

DEFERENCE TO THE MAJORITY: WHY ISN'T THE SUPREME COURT APPLYING THE REASONING OF *ATKINS V. VIRGINIA* TO JUVENILES?

I. INTRODUCTION

On June 20, 2002, the Supreme Court decided *Atkins v. Virginia*,¹ holding that the execution of mentally retarded criminals is “cruel and unusual punishment” and therefore directly violates the Eighth Amendment.² This decision overruled the Court’s 1989 ruling in *Penry v. Lynaugh*,³ which allowed the execution of mentally retarded criminals.⁴ On the same day that the Court decided *Penry*, it ruled on another death penalty case—*Stanford v. Kentucky*.⁵ The *Stanford* ruling upheld the death penalty as used against a different class of criminals—juvenile offenders between the ages of sixteen and seventeen.⁶

The *Atkins* majority indicated that its decision had no bearing on the *Stanford* decision.⁷ Yet two months later, three members of the *Atkins* majority stated otherwise. In their dissent urging a stay of the execution of Toronto Patterson, who was arrested for murdering three people when he was seventeen years-old, Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer, argued that it was time to reconsider juvenile executions in light of the *Atkins* ruling.⁸

1. 536 U.S. 304 (2002).

2. *Id.* at 340.

3. 492 U.S. 302 (1989).

4. *Id.* at 321.

5. 492 U.S. 361 (1989).

6. *See id.*

7. *See Atkins*, 536 U.S. at 315 n.18.

8. *See In re Patterson*, 536 U.S. 984 (2002); *see also* Tony Mauro, *High Court Denies Habeas Petition of Teen-Age Killer*, THE LEGAL INTELLIGENCER October 22, 2002, at 4.

On October 21, 2002, the issue came before the Court once again. Kevin Stanford (whose case produced the *Stanford* ruling) filed a habeas corpus petition seeking to set aside his death sentence.⁹ In a 5-4 decision, the Court denied the petition.¹⁰ Justice Souter, however, dissented and joined ranks with the three Justices who dissented in *Patterson*. These actions demonstrated that the sentiment regarding the juvenile death penalty might be evolving among the Justices.¹¹ Nevertheless, a few months later the Court once again denied a petition for certiorari on the same issue in a similar case, with the split among the Justices remaining stagnant.¹²

In addition, current events have fueled more fire for the debate. Lee Boyd Malvo, one of the infamous suspected snipers, was only seventeen years-old when he was arrested.¹³ He was tried as an adult in Virginia, one of the remaining states that imposes the death penalty on offenders under the age of eighteen.¹⁴ Malvo was convicted, but rather than imposing a death sentence, the jury sentenced him to life in prison without parole. His adult co-conspirator, however, was sentenced to die for a separate sniper killing.¹⁵ The jury in the Malvo case was fiercely divided—five jurors favored the death penalty while seven others believed that Malvo was too young to die.¹⁶

In the most recent development, the Supreme Court signaled that they were ready to once again review the propriety of the juvenile death penalty when they granted certiorari in the case of *Roper v. Simmons* on January 26, 2004.¹⁷ Christopher Simmons was sentenced to death for a murder that he committed at the age of

9. See Mauro, *supra* note 8.

10. See *In re Stanford*, 537 U.S. 968 (2002).

11. *Id.*

12. See *Hain v. Mullin*, 537 U.S. 1173 (2003).

13. In the fall of 2002, a wave of random sniper attacks terrorized the northeast. About a dozen people were murdered and several others were wounded. For more information regarding the sniper attacks, see <http://www.cnn.com/US/sniper/archive/index.html>.

14. *Jury Sharply Split in Sparing Sniper Malvo*, CNN, Dec. 24, 2002, at <http://www.cnn.com/2003/LAW/12/24/sprj.dcsp.malvo.trial/index.html>.

15. *Id.*

16. *Id.*

17. See *Roper v. Simmons*, No. 03-0633 (2004) available at 2004 WL 110849. It should be noted that this development came just before this article was sent to the “presses.”

seventeen, however, the Missouri Supreme Court set aside Simmons death sentence in the wake of *Atkins v. Virginia*.¹⁸ While some may speculate that four justices who dissented in the denial of Stanford's habeas petition now have a fifth justice on their side, the fact that the Court is going to readdress the issue does not spell a certain victory for opponents of the juvenile death penalty. It is also possible that the pro-death penalty justices may use this opportunity to strengthen their stance that the *Atkins* reasoning should not be extended to the issue of the juvenile death penalty.¹⁹

This Note addresses the inconsistency of the Court's death penalty jurisprudence as applied to mentally retarded and juvenile offenders and argues that the Court should extend its reasoning in *Atkins* to juveniles. In particular, Part II of this Article traces the history of the juvenile justice system as well as this country's death penalty jurisprudence and its application to juvenile offenders. This Section questions whether the "constitutionalization" of the juvenile system may have back fired—by creating a more rigid procedural process, the individual needs of juvenile offenders may have gotten lost along the way.

Part III of this Article analyzes the *Thompson*, *Stanford*, and *Penry* decisions while tracing the Court's evolving reasoning behind the constitutionality of the death penalty as applied to juvenile and mentally retarded defendants. Part IV of this Article dissects the *Atkins* decision and discusses its applicability to juvenile offenders. Specifically, Part IV. A. suggests that there actually may be a consensus against juvenile executions among the states. Part IV. B. addresses the additional factors on which the Court relied in *Atkins*.²⁰

18 See Bill Mears, *Supreme Court Will Revisit Execution of Teenage Killers*, CNN, Jan. 26, 2004, at <http://www.cnn.com/2004/Law/01/26/scotus.death.penalty/index.html>. [hereinafter *Mears*]. The Missouri court reasoned that the ruling of *Atkins*, 536 U.S. 304 (2002), should extend to the execution of minors and thus the state's juvenile death penalty is unconstitutional. Missouri officials subsequently appealed to the U.S. Supreme Court asking for the law to be upheld. *Id.*

19. See Tony Mauro, *Supreme Court to Examine Validity of Teen Executions*, THE RECORDER, Jan. 27, 2004, at 1.

20. These additional factors are: 1) the attitude of the world community against the death penalty for these specific classes; 2) diminished capacity of these types of offenders; 3) the penological utility of applying the death

and reasons that an application of these additional factors demands outlawing the juvenile death penalty. The Article recognizes that the Supreme Court will only apply these paramount factors after it determines that a consensus against the juvenile death penalty exists among the states.

Next, the Article argues that such a consensus does exist and therefore the Court should outlaw the juvenile death penalty under the reasoning of *Atkins*. In the alternative, the Article suggests that even if a consensus does not exist, the Court's heavy reliance on the state legislatures to act first against the juvenile death penalty is inappropriate. The purpose of enumerating rights, such as the protection against cruel and unusual punishment in the Constitution, is to elevate certain fundamental rights above the reach of the political process.²¹ By deferring to the states on the issue of the death penalty the Court has undermined the power of the Eighth Amendment.

