virginia *has* the death penalty."<sup>174</sup> Rather, he argued, the fact that a defendant is mentally retarded should be taken by the jury and considered as a mitigating factor in its decision on whether to impose the death penalty.<sup>175</sup> Instead of focusing on the culpability of the defendant, he defended the jury's right to impose severe retribution upon anyone guilty of an especially depraved crime, so long as juries are given the opportunity to consider a defendant's retardation as a mitigating factor.<sup>176</sup>

The *Atkins* Court, though thirteen years wiser, still could not escape the inevitable questions of legislative votes and proportionality. The question that comes next is this: now that *Penry* has been overturned, is *Stanford* next?

#### IV. POST-ATKINS APPLICATIONS

As surprising as the decision in *Atkins* was, its possible applications have raised hopes and eyebrows in the months since its announcement. Defendants have already brought cases to the Supreme Court seeking habeas corpus relief in light of *Atkins*, and potential applications suggest themselves by the score.

##### A. *Patterson v. Texas*, *In re Stanford*, and *Hain v. Mullin*: *Seeking to Apply Atkins to Juveniles*

One month after *Atkins* was released, Toronto Patterson, a death row inmate convicted of a crime he committed when he was seventeen,<sup>177</sup> applied for habeas corpus relief to the Supreme Court.<sup>178</sup> Though a

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173. *See id.* at 349.

174. *Id.* at 351.

175. *Id.* at 352.

176. *Id.*

177. The story goes that he killed his cousin and her two young daughters, ages three and six, as part of a plot to steal some expensive hubcaps from their garage. He was only prosecuted for the murder of the three-year-old because her murder was the only one that made him death-eligible. *See* Toronto Markkey Patterson, *U.S. Executions Since 1976*, Clark County Indiana Prosecutor, at <http://www.clarkprosecutor.org/html/death/US/patterson795.htm>.

178. *Patterson v. Texas*, 123 S. Ct. 24 (2002).

majority of the Court denied his petition without comment,<sup>179</sup> Justices Stevens, Ginsburg, and Breyer all dissented in a more lengthy fashion. Justice Stevens, quoting from Justice Brennan's dissenting opinion in *Stanford v. Kentucky*,<sup>180</sup> pointed out that "[s]ince that opinion was written, the issue has been the subject of further debate and discussion both in this country and in other civilized nations."<sup>181</sup> Citing a change in circumstances, he asserted that it would be appropriate to revisit the issue.<sup>182</sup> Justice Ginsburg, joined by Justice Breyer, specifically urged that the Court's decision in *Atkins v. Virginia*<sup>183</sup> made it tenable to urge reconsideration of *Stanford*.<sup>184</sup>

Two months after *Patterson*, in October 2002, Kevin Stanford himself petitioned the Court for a writ of habeas corpus.<sup>185</sup> In a five to four decision against granting the petition, the majority of the Court was again silent as to its reasoning, leaving the four dissenting Justices to write alone.<sup>186</sup> United this time and joined by Justice Souter, the dissenting justices, through the pen of Justice Stevens, wrote a two and a half page dissent, consisting mainly of quoted sections of the reasoning used by Justice Brennan in his original *Stanford* dissent.<sup>187</sup> Justice Stevens specifically mentioned that the issue of the juvenile death penalty is now ripe because of the decision in *Atkins* and because all but one of the reasons supporting the holding in that case "apply with equal or greater force to the execution of juvenile offenders."<sup>188</sup> The only exception, it seems, is in the number of states expressly forbidding the execution of juvenile offenders (twenty-eight) compared to the number forbidding the execution of the mentally retarded (thirty).<sup>189</sup> However, since five states had banned the execution of minors since 1989,<sup>190</sup> the

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179. The Court's decision came out two hours before his scheduled execution, thus, (assuming Patterson was executed at the traditional time of just after midnight and the actual decision could not be published until the next day) his execution date is identical to the date of the Court's decision: August 28, 2002. See Toronto Markkey Patterson, *supra* note 177.

180. 492 U.S. 361, 382-405 (1989)(Brennan, J., dissenting).

181. *Patterson*, 123 S. Ct. at 24.

182. *Id.*

183. 536 U.S. 304 (2002).

184. *Patterson*, 123 S. Ct. at 24.

185. See generally *In re Stanford*, 123 S. Ct. 472 (2002).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* (counting those states which forbid the death penalty entirely, but excluding those states discounted by the *Atkins* dissent which had not actually passed their laws yet.)

190. *Id.* (including Indiana, Montana, New York, Kansas, and (by state supreme court order) Washington).

dissenting justices felt that the direction of the change<sup>191</sup> minimized the significance of those two numbers.<sup>192</sup>

Finally, on January 27, 2003, a third juvenile offender, Scott Allen Hain,<sup>193</sup> petitioned for habeas corpus relief from the Court.<sup>194</sup> This time without a vocal dissent, the Court flatly denied Hain's petition for writ of certiorari.<sup>195</sup> The day the decision was announced, newspapers and death penalty abolition advocates recognized a temporary defeat on the issue, concluding that *In re Stanford's* four dissenting Justices had realized they weren't going to get the crucial fifth vote they needed to consider a juvenile death penalty case.<sup>196</sup> Though the abolition advocates may be correct in their prediction of at least a temporary defeat, the issue is far from ultimately decided. Referring to the direction of change that brought about the Court's *Atkins* decision, one report related that "[d]eath penalty opponents say they need the same kind of momentum among state legislatures on the question of young killers, and said the high court will get involved when more states outlaw the death penalty for those under 18."<sup>197</sup>

#### B. Current Status of State Statutes on the Execution of Minors

Though the Court might not consider the execution of juveniles until more state legislatures ban the practice, it is instructive to examine the current count of the state statutes (or "votes")<sup>198</sup> on the execution of minors for such a time as it may come up. Attached as Appendix A is a chart showing where each state falls on the scale. How the Court would count these votes will depend, of course, on the justice(s) doing the

191. See discussion *supra* notes 149-50 and accompanying text.

192. See generally *In re Stanford*, 123 S. Ct. 472 (2002).

193. Hain was convicted and sentenced to death for a double murder committed when he was seventeen. See *Hain v. Gibson*, 287 F.3d 1224 (2002). Together with a friend, he had stolen a car, a truck, and \$565 from a young couple and then burned the car with the couple trapped alive in the trunk. *Id.*

194. *Hain v. Mullin*, 123 S. Ct. 993 (2003).

195. *Id.* A little over a month later, having exhausted all his appeals, Hain was executed April 3, 2003 by lethal injection. See Scott Allen Hain, *U.S. Executions Since 1976*, Clark County Indiana Prosecutor, at <http://www.clarkprosecutor.org/html/death/US/hain843.htm>.

196. See generally Linda Greenhouse, *Justices Deny Inmate Appeal In Execution Of Juveniles*, N.Y. TIMES, Jan. 28, 2003, at A18 ("The Supreme Court effectively shut the door today on reconsidering, at least in the foreseeable future, its precedents permitting the death penalty to be imposed on those who were 16 or 17 when they committed their capital crimes.").

197. Anne Gearan, *Court Refuses Juvenile Death Row Case*, Associated Press, Jan. 27, 2003, at [http://quickstart.clari.net/qs\\_se/webnews/wed/bn/Ascotus-death-penalty.Rmp3\\_DJR.html](http://quickstart.clari.net/qs_se/webnews/wed/bn/Ascotus-death-penalty.Rmp3_DJR.html).