II. HISTORICAL PERSPECTIVE

A. *The Development and Decline of the Juvenile Justice System*

Historically, juvenile offenders have been treated differently from their adult counterparts.²² Prior to the 1900's, children and adults were tried in the same courts. However, children were treated more compassionately than adults, typically receiving less severe sentences.²³ Children under the age of seven were generally exempt from prosecution as it was believed that children of such a young age could not form criminal intent.²⁴

In 1899, the first formal juvenile justice court was created in Illinois, and by 1925, all but two states had juvenile court legislation.²⁵ Reformers behind the creation of the juvenile justice system were "appalled by adult procedures and penalties, and by the

penalty to these groups; and 4) the necessity of a legislative consensus. *See infra* text accompanying 197-232.

21. *See* *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

22. *See* VICTOR L. STREIB, *DEATH PENALTY FOR JUVENILES* 4 (1987).

23. *Id.*

24. *Id.*

25. *Id.*

fact that children could be given long prison sentences and mixed in jails with hardened criminals.”²⁶

The resulting system was fundamentally different from other American judicial infrastructures.²⁷ The system was idealistically “fashioned to work more like a social welfare agency than an institution of justice.”²⁸ Instead of reacting to violations of law, the juvenile justice system attempted to intervene before serious violations occurred.²⁹ Juvenile courts focused on predicting the future behavior of children rather than considering the evidence of past criminal acts.³⁰ Rehabilitation and guidance were the primary aims.³¹ The noble intentions of this system however, resulted in outrageous abuses.³² Juveniles were essentially excluded from the constitutional protections of criminal procedure.³³ Courts were not required to adhere to the due process standards of adult courts.³⁴ Rather, children were convicted of crimes without evidence of guilt.³⁵ Additionally, they often lacked the assistance of lawyers and did not have the chance to face their accusers.³⁶

During the late 1960’s and early 1970’s, the Supreme Court decided a series of cases that served to “constitutionalize” the juvenile justice system.³⁷ Decided in 1966, *Kent v. United States*³⁸ was the first Supreme Court case to directly consider juvenile justice

26. *In re Gault*, 387 U.S. 1, 15 (1967).

27. STREIB, *supra* note 22, at 4.

28. YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 1 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter YOUTH ON TRIAL].

29. STREIB, *supra* note 22, at 4.

30. *Id.*

31. YOUTH ON TRIAL, *supra* note 28, at 1.

32. EDWARD HUMES, NO MATTER HOW LOUD I SHOUT: A YEAR IN THE LIFE OF JUVENILE COURT 25 (1996).

33. *See generally In re Gault*, 387 U.S. 1 (1967) (United States Supreme Court granted habeas corpus petition to a delinquency commitment of six years, where fifteen year old defendant allegedly made a lewd phone call to a neighbor, and where juvenile defendant had not been given sufficient notice of the allegations against him, nor been provided the assistance of counsel.).

34. *See YOUTH ON TRIAL*, *supra* note 28, at 1.

35. HUMES, *supra* note 32, at 25.

36. *See id.*

37. STREIB, *supra* note 22, at 5.

38. 383 U.S. 541 (1966).

issues.³⁹ Prior to this ruling, juvenile courts had broad discretion in deciding whether to waive juvenile defendants into adult criminal courts.⁴⁰ The holding in *Kent* placed a constitutional limit on that discretion.⁴¹ Thus before a court could waive juvenile offenders into criminal courts, minors were now entitled to a hearing and the assistance of counsel.⁴² In making its ruling, the *Kent* Court observed, “[t]here is evidence . . . that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”⁴³

The year following *Kent*, the Supreme Court extended further protections to child offenders, holding in *In re Gault*, that the Fourteenth Amendment’s Due Process Clause applied to minors.⁴⁴ Thus, the current standards were established—during juvenile adjudications children are given the same rights that adults receive in criminal proceedings: the right to counsel, the right to notice of charges against them, the right to confront and cross-examine witnesses, the right to remain silent and not to testify against oneself.⁴⁵ The Court followed up with *In re Winship*,⁴⁶ holding that proof beyond a reasonable doubt in juvenile proceedings is a necessary element of due process required by *Gault*.⁴⁷ However, in 1971 the Court ruled that the Constitution does not require trial by jury in juvenile adjudications.⁴⁸

Some argue that “constitutionalization” of juvenile justice rebounds the system to the other extreme—rather than focusing on the rehabilitation and welfare of children, the system is overly

39. See *id.*; see *History of Juvenile Death Penalty*, at http://www.ncjrs.org/html/ojjdp/coordcouncil/cc_03.html (last visited Sept. 21, 2002) [hereinafter *History of Juvenile Death Penalty*].

40. *History of Juvenile Death Penalty*, *supra* note 39.

41. See *id.*

42. See *Kent*, 383 U.S. at 554; see also STREIB, *supra* note 22, at 14; Katherine Hunt Federle, *Emancipation and Execution: Transferring Children to Criminal Court in Capital Cases*, 1996 WIS. L. REV. 447, 452 (1996) (discussing the procedural safeguards for juveniles established in *Kent*).

43. *Kent*, 383 U.S. at 556.

44. *In re Gault*, 387 U.S. 1, 3 (1967).

45. STREIB, *supra* note 22, at 14.

46. 397 U.S. 358 (1970).

47. *Id.* at 368.

48. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

focused on adversarial procedures and technicalities.⁴⁹ By providing children with the same procedural safeguards as adults, the system legitimizes giving children adult punishments.⁵⁰ This concern was presupposed by Justice Stewart in his dissent to *Gault*:

[M]any dedicated men and women have devoted their professional lives to the enlightened task of bringing us out of the dark world of Charles Dickens in meeting our responsibilities to the child in our society. . . . [The Court now] invite[s] a long step backwards into the nineteenth century. In that era there were no juvenile proceedings, and a child was tried in a conventional criminal court with all the trappings of a conventional criminal trial. So it was that a 12-year-old boy named James Guild was tried in New Jersey for killing Catharine Beakes. A jury found him guilty of murder, and he was sentenced to death . . . The sentence was executed. It was all very constitutional.⁵¹

B. America's Death Penalty Jurisprudence

In order to understand the application of the death penalty to juvenile offenders, it is necessary to first examine death penalty jurisprudence in general.

Adopted in 1791, the Eighth Amendment provides, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁵² Like most clauses of the Constitution, the words of this “Amendment are not precise, and . . . their scope is not static.”⁵³ A claim that punishment is excessive is not judged by the standards that existed when the Eighth Amendment was adopted, but rather by those that currently prevail.⁵⁴ The definition of what is cruel and unusual punishment is drawn from “evolving standards of decency that mark the progress of a maturing society.”⁵⁵ In other words, the cruel and unusual clause is

49. HUMES, *supra* note 32, at 78; *see* YOUTH ON TRIAL, *supra* note 26, at 128.

50. *See* YOUTH ON TRIAL, *supra* note 28, at 128.

51. *In re Gault*, 387 U.S. 1, 79–80 (1967) (Stewart, J., dissenting).

52. U.S. CONST. amend. XIII.

53. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

54. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

55. *Trop*, 356 U.S. at 100–01.

“progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”⁵⁶

The modern death penalty era began in 1972 with the Court’s landmark decision in *Furman v. Georgia*.⁵⁷ Rather than declaring the death penalty unconstitutional per se, the Court held that because of current sentencing procedures and the risk that executions could be inflicted in an “arbitrary and capricious manner,” the death penalty as then administered violated the Eighth Amendment.⁵⁸ The Court’s decision was set forth in a brief per curiam opinion and did not provide an explanation for its ruling.⁵⁹ Although the majority had not rejected the death penalty outright, it had not indicated under what conditions it might be preserved.⁶⁰ As a result, *Furman* created considerable confusion among the death penalty states.⁶¹ For the next few years executions were put on hold, but by 1976 at least thirty-five states had revised their death penalty legislation in response to *Furman*.⁶² That same year, the Court decided *Gregg v. Georgia*,⁶³ ruling “the punishment of death does not invariably violate the Constitution,”⁶⁴ and that the “concerns expressed in *Furman* . . . can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.”⁶⁵ Thus, the imposition of the death penalty resumed in 1977, when a Utah firing squad executed Gary Gilmore on January 17.⁶⁶ He was the first person executed in the United States in almost ten years.⁶⁷

56. *Weems v. United States*, 217 U.S. 349, 378 (1910).

57. 408 U.S. 238 (1972).

58. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 493–94 (7th ed. 2001).

59. *Id.* at 494.

60. *Id.*

61. *Id.*

62. *Id.*

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

64. *Id.* at 169.

65. *Id.* at 195.

66. *Angel on Death Row: Chronology of Capital Punishment*, 5 CONGRESSIONAL QUARTERLY RESEARCHER, No. 9, March 10, 1995 available at <http://www.pbs.org/wgbh/pages/frontline/angel/timeline.html> (last visited Jan. 3, 2003).

67. *Id.*

C. The History of Juvenile Executions

America's first documented juvenile execution occurred in 1642, when sixteen year-old Thomas Graugner was executed in Massachusetts for the crime of bestiality.⁶⁸ Since then, approximately 365 juvenile offenders have been executed in the United States.⁶⁹ Although 226 juveniles have been sentenced to death in the "modern death penalty era" only twenty-two have actually been executed (as of June 30, 2003).⁷⁰ The age range of juvenile offenders executed throughout American history varies from those who committed crimes days before their eighteenth birthday to ten year-olds.⁷¹ It was not until 1988, in *Thompson v. Oklahoma*, that the Supreme Court placed an age limit on executions—capital offenders under the age of sixteen can no longer be executed.⁷²

In *Eddings v. Oklahoma*,⁷³ the Court first approached the juvenile death penalty issue without explicitly considering the constitutional implications of executing juvenile offenders. In this case, the Court vacated a juvenile's death sentence holding that the "chronological age of a minor" is a significant mitigating factor that must be considered when imposing sentences.⁷⁴ Writing on behalf of the majority, Justice Powell acknowledged:

[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors . . . generally are less mature and responsible than adults.⁷⁵

During the late 1980's and 1990's, the United States saw an increase in juvenile crime.⁷⁶ This was due in part to the fact that

68. STREIB, *supra* note 22, at 55.

69. Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973–June 30 2003* at <http://www.law.onu.edu/faculty/streib/juvdeath.htm> (last visited Sept. 27, 2003) [hereinafter *Streib Web Report*].

70. *Id.*

71. STREIB, *supra* note 22, at 57.

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

73. 455 U.S. 104 (1982).

74. *Id.* at 116.

75. *Id.* at 115–16.

76. Steven A. Drizin & Stephen K. Harper, *Old Enough to Kill, Old Enough to Die*, SAN FRANCISCO CHRONICLE, Apr. 16, 2000 available at

“[a]s crack cocaine hit the streets . . . adult gang leaders and drug dealers recruited and armed youngsters in their battle to control the lucrative drug trade.”⁷⁷ The number of juveniles charged with murder spiked, and in 1995 John Dilulio coined the term “superpredator” and predicted that a new breed of “remorseless and morally impoverished” juveniles would soon take over the streets of America as the youth population increased.⁷⁸ In reaction to this increase in juvenile crime, almost every state in the nation changed their juvenile laws. A variety of approaches to deal with this new crime wave emerged, from waiving more juveniles into criminal court, to increasing the severity of punishments, to reducing the confidentiality of juvenile court proceedings.⁷⁹ Against this backdrop, the Supreme Court finally addressed the constitutionality of the juvenile death penalty head on. In 1987, the Court decided *Thompson v. Oklahoma*, placing an age limit on executions—capital offenders under the age of sixteen could no longer be executed.⁸⁰

Reasonable people may differ in their approach on how to treat young criminals who commit violent crimes, but the bottom line is that their age and level of maturity is a factor that cannot be glossed over—“ignoring this factor entirely is like trying to ignore a very large elephant that has wandered into the room.”⁸¹ The current application of the juvenile death penalty fails to adequately address what should be the focal point—the age, maturity, and thus culpability of the offender.

III. EVOLVING STANDARDS OF DECENCY: *THOMPSON*, *STANFORD*, AND *PENRY*

Over time, the Supreme Court has articulated that the central question in an Eighth Amendment analysis is whether the practice is “cruel and unusual” in light of evolving standards of decency.⁸² In the late 1980’s the Court closely examined the death penalty as

<http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2000/04/16/S C52SUN.DTI>.

77. *Id.*

78. *Id.*

79. *YOUTH ON TRIAL*, *supra* note 28, at 14.

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

81. *YOUTH ON TRIAL*, *supra* note 28, at 30.

82. *See supra* text accompanying notes 52-56.

applied to juveniles and mentally retarded offenders—*Thompson*,⁸³ *Stanford*,⁸⁴ and *Penry*⁸⁵ are the product of that assessment.

A. *Thompson v. Oklahoma*

On January 23, 1983, fifteen year-old William Wayne Thompson and three older accomplices savagely murdered Thompson's former brother in law, Charles Keene.⁸⁶ The crime was premeditated.⁸⁷ The motive (at least in part) was Keene's history of physically abusing Thompson's sister.⁸⁸ Keene was severely beaten before he was shot twice by Thompson—once in the head and once in the abdomen.⁸⁹ Thompson and his fellow accomplices chained Keene to a concrete block and threw his body in the river, but not before Thompson cut his throat, so "the fish could eat his body."⁹⁰

The Court tried fifteen year-old Thompson as an adult and subsequently found him guilty of first degree murder and sentenced him to death.⁹¹ In 1987, Thompson's case came before the Supreme Court.⁹² In a plurality opinion with Justice O'Connor concurring, the Court ruled that it was unconstitutional to execute an offender who committed a crime while under the age of sixteen.⁹³

1. The reasoning of the plurality—Justices Stevens, Brennan, Marshall, and Blackmun

In determining that executing offenders under the age of sixteen was unconstitutional in light of evolving standards of decency, the plurality first examined the practices of the states.⁹⁴ The plurality pointed to the fact that of the eighteen states that had expressly considered the question of a minimum age for imposition of the death penalty, all eighteen passed statutes requiring that the

83. 487 U.S. 815 (1988).

84. 492 U.S. 361 (1989).

85. 492 U.S. 302 (1989).

86. *Thompson*, 487 U.S. at 859 (Scalia, J., dissenting).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 861.

91. *Id.* at 862.

92. *Id.* at 863.

93. *Id.* at 815.

94. *Id.*

defendant must have at least attained the age of sixteen at the time of the capital offense.⁹⁵ Additionally, at the time of the ruling, thirteen states and the District of Columbia had completely outlawed the death penalty.