198. Though the Court is technically a non-political body, the reasoning in their decisions clearly shows that the justices judge the evolving standard of decency (and, hence, the requirements of the Eighth Amendment) through examination of state statutes—or, by analogy, the state's "votes" on the issue.

counting. However, the basic facts are that, out of fifty-two jurisdictions,<sup>199</sup> thirty (57%) currently make it impossible to execute any offender younger than eighteen at the time of his/her offense. Twenty-two (42%) either specifically or technically allow executing juvenile offenders and, of those, only seven (31.8%) have executed any juvenile offenders since 1976.<sup>200</sup>

Considering those seven states which set no minimum age, it is difficult to tell how the different sides would count them since each side has historically swung back and forth on the subject. Whether they are included or excluded, only two of those states have actually executed a juvenile since 1976.<sup>201</sup> However, each of them has one or more juveniles currently on death row—or so few adults on death row that the presence of just one juvenile would make that state's percentage skyrocket above the national average of 2.36%.<sup>202</sup>

Were the justices of the *Stanford* plurality to count the votes today,<sup>203</sup> they would most likely only count the statutes of the thirty-nine jurisdictions that technically allow capital punishment. By this count, they would yield twenty-two jurisdictions (42% of all fifty-two and 56% of the thirty-nine death penalty states) which allow the execution of juveniles aged sixteen and seventeen, including only eighteen jurisdictions (34.6% of all fifty-two and 46% of the thirty-nine death penalty states) which allow the execution of offenders as young as sixteen. The justices of *Stanford*'s dissent would count the votes of all fifty-two jurisdictions. Their count would identify thirty jurisdictions (57.7%) which do not execute any juveniles, thirty-four jurisdictions (65%) which do not execute sixteen-year-old offenders, and may even count seven more states which have not used their statute since 1976.<sup>204</sup> Including those seven would yield a grand total of thirty-seven jurisdictions (71%) which do not execute juveniles and forty-one jurisdictions (79%) which do not execute sixteen-year-olds.

Of course, the numbers mentioned above will not be accurate for long. Even now, ten states are considering a possible ban on the

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199. This number includes the Federal Government and the District of Columbia but excludes the Military.

200. It is interesting to note that, of those executed, Texas, which only executes ages seventeen and up, is responsible for thirteen (62%) of them. *See infra* Appendixes A-B.

201. Louisiana and South Carolina. *See id.*

202. *See id.*

203. This assumes the justices might count the votes from each of the fifty-two jurisdictions mentioned above and included in the chart in Appendix A.

204. New Hampshire does not use their capital punishment statute at all. *See* Appendix B. Arkansas, Delaware, Wyoming, Idaho, South Dakota, and Utah have not executed any juvenile offenders since 1976, and none of these states has any juvenile offenders currently on death row. *See id.*

execution of juvenile offenders.<sup>205</sup> Though it is unlikely that all ten will decide to enact such a ban,<sup>206</sup> if even two states do so, the numbers of states banning the execution of juvenile offenders would then match the number of states (thirty) banning mentally retarded executions prior to the Court's decision in *Atkins*.<sup>207</sup> With at least three of those states considering such legislation during the 2003 legislative season,<sup>208</sup> *Stanford* could soon be ripe for reconsideration.

### *C. Ramifications of Overturning Stanford*

#### *1. The "low culpability defense"*

Were *Stanford* to be overturned, it is naive to think that it would stop there. Once mentally retarded persons are excluded for low IQ's and juveniles are excluded for their sub-average mental and social skills, it is easy to predict that many defendants will emerge from the new loopholes of the criminal justice system claiming "low culpability." Middle-aged adults, for instance, who never grew up or who fried their brains as children, will also want to claim that the Eighth Amendment prohibits their execution. Every adult in America knows that there are adults among us who will lose a contest of wits to a bright fifteen-year-old every time. Would it be fair to impose the death sentence upon these adults when we absolutely refrain from imposing it upon the bright fifteen-year-old?

#### *2. Mandatory culpability analysis*

Juries may be one day required to consider not only the heinousness of the crime and the mitigating factors presented by the defendant, but also whether or not the defendant is culpable *at the "normal" adult level*. This possibility naturally raises difficult questions of definition. (What is the "normal" adult level of culpability? How do we measure it?) One question that must also be raised, however, is *why not* require that a jury perform a culpability analysis for every defendant? Were juveniles presumed to be less culpable until a jury is able to find them to be one of the bright ones, it would relieve the biggest problems of both sides of the

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205. Including Alabama, Arizona, Arkansas, Florida, Kentucky, Mississippi, Missouri, Nevada, South Carolina, and Texas. *Overview of the Death Penalty Today*, American Bar Association, at <http://www.abanet.org/crimjust/juvjus/resources.html>

206. In Arkansas, Florida, and Texas, similar legislation has already been attempted, but only passed in one house. It is being reintroduced this year. *Id.*

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

208. See *supra* note 206.

argument. Justice Scalia could rest easy knowing that the really culpable juveniles were being punished as they deserved, and Justice Stevens could sigh with the relief of knowing that the below average juveniles were being spared. It would not be a perfect solution, for some will certainly slip through the cracks each way, but it would certainly go a long way toward alleviating the problem.

For this particular plan to work, however, two things must happen. First, juveniles must not be excluded from the death penalty. In order to leave juries with the power to execute the bright ones who truly knew what they were doing, the Supreme Court cannot ban the whole group from capital punishment eligibility. However, to counteract the dangerous possibility that the truly less culpable defendant would be executed by a jury prejudiced by the horrific nature of his or her crime, another procedural layer must be added. In order to protect the jury from such prejudice, there would need to be a requirement that the jury not consider the heinousness of the crime while considering the culpability of the defendant. To truly make the punishment fit the crime *and* the culpability of the defendant, the defendant's culpability would not be simply another mitigating factor, but a way to remove those who are truly less culpable from the grasp of the death penalty.

### 3. *What if we evolve backwards?*

One thing that few of the justices have openly considered is the possibility that our national morals may change dramatically. What will happen when, one-hundred years from now, after the death penalty has been whittled down to a stump, the nation as a whole decides (perhaps in response to an uncontrollable upswing in simple murder) that they are more concerned about a victim's sensibilities than with the culpability of a violent murderer? Justice Scalia, as part of his attack on the *Atkins* plurality's "consistency of the direction of change" analysis, urged that "reliance upon 'trends,' even those of much longer duration than a mere 14 years, is a perilous basis for constitutional adjudication."<sup>209</sup> Thereafter, he quoted a section of Justice O'Connor's *Thompson* dissent, which, as Justice Scalia said, "eloquently explain[s]" the problem.<sup>210</sup>

In 1846, Michigan became the first State to abolish the death penalty . . . . In succeeding decades, other American States continued the trend towards abolition . . . . Later, and particularly after World War II, there ensued a steady and dramatic decline in executions . . . . In the 1950's and 1960's, more States abolished or radically restricted capital

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209. *Atkins v. Virginia*, 536 U.S. 304, 345 (2002)(Scalia, J. dissenting).

210. *Id.*

punishment, and executions ceased completely for several years beginning in 1968 . . . . In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus . . . . We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.<sup>211</sup>

The main problem seems to be that traditional analysis of the evolving standards of decency does not leave room for regression.