In contrast, nineteen other states allowed capital punishment and did not have a minimum age for the death penalty⁹⁶ (but two out of the nineteen had not imposed the death penalty since *Furman*).⁹⁷ As a practical matter, since they had not executed anyone in recent history, those two states should be counted among the states that would not execute a minor. Therefore, only seventeen out of fifty-one jurisdictions⁹⁸ would possibly impose the death penalty on a defendant who had committed a crime under the age of sixteen.

However, because a state that failed to set a minimum age could theoretically permit the imposition of the death penalty on children as young as ten years old, the plurality argued that the approach of the nineteen states that allowed capital punishment without reference to a minimum age for its imposition were irrelevant for the purposes of calculating how many states opposed the juvenile death penalty. The plurality explained:⁹⁹

We think it self-evident that such an argument is unacceptable If, therefore, we accept the premise that some offenders are simply too young to be put to death, it is reasonable to put this group of statutes to one side because they do not focus on the question of where the chronological age line should be drawn.¹⁰⁰

Therefore, the plurality found that only the eighteen states that had set a minimum age limit for the death penalty were relevant for the purposes of an “evolving standards of decency” analysis.¹⁰¹

The plurality also found that all states had laws which essentially drew lines between children and adults, thus

95. *Id.* at 829.

96. *See id.* at 826–27 n.25.

97. Those two states are South Dakota and Vermont. *Id.* at 829 n.29.

98. 50 states plus the District of Columbia.

99. *See Federle, supra* note 42, at 467–68.

100. *Thompson*, 487 U.S. at 828–29.

101. *See id.*

demonstrating that the states recognize that children and adults warrant different treatment in the eyes of the law.¹⁰² For example, in no state could a fifteen year-old vote or serve on a jury.¹⁰³ In all but one state, a fifteen year-old could not drive with out the consent of an adult, and in all but four states, a fifteen year-old could not marry without parental consent.¹⁰⁴ The Justices reasoned that “[a]ll of this legislation is consistent with the experience of mankind, as well as the long history of our law, that the normal 15-year-old is not prepared to assume the full responsibilities of an adult.”¹⁰⁵

In addition, the plurality noted that executing children under the age of sixteen would offend civilized standards of decency.¹⁰⁶ This conclusion was consistent with the views of several respected professional organizations and Western European nations including: the American Bar Association, the American Law Institute, (former) West Germany, France, Portugal, the Netherlands, New Zealand and the United Kingdom.¹⁰⁷

Finally, the plurality considered whether capital punishment as applied to juveniles under the age of sixteen would serve to further the “principal social purposes” of the death penalty—retribution and deterrence.¹⁰⁸ The Court concluded that executing such young offenders would further neither purpose.¹⁰⁹ According to the plurality, juveniles are less culpable than adults, and “[g]iven . . . the teenager’s capacity for growth, and society’s fiduciary obligations to its children,” the theory of retribution “is simply inapplicable to the execution of a 15-year-old.”¹¹⁰ Moreover, the plurality recognized that teenagers are less likely to make a cost-benefit analysis before acting. Finally, given the fact that very few children under the age of

102. *Id.* at 824.

103. *Id.*

104. *Id.*

105. *Id.* at 824–25.

106. *See id.* at 830.

107. *See id.* at 830–31.

108. *Id.* at 836.

109. *See id.* at 836–37.

110. *Id.* Moreover, the plurality argued “[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.” *Id.* at 837.

fifteen are executed, the death penalty has a minimal deterrent effect on this class of criminals.¹¹¹

2. O'Connor's tie breaking concurrence

Although she believed that a "national consensus forbidding the execution of any person for a crime committed before the age 16 very likely does exist," Justice O'Connor declined to join the plurality because she did not believe the available evidence was sufficient to make a "conclusion as a matter of constitutional law."¹¹² Rather she believed that Thompson's death sentence should be set aside on narrower grounds.¹¹³ O'Connor's main motivation for reversing the defendant's sentence derived from the statute's deficiency—since the statute was not age-specific, it did not adequately address the important mitigating factor of the defendant's age.¹¹⁴ O'Connor explained that, with non-specific death penalty statutes, there was a significant risk that state legislatures had not thoroughly considered the possibility of execution when proscribing the waiver of juveniles into the adult criminal system.¹¹⁵

The net effect of *Thompson* was to exempt offenders under the age of sixteen from the death penalty. However, one year later in 1989, the *Stanford* court refused to extend death penalty protection to juveniles between the ages of sixteen and seventeen.

B. *Stanford v. Kentucky*

Stanford was a consolidation of two cases: *Stanford v. Kentucky*¹¹⁶ and *Wilkins v. Missouri*.¹¹⁷ In early January 1981, seventeen year-old Kevin Stanford and an accomplice robbed a gas station stealing 300 cartons of cigarettes, two gallons of fuel, and a small amount of cash.¹¹⁸ During the commission of the robbery, the two robbers repeatedly raped and sodomized twenty year-old Barbel Poore, the attendant.¹¹⁹ Stanford and his accomplice then drove her

111. *See id.*

112. *Id.* at 848–49.

113. *Id.* at 849.

114. *See id.* at 857–58.

115. *Id.* at 857; *See Federle, supra* note 42, at 469.

116. 492 U.S. 361, 361 (1989).

117. *Id.* at 361.

118. *Id.* at 365.

119. *Id.*

to a secluded area where Stanford shot the victim two times—once in the face, and once in the back of the head.¹²⁰ At trial a corrections officer testified, offering an explanation of why Stanford murdered the young woman, “[H]e said, I had to shoot her, [she] lived next door to me and she would recognize me”¹²¹ The facts of the companion case were just as brutal, except this time the defendant was only sixteen years old when he viciously murdered his victim.¹²²

1. The *Stanford* plurality

Again, the Court was splintered, but this time the four Justices that dissented in *Thompson* (Justices Scalia, White, Kennedy and Chief Justice Rehnquist) announced the plurality decision.¹²³ The four Justices that voted to outlaw executing fifteen year-olds (Justices Brennan, Stevens, Blackmun, and Marshall) dissented.¹²⁴ O’Connor, acting yet again as the tie breaker, concurred.¹²⁵

The plurality once again looked to evolving standards of decency, but this time only whether the state allowed or forbade the juvenile death penalty was factored into their “prevailing standard of decency” analysis. The Court did not consider the states’ legislative

120. *Id.*

121. *Id.*

122. Here, Heath Wilkins planned to rob a convenience store and murder “whoever was behind the counter” because “a dead person can’t talk.” *Id.* at 366. Wilkins’ accomplice held down twenty-nine year-old Nancy Allen while Wilkins stabbed her. *Id.* When the accomplice had trouble opening the cash register, Allen spoke up to assist him. *Id.* Wilkins responded by stabbing her three times in the chest. *Id.* When the victim begged for her life, Wilkins stabbed her four more times in the neck. *Id.* The two left her on the floor to die making off with approximately \$450 dollars and some liquor and cigarettes. *Id.*

123. *Id.* at 364.

124. *Id.* at 392.

125. O’Connor agreed with the plurality that death sentences of Stanford and Wilkins “should not be set aside because 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. (O’Connor, J. concurring). However, she urged that when addressing the constitutionality of the death penalty as applied to a particular class, the Court has a “constitutional obligation to conduct proportionality analysis.” *Id.* at 382. In other words, O’Connor endorsed an approach in which the Court assessed legislative actions of the state and judged whether the “nexus between the punishment imposed and the defendant’s blameworthiness’ is proportional.” *Id.*

treatment of juveniles in other respects.¹²⁶ As a result, the plurality ultimately concluded that defendants had failed to prove that a national consensus existed in opposition to the juvenile death penalty.¹²⁷ In direct contrast to the reasoning of *Thompson*, the plurality in this case reasoned that state laws which set the legal age at eighteen and above for adult activities such as voting, driving and drinking alcoholic beverages are irrelevant.¹²⁸ The Court explained, “It is . . . absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong.”¹²⁹ Moreover, the plurality reasoned that these statutes are irrelevant because they operate in gross, for efficiency reasons, and do not “conduct individualized maturity tests for each driver, drinker, or voter.”¹³⁰ The criminal justice system, on the other hand, does address the age and maturity level of offenders individually, “[i]n the realm of capital punishment in particular, ‘individualized consideration [is] a constitutional requirement.’”¹³¹ The plurality supported this contention by citing to twenty-nine states (including Kentucky and Missouri) that have laws that specifically designate age as a mitigating factor in capital cases.¹³²

The plurality also rejected the argument that various professional legal associations, public interest groups, and public opinion should be considered when determining a consensus.¹³³ In addition, the plurality declared that sentencing practices of foreign countries were completely irrelevant, emphasizing that in Eighth Amendment analysis “it is *American* conceptions of decency that are dispositive.”¹³⁴ Finally, the plurality refused to entertain arguments addressing the “goals of penology” and the efficacy of the death penalty in meeting those goals.¹³⁵ According to the plurality:

126. *See id.* at 370–73.

127. *See id.*

128. *Id.* at 374.

129. *Id.*

130. *Id.*

131. *See id.* at 375 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

132. *Id.*

133. *See id.* at 377.

134. *Id.* at 369 n.1.

135. *Id.* at 377.

The audience for these arguments . . . is not this Court but the citizenry of the United States. It is they, not we, who must be persuaded [O]ur job is to *identify* the “evolving standards of decency”; to determine, not what they *should* be, but what they *are*.¹³⁶

a. playing with numbers: evolving standards of decency as evidenced by the decisions of the states’ legislatures

According to the plurality, the most definitive indicator of evolving standards of decency are the laws passed by state legislatures.¹³⁷ The plurality noted that out of the thirty-seven states (as of 1989 when this case was decided) whose laws permitted capital punishment, twelve declined to impose it on minors.¹³⁸ The plurality declared “[t]his does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual.”¹³⁹

Upon closer inspection, it appears that the plurality may have skewed its calculations to achieve a desired result. When addressing whether a consensus existed, the plurality did not include those states which had already abolished the death penalty.¹⁴⁰ It is illogical not to include these states into the calculus. As Amnesty International posits:

[A] state which does not allow the execution of anyone, juvenile or adult, has by definition taken a stronger stand against the death penalty than by only exempting youthful offenders from it [I]n the event of a decision to reinstate the death penalty, such a state would exempt children from its scope.¹⁴¹

Thus, in actuality, there was a fifty-fifty split among the states. When *Stanford* was decided twenty-five states still imposed the

136. *Id.* at 378.

137. *Id.* at 370.

138. *Id.*

139. *Id.*

140. *See id.* at 370–71.

141. *United States of America, Indecent and Internationally Illegal: The Death Penalty Against Child Offenders, Abridged Version*, AMNESTY INT’L, Sept. 25, 2002, at 5 [hereinafter AMNESTY INTERNATIONAL].

death penalty on offenders under the age of eighteen.¹⁴² Of the death penalty states, twelve refused to impose it against juveniles and thirteen states had completely outlawed capital punishment—in other words, twenty-five states had completely eradicated the juvenile death penalty.¹⁴³ Only three states allowed the execution of sixteen year-olds. The dissent saw this manipulation and argued that the plurality's "discussion of state laws concerning capital sentencing . . . gives a distorted view of the evidence of contemporary standards that these legislative determinations provide."¹⁴⁴ The dissent advocated including the District of Columbia in the calculus, and argued that those states that had completely outlawed the death penalty should be counted.¹⁴⁵ The balance tips further if the federal death penalty (which does not allow the execution of minors) is also counted.¹⁴⁶ With this approach, a consensus becomes clear—twenty-five jurisdictions willing to impose the death penalty on juvenile offenders compared with twenty-seven jurisdictions that would not do so.

C. *Penry v. Lynaugh*

Numerous parallels exist between the Court's analysis in *Penry* and *Stanford*. The Court has since rejected the reasoning of *Penry*, overruling its holding with the recent *Atkins* opinion.¹⁴⁷ A logical extension of this reasoning would be for the Court to also reject the reasoning of *Stanford*, and thus find the execution of minors unconstitutional.

1. The death penalty and mentally retarded offenders

On the same day that the Court decided *Stanford*, it also concluded that there was insufficient evidence of a national consensus against executing mentally retarded people to establish that the Eighth Amendment categorically prohibits it.¹⁴⁸

142. See *Stanford*, 492 U.S. at 370.

143. *Id.* at 384. (Brennan, J., dissenting).

144. *Id.*

145. See *id.*

146. See *id.*

147. See *Atkins v. Virginia*, 536 U.S. 304, 311–21 (2002).

148. *Penry v. Lynaugh*, 492 U.S. 302 (1989) (Here the majority consisted of O'Connor, Scalia, White, Kennedy, and Chief Justice Rehnquist.).

In October of 1979, twenty-two year-old Paul Penry raped, beat and then stabbed Pamela Carpenter with a pair of scissors.¹⁴⁹ Before standing trial for the murder of Carpenter, Penry underwent a competency hearing.¹⁵⁰ A clinical psychologist testified that Penry had a mental age of a six-and-a-half year-old.¹⁵¹ Nevertheless, a jury determined that he was competent to stand trial.¹⁵² In other words, the jury found that Penry had “the ability to consult with his lawyer with a reasonable degree of rational understanding,” and that he had “a rational as well as factual understanding of the proceedings”¹⁵³ The jury also rejected Penry’s insanity defense and by doing so, it concluded “that Penry knew that his conduct was wrong and was capable of conforming his conduct to the requirements of the law.”¹⁵⁴

The majority cited the common law prohibition against punishing “idiots” for their crimes.¹⁵⁵ According to the majority, this common law prohibition suggested that “it may indeed be ‘cruel and unusual’ punishment to execute persons who are profoundly or severely retarded”¹⁵⁶ Nevertheless, the majority argued that, because of the insanity defense, defendants with such extreme mental deficiencies will most likely not have to face conviction or punishment.¹⁵⁷ This is because those defendants will either be found incompetent to stand trial or will be found not guilty by reason of insanity or mental disease or defect. Here, though, Penry had been found both competent to stand trial and sane at the time of his crime.¹⁵⁸

The *Penry* Court reiterated that the “clearest and most reliable objective evidence of contemporary values [of evolving standards of

149. *Id.* at 307.

150. *Id.*

151. In other words, Penry had “the ability to learn and the learning or the knowledge of an average 6½ year old.” *Id.* at 308.

152. *Id.*

153. *Id.* at 333.

154. *Id.*

155. Although there was no one definition of idiocy at common law, the Court noted that the term “idiot” was generally used in reference to people “who had a total lack of reason or understanding, or an inability to distinguish between good and evil.” *Id.* at 331–32.