#### V. CONCLUSION

Since 1976, we have seen many changes in death penalty jurisprudence. One group after another has been gradually eliminated from the arena of the death penalty—first for the type of crime or because of complete incompetence, then because certain justices believed that group to be less culpable than the rest. In the end, in order to predict the outcome of any given issue—such as the future of the juvenile death penalty—we must be able to make accurate guesses on a few different factors. We must be aware that Justice O'Connor is swayed by the dual prongs of proportionality and state statutes (assuming that she will remain on the Court long enough to vote on this issue again). Though it is difficult to tell the weight she gives to each, the best guess would assume that a bare majority of state statutes will enable her to vote on the side of excluding juvenile offenders so long as the inevitable amici have been able to persuade her that juveniles are truly less culpable than their adult counterparts. The rest of the Court, with the possible exception of Justice Kennedy, is easier to predict. Justices Stevens, Souter, Ginsburg, and Breyer have already demonstrated that proportionality reigns supreme in their camp. They will likely ban the execution of juvenile offenders as soon as they can compile enough Supreme Court votes to do so, regardless of which way the state statutes fall. On the opposite side of the line, Chief Justice Rehnquist and Justices Scalia and Thomas, who ignore proportionality completely, will most likely need to see a great majority of state statutes banning the execution of juvenile offenders before they will conclude that a conclusive national consensus exists.

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211. *Id.* See also *Thompson v. Oklahoma*, 487 U.S. 815, 854-855 (1988).



In the end, one cannot help but be torn by the controversy that has divided the highest Court for years. Few Americans doubt that some crimes—or at least some defendants—deserve death no matter what their age. This is one reason why seventeen-year-old John Lee Malvo, of Washington, D.C. sniper fame, is being tried first in Virginia—where he can still be executed—instead of Maryland, where most of the shootings took place.<sup>212</sup> Still, however, one has to wonder whether defendants as young as Malvo, who psychologists tell us do not yet function at the adult level of culpability, truly deserve to die for what might have been simply a youthful—if egregious—mistake in judgment.

*Robin M. A. Weeks*

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212. Linda Greenhouse, *Justices Deny Inmate Appeal In Execution Of Juveniles*, N.Y. TIMES, Jan. 28, 2003, at A18 (“Mr. Malvo is being tried in Virginia, after a public search by the Bush administration for a jurisdiction where he could be executed. Maryland, where the greatest number of the sniper killings took place, bars the execution of those younger than 18.”).

451]

## DEATH PENALTY

483

Appendix A<sup>213</sup>

## AGE OF DEATH PENALTY ELIGIBILITY BY JURISDICTION

	<b>No Death Penalty 25%</b>	<b>18 and Over 33%</b>	<b>17 8%</b>	<b>16 21%</b>	<b>No Minimum Age Specified 13.5%</b>
1.	Alaska	California	Georgia (1)	Alabama‡	Arizona‡
2.	Washington, D.C.	Colorado	New Hampshire†	Arkansas‡	Idaho
3.	Hawaii	Connecticut	North Carolina	Delaware	Louisiana (1)
4.	Iowa	Illinois *	Texas (13)‡	Florida‡	Pennsylvania
5.	Maine	Indiana *		Kentucky‡	South Carolina (1)‡
6.	Massachusetts	Kansas *		Mississippi‡	South Dakota
7.	Michigan	Maryland		Missouri (1)‡	Utah
8.	Minnesota	Montana (1)*		Nevada‡	
9.	North Dakota	Nebraska		Oklahoma (2)	
10.	Rhode Island	New Jersey		Virginia (3)	
11.	Vermont	New Mexico		Wyoming	
12.	West Virginia	New York*			
13.	Wisconsin	Ohio			
14.		Oregon			
15.		Tennessee			
16.		Washington*			
17.		Federal Gov.*			

( ) Parentheses indicate numbers of juvenile offenders executed in each state between 1976 and April 2003.

\* Indicates a jurisdiction that has moved *to* the “18 and over” category since 1989 (Seven total).

† Indicates a jurisdiction that has moved *from* the “18 and over” category since 1989 (One total).

‡ Indicates a jurisdiction considering legislation banning the execution of juvenile offenders (Ten total).