156. *Id.* at 333.

157. *See id.*

158. *Id.*

decency] is the legislation enacted by the country's legislatures."¹⁵⁹ At the time *Penry* was decided, only two states had enacted statutes banning the execution of mentally retarded persons.¹⁶⁰ Not surprisingly, the Court held that "two state statutes prohibiting execution of the mentally retarded, even when added to the fourteen States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus."¹⁶¹

In addition, the Court reasoned (as they did in *Stanford*) that public opinion surveys expressing opposition to the execution of mentally retarded criminals, as well as opposition by respected professional groups, were not sufficient to establish a national consensus.¹⁶² The Court took the stance that although such data may reflect a growing sentiment, it would not be considered by the Court because the only objective indicator of contemporary values is state legislation.¹⁶³ The Court, however, indicated that it would be willing to consider the behavior of juries in its calculus of evolving standards of decency.¹⁶⁴ Nevertheless, because *Penry* did not offer such evidence, this factor went unconsidered.¹⁶⁵

As in *Stanford*, the majority also rejected arguments dealing with penological goals.¹⁶⁶ Both *Penry* and various amici argued 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."¹⁶⁷ Therefore, they claimed that execution of mentally retarded people would serve "no valid retributive purpose."¹⁶⁸ The Court was unwilling to conclude that "all mentally retarded people . . .

159. *Id.* at 331.

160. Those two states are Maryland and Georgia. *Id.* at 334.

161. *Id.*

162. *Id.* at 334–35.

163. "The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely." *Id.* at 335.

164. The majority stated that "[i]n discerning those 'evolving standards' . . . [w]e have also looked to data concerning the actions of sentencing juries." *Id.* at 331. However, note that the *Stanford* plurality virtually ignored this evidence. See *Stanford*, 492 U.S. 361 (1989).

165. See *Penry*, 492 U.S. at 335–39.

166. See *id.* at 336–39.

167. *Id.* at 336.

168. *Id.* at 337.

inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty.”¹⁶⁹ The Court acknowledged that the degree of disability varies among mentally retarded persons.¹⁷⁰ However, the Court argued that giving mentally retarded persons blanket immunity to the death penalty could actually result in greater stigmatization, thereby setting a precedent to limit their rights.¹⁷¹ Moreover, the majority reiterated that both competency hearings and the insanity defense would act as safe-guards to ensure that retribution and deterrence would be effective for higher functioning mentally retarded criminals.¹⁷²

III. *ATKINS V. VIRGINIA* AND ITS APPLICATION TO JUVENILES

In June 2002, the Supreme Court re-addressed the constitutionality of executing mentally retarded offenders.¹⁷³ Citing *Penry*, the Court focused on the activities of state legislatures to determine whether a consensus existed against executing the mentally retarded.¹⁷⁴ Since *Penry* was handed down, sixteen states have passed legislation prohibiting such executions.¹⁷⁵ As a result, a total of eighteen death penalty states prohibited the execution of mentally retarded offenders. Adding that figure to the twelve states that prohibit the death penalty entirely, the resulting ratio of thirty to twenty emerges: thirty states would not permit the execution of a mentally retarded defendant, while twenty states would.

Nevertheless, the Court stated that it was “not so much the number of these States that is significant, but the consistency of the direction of change.”¹⁷⁶ In other words, the Court found the combination of the “large number of States prohibiting the execution

169. *Id.* at 338.

170. *Id.* The Court used the report of an amicus group to support its contention. The American Association of Mentally Retarded (AAMR) provided evidence that although mentally retarded individuals “share the common attributes of low intelligence and inadequacies in adaptive behavior there are marked variations in the degree of deficit” *Id.*

171. *See id.* at 340. For example, mentally retarded people as a class could be denied the right to marry or enter contracts.

172. *See id.* at 337–38.

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

174. *Id.* at 312.

175. *Id.* at 314–15. The court also noted that at least three other states have had similar legislation pass through at least one house. *Id.* at 315.

176. *Id.* at 315.

of mentally retarded persons” and the “complete absence of States passing legislation” to reinstate such executions was compelling evidence that “today our society views mentally retarded offenders as categorically less culpable than the average criminal.”¹⁷⁷ Furthermore, the Court noted that “even in those States that allow the execution of mentally retarded offenders, the practice is uncommon.”¹⁷⁸ Thus, the Court concluded the execution of mentally retarded offenders “has become truly unusual, and it is fair to say that a national consensus has developed against it.”¹⁷⁹

The Court then added a footnote addressing where this left juvenile executions. The Court wrote:

A comparison of *Stanford v. Kentucky*, in which we held that there was no national consensus prohibiting the execution of juvenile offenders over age 15, is telling. Although we decided *Stanford* on the same day as *Penry*, apparently only two state legislatures have raised the threshold age for imposition of the death penalty.¹⁸⁰

A. A Current Consensus Against Juvenile Executions

Although the trend against banning juvenile executions is less recent and pronounced, this does not mean that it does not exist.¹⁸¹ In the thirteen years since the 1989 *Stanford* and *Penry* rulings, fewer states have banned juvenile executions than those who have enacted legislation banning the execution of mentally retarded.¹⁸² This result however, can be explained by realizing that “the states had farther to go in outlawing the execution of the mentally retarded.”¹⁸³ Moreover, the “direction” of change against banning juvenile executions remains constant.¹⁸⁴

It is also arguable that there is legislative consensus against juvenile executions. By including those states that completely

177. *Id.* at 315–16.

178. *Id.*

179. *Id.*

180. *Id.* at 315 n.18.

181. Appellant’s Petition for Certiorari at 7, *Patterson v. Texas*, 536 U.S. 984 (2002) *cert. denied*, 71 U.S.L.W. 3162 (U.S. Aug. 28, 2002) (No. 02-6010). [hereinafter *Patterson Brief*].

182. *Id.*

183. *Id.*

184. *Id.*

prohibit the death penalty in the count, the following ratio results: twenty-eight to twenty-two. In other words, twenty eight states will not execute offenders under the age of eighteen, while twenty-two states still allow the execution of minors. Thus, 56% of the states will not execute minors. This development, however, is not as dramatic as the change in the states' attitudes towards the execution of mentally retarded defendants. Nevertheless, as the *Atkins* Court discussed, it was the "consistency of the direction" of change, which they found to be compelling.¹⁸⁵

This "consistency and direction" is more dramatically demonstrated when looking at how state courts have actually imposed the death penalty on juveniles than by examining the formal actions of the legislature. In the modern death penalty era (i.e. since *Furman*) only twenty-two people have been executed for crimes that they committed as juveniles.¹⁸⁶ This constitutes a mere 2.6% of the total of approximately 800 executions that have occurred in the United States in that time period.¹⁸⁷ Of those twenty-two people executed, only one of the defendants was sixteen when he committed murder—Sean Sellers.¹⁸⁸ In fact, the execution of Sean Sellers was the first time in forty years that a defendant has been executed for a crime committed while under the age of seventeen.¹⁸⁹

Furthermore, since *Stanford*, seventeen of the twenty-two juvenile death penalty states have sentenced a person to death for a crime that was committed while under the age of eighteen.¹⁹⁰ However, two of those seventeen states reversed those sentences and

185. *Atkins*, 536 U.S. at 315.

186. *Strieb Web Report supra* note 69. Eighteen of those executions have occurred since the 1989 rulings of *Stanford* and *Penry*. Adam Liptak, *3 Justices Call for Reviewing Death Sentences for Juveniles*, N.Y. TIMES, Aug. 30, 2002, at A1. But note that of those states that authorized the execution of the mentally retarded, only five offenders were executed in the years between *Penry* and *Atkins*. *See id.*

187. *Strieb Web Report, supra* note 69.

188. *Id.*

189. *Juveniles Executed in the U.S. Since 1976*, Death Penalty Info Center, at <http://www.deathpenaltyinfo.org/article.php?scid=27&did=206> (last visited Sept. 28, 2003). Sean Sellers was executed in Oklahoma on February 4, 1999. *Id.* The last sixteen year old offender executed was Leonard Shockley who died in Maryland's gas chamber in 1959. *Id.* Although the companion case to *Stanford* involved the execution of a defendant who committed a crime at the age of sixteen, he has not been executed. *See id.*

190. *See Strieb Web Report, supra* note 69.

have not imposed a juvenile death penalty since, leaving only fifteen states that actively impose the death penalty on juvenile offenders.¹⁹¹ Moreover, since *Stanford*, only six states have actually executed a juvenile offender.¹⁹² In addition, it seems that juries are less inclined to impose death sentences. Fourteen minors were given a death sentence in 1999, seven in 2001, four in 2002 and only two juveniles were given a death penalty sentence in 2003.¹⁹³ This lack of frequency is telling.

Current public opinion also demonstrates that the majority of American citizens are against the execution of juveniles. A recent CNN/USA Today/Gallup poll found that although 64% of Americans support the death penalty in general, 69% of Americans oppose the application of the death penalty to juvenile offenders.¹⁹⁴

THE CURRENT CONSENSUS:

DEATH PENALTY AS APPLIED TO JUVENILE OFFENDERS

<i>STATES THAT DO NOT EXECUTE JUVENILE OFFENDERS</i>		<i>STATES THAT DO EXECUTE JUVENILE OFFENDERS</i>	
STATES WITH 18 AS THE MINIMUM AGE FOR DEATH PENALTY ELIGIBILITY:	16 (17 including Federal Jurisdiction)	STATES WITH 16 AS THE MINIMUM AGE FOR DEATH PENALTY ELIGIBILITY:	17
STATES WITHOUT DEATH PENALTY:	12 (13 including the District of Columbia)	STATES WITH 17 AS THE MINIMUM AGE FOR DEATH PENALTY ELIGIBILITY:	5
<i>TOTAL</i> : ¹⁹⁵	28 (30 including D.C. and Fed. Juris.)	<i>TOTAL</i> : ¹⁹⁶	22

191. *Id.* Washington and Kentucky imposed death sentences on juvenile offenders but the state supreme courts have reversed each sentence. *Id.*

192. *See id.* The six states are Texas, Louisiana, Missouri, Georgia, Virginia, and Oklahoma.

193. *Mears supra* note 18.

194. Bill Mears, *Supreme Court Not Ready to Debate Execution of Juveniles*, CNN, Jan. 29, 2003 at <http://www.cnn.com/2003/LAW/01/29/scotus.deathpenalty/index.html>.

195. The following states have outlawed the death penalty as applied to juveniles: 1) California, 2) Colorado, 3) Connecticut, 4) Illinois, 5) Indiana,

DEATH PENALTY AS APPLIED TO MENTALLY RETARDED OFFENDERS

STATES THAT DID NOT EXECUTE MENTALLY RETARDED OFFENDERS		STATES THAT DID EXECUTE MENTALLY RETARDED OFFENDERS	
STATES THAT DID NOT APPLY DEATH PENALTY TO MENTALLY RETARDED OFFENDERS:	18 (19 including Federal Jurisdiction)	STATES THAT DID EXECUTE MENTALLY RETARDED OFFENDERS:	20
STATES WITHOUT DEATH PENALTY:	12 (13 including District of Columbia)	_____	_____
TOTAL: ¹⁹⁷	30 (32 including D.C. and Fed. Juris.)	TOTAL: ¹⁹⁸	20

6) Kansas, 7) Maryland, 8) Montana, 9) Nebraska, 10) New Jersey, 11) New Mexico, 12) New York, 13) Ohio, 14) Oregon, 15) Tennessee, and 16) Washington. *Streib Web Report, supra* note 69. Under Federal jurisdiction, juveniles cannot be executed. Twelve states have completely outlawed the death penalty: 1) Alaska 2) Hawaii 3) Iowa 4) Maine 5) Massachusetts, 6) Michigan, 7) Minnesota, 8) North Dakota, 9) Rhode Island, 10) Vermont, 11) West Virginia, and 12) Wisconsin. *Id.* The District of Columbia has also outlawed the death penalty for all age groups. *Id.*

196. The following states have age sixteen as the minimum age for death penalty eligibility: 1) Alabama, 2) Arizona, 3) Arkansas, 4) Delaware, 5) Idaho, 6) Kentucky, 7) Louisiana, 8) Mississippi, 9) Missouri, 10) Nevada, 11) Oklahoma, 12) Pennsylvania, 13) South Carolina, 14) South Dakota, 15) Utah, 16) Virginia, and 17) Wyoming. *Id.* Five states have age seventeen as the minimum age for death penalty eligibility: 1) Florida, 2) Georgia, 3) New Hampshire, 4) North Carolina, 5) Texas. *Id.*

197. The following states have outlawed the death penalty as applied to mentally retarded offenders: 1) Arizona, 2) Arkansas, 3) Colorado, 4) Connecticut, 5) Florida, 6) Georgia, 7) Indiana, 8) Kansas, 9) Kentucky, 10) Maryland, 11) Missouri, 12) Nebraska, 13) New Mexico, 14) New York, 15) North Carolina, 16) South Dakota, 17) Tennessee, and 18) Washington.

198. The following states did execute mentally retarded offenders: 1) Alabama, 2) California, 3) Delaware, 4) Idaho, 5) Illinois, 6) Louisiana, 7) Mississippi, 8) Montana, 9) Nevada, 10) New Hampshire, 11) New Jersey,

B. Additional Atkins Factors and Their Application to Juveniles

In stark contrast with its approach in *Penry*, the Court in *Atkins* reflected on the approaches of other nations and professional organizations.¹⁹⁹ In one footnote, the Court considered that several organizations had adopted official positions opposing the execution of the mentally retarded.²⁰⁰ The Court also found the practice and attitudes of other nations to be persuasive, writing that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”²⁰¹

1. A world consensus

Many of the same organizations cited by the *Atkins* majority (and other similar organizations) have also spoken out against the juvenile death penalty, including: the American Bar Association, the National Parents and Teachers Association, the American Society for Adolescent Psychiatry, the American Psychiatric Association, the National Mental Health Association, the American Baptist Church, the American Jewish Congress, General Assembly of the Presbyterian Church, Southern Christian Leadership, and the United States Catholic Conference.²⁰²

Moreover, the United States’ continued protection of juvenile executions is “increasingly out of step with international standards of decency and established international law.”²⁰³ Since 1990, approximately 56% of the world’s known juvenile executions have taken place in the United States.²⁰⁴ The others took place in the

12) Ohio, 13) Oklahoma, 14) Oregon, 15) Pennsylvania, 16) South Carolina, 17) Texas, 18) Utah, 19) Virginia, 20) Wyoming.