213. See *U.S. Executions Since 1976*, Clark County Indiana Prosecutor, at <http://www.clarkprosecutor.org/html/death/usexecute.htm>; *The Death Penalty in the U.S.* Clark County Indiana Prosecutor, at <http://www.clarkprosecutor.org/html/death/dpusa.htm>; *Death Row U.S.A. Winter 2003*, Death Penalty Information Center at <http://www.deathpenaltyinfo.org/DEATHROWUSArecent.pdf>; *Execution of Juvenile Offenders*, Amnesty International, at <http://www.icomm.ca/aiusa/abolish/juvexec.html> (last visited October 2002); *Capital Punishment Statistics*, U.S. Department of Justice Bureau of Justice Statistics at <http://www.ojp.usdoj.gov/bjs/cp.htm>; *Overview of the Death Penalty Today*, American Bar Association, available at <http://www.abanet.org/crimjust/juvjus/resources.html>; *Factsheet: The Juvenile Death Penalty*, American Bar Association, available at <http://www.abanet.org/crimjust/juvjus/resources.html>; *Death Row Inmates by State*, Death Penalty Information Center, at <http://www.deathpenaltyinfo.org/DRowInfo.html#state>; see also *Capital Punishment Timeline*, Clark County Indiana Prosecutor, at <http://www.clarkprosecutor.org/html/death/timeline.htm>. Each of these sites contain general information, charts, lists, etc, about the death penalty as it relates to juveniles or others that was used to compile the information in Appendices A and B.

Appendix B<sup>214</sup>JUVENILES ON DEATH ROW BY STATE INCLUDING STATISTICS OF  
EXECUTED JUVENILES IN EACH STATE AS OF JANUARY 2003

Total Juveniles on Death Row out of Total Death Row Inmates: 83 / 3,516 (2.36%)

- Death Row Juvenile Offenders in States that execute 17 and over:
  - Georgia: 2 out of 118 (1.7%)
    - Executed 1 juvenile offender since 1976
  - New Hampshire: 0 out of 0 total
  - North Carolina: 5 out of 217 (2.3%)
  - Texas: 28 out of 454 (6.16%)
    - Executed 13 juvenile offenders since 1976
    - Executed Toronto Markkey Patterson on August 28, 2002
- Death Row Juvenile Offenders in States that execute 16 and over:
  - Alabama: 13 out of 194 (6.7%)
  - Arkansas: 0 out of 42
    - Just one juvenile offender would be 2.4%
  - Delaware: 0 out of 19
    - Just one juvenile offender would be 5.26%
  - Florida: 2 out of 382 (.5%)
  - Kentucky: 1 out of 39 (2.56%)
  - Mississippi: 6 out of 69 (8.7%)
  - Missouri: 2 out of 70 (2.85%)
    - Executed 1 juvenile offender since 1976
  - Nevada: 1 out of 86 (1.16%)
  - Oklahoma: 1 out of 116<sup>215</sup>
    - Executed 2 juvenile offenders since 1976 (including Hain)
    - Executed Scott Allen Hain on April 9, 2003
  - Virginia: 1 out of 25 (4%)
    - Executed 3 juvenile offenders since 1976
  - Wyoming: 0 out of 2
    - Just one juvenile offender would be 50%
- Death Row Juvenile Offenders in Unspecified Age States:
  - Arizona: 5 out of 122 total (4.1%)
  - Idaho: 0 out of 22 total
    - Just one juvenile offender would be 4.5%

214. See generally cites contained in *supra* note 213.

215. Though it is noted that Oklahoma has executed a juvenile (Hain) since January, 2003, numbers remain unaltered so that they may be counted from the same point as the rest of the states.

451]

## DEATH PENALTY

485

Louisiana: 7 out of 97 total (7.2%)

Executed 1 juvenile offender since 1976

Pennsylvania: 4 out of 244 total (1.6%)

South Carolina: 3 out of 77 total (9%)

Executed 1 juvenile offender since 1976

South Dakota: 0 out of 5 total

Just one juvenile offender would be 20%

Each of the 5 total have been sentenced since 1989

(Stanford dissent pointed out that SD had not sentenced  
anyone to death since Furman)

Utah: 0 out of 11 total

Just one juvenile offender would be 9%