199. See *supra* text accompanying notes 133–36.

200. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). The APA, the AAMR and in addition, representatives of widely diverse religious communities also spoke out against the death penalty as applied to this class.

201. *Id.* at 317 n.21.

202. See generally, Brief for Appellant at 38–41, *Missouri v. Simmons*, (Mo. 2002) (No. SC84454) [hereinafter *Simmons Brief*] (citing amicus briefs submitted on behalf of Kevin Stanford and other recent groups that have spoken out).

203. Drizin and Harper, *supra* note 76.

204. AMNESTY INTERNATIONAL, *supra* note 131, at 25.

Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, and Yemen.²⁰⁵ Both Yemen and Pakistan have since abolished the death penalty, and the Democratic Republic of Congo has instated a moratorium on juvenile executions.²⁰⁶

The United Nations Convention on the Rights of Children (Article 37(a)) provides that “[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”²⁰⁷ The United States is the only country that has failed to ratify this agreement, “in large part because of our [the United States’] desire to remain free to retain the death penalty for juvenile offenders.”²⁰⁸

C. Culpability, Penology, and Lack of Procedural Protection

The *Atkins* Court also discussed three other factors that serve to justify the prohibition against executing mentally retarded offenders: The culpability of mentally retarded offenders, the penological utility of executing mentally retarded offenders, and the lack of procedural protections where a mentally retarded defendant faces the death penalty.²⁰⁹

1. Diminished culpability of mentally retarded and juveniles

The *Atkins* Court reasoned, that although many mentally retarded individuals are capable of distinguishing between right and wrong and are competent to stand trial, this does not necessarily mean that they are deserving of the ultimate punishment. “Because of their impairments . . . they [the mentally retarded] have diminished capacities to understand and process information . . . to abstract from mistakes . . . [to] learn from experience, to engage in logical reasoning . . . and to understand the reactions of others.”²¹⁰

While the same is not necessarily true for juveniles, both classes share a common deficiency, which the *Atkins* court also found to be

205. *Id.*

206. *Id.*

207. *Streib Web Report*, *supra* note 69.

208. *Id.* This uniquely American practice is also in conflict with various other international laws and treaties including: Article 6 of the International Covenant on Civil and Political Rights, the Geneva Conventions. *See* AMNESTY INTERNATIONAL, *supra* note 141, at 25–27.

209. *See Atkins v. Virginia*, 536 U.S. 304, 317–21 (2002).

210. *Id.* at 318.

persuasive.²¹¹ Juveniles and the mentally retarded both lack impulse control.²¹²

Within the past decade, neuroscientists have discovered that the adolescent brain is far from mature, instead the “teenage brain is a work in progress.”²¹³ One of the last parts of the brain to develop is the prefrontal cortex.²¹⁴ Known as the “supervisor of the brain,” the prefrontal cortex is what “separates man from beast,” regulating emotions and allowing us to make judicious decisions.²¹⁵ Evidence is constantly emerging that brain development continues beyond the age of eighteen.²¹⁶ After studying brain scans, the National Institute of Mental Health has found that there is a defined difference in the frontal lobes of those between the ages of twelve to sixteen and twenty-three to thirty.²¹⁷ This difference suggests that teenagers have a slower maturation of cognitive processing and other “executive” functions.²¹⁸

This biological insight helps explain what we already know. Teenagers behave with limited awareness of the consequences of their actions. As the dissenters in *Stanford* wrote, “[M]inors are treated differently from adults in our laws, which reflects the simple truth derived from communal experience that juveniles as a class have not the level of maturation and responsibility that we presume in adults”²¹⁹

211. *See id.*

212. *See id.*; *see also* Simmons Brief, *supra* note 202, at 4–8 (discussing an adolescent’s lack of brain development as a basis for poor impulse control and decision making).

213. Shannon Brownlee, *Inside the Teen Brain*, U.S. NEWS & WORLD REPORT, Aug. 9, 1999, at 46.

214. *See* Simmons Brief, *supra* note 202, at 5.

215. *See id.* at 4–16.

216. *United States of America: Indecent and Internationally Illegal, the Death Penalty against Child Offenders, Abridged version*, Sept. 25, 2002, at 14.

217. *See also* Patterson Brief, *supra* note 181, at 13–14 (quoting Dr. Ruben C. Gur on his findings on the maturation of the adult brain versus the adolescent brain).

218. *See id.*

219. *In re* Kevin Nigel Stanford, 537 U.S. 968 (2002) (Stevens, J., dissenting) (quoting J. Brennan’s dissent in the original *Stanford*). With all of these arguments in mind, the question arises, why draw the line at eighteen? The Stanford dissenters have addressed this issue:

2. Penological utility

It is this lack of impulse control, and thus culpability that renders the death penalty futile in terms of penological theory when applied to either the mentally retarded or juvenile offenders. According to *Atkins*, “[u]nless the imposition of the death penalty” measurably serves a punitive or deterrent function, “‘it is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment.”²²⁰ The death penalty can only act as a deterrent when murder is a result of premeditation and calculation.²²¹ Therefore, its imposition could not possibly accomplish any of the penological goals which might justify such a severe punishment.

3. Lack of procedural protection

Not only did the Court recognize that the death penalty for the mentally retarded lacked positive utilitarian value, but the Court also acknowledged that its imposition carried inherent serious risks.²²² The Court declared that “mentally retarded defendants in the aggregate face a special risk of wrongful execution.”²²³ This risk derives from the possibility of coerced confessions, diminished ability of mentally retarded defendants to assist in their own defense,

Insofar as age 18 is a necessarily arbitrary social choice as a point ‘at which to acknowledge a person’s maturity and responsibility, given the different developmental rates of individuals, it is in fact ‘a conservative estimate of the dividing line between adolescence and adulthood’

Id. at 971.

The answer is that we have to draw the line somewhere and “[eighteen] is the dividing line that society has generally drawn, the point at which it is thought reasonable to assume that persons have an ability to make . . . [and] bear responsibility for their judgments.” *Id.* Making eighteen the cut off age will also resolve any inconsistencies in death penalty application caused by the juvenile waiver system. Finally, eighteen is the cut off age dictated by the United Nations. By elevating the cut off age, the United States will fall in line with almost every other nation in the world. *See supra* text accompanying footnotes 203–08.

220. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

221. *See id.*

222. *See id.* at 321.

223. *Id.*

and the difficulties they face making a persuasive showing of mitigating factors.²²⁴

Several of these risks apply equally to juvenile offenders. First, like people with mental retardation, juvenile offenders may be more vulnerable to making false confessions than a more experienced adult.²²⁵ Second, at the trial stage, rather than acting as a mitigating factor, the youthfulness of an offender may in fact become a “double edged sword that may increase the likelihood that the jury will view the defendant as a dangerous individual”²²⁶ Finally, a youthful offender will be hard pressed to demonstrate background generally presented in criminal sentencing as “typical” mitigation evidence (i.e. a positive work history, being a supportive parent, or having meaningful relationships with friends and family) simply because they have not lived long enough to develop this history.²²⁷ Therefore, as with the mentally retarded, there is a significant risk of wrongful execution of juvenile offenders.

In addition, the procedures that allow juvenile offenders to be waived out of juvenile court and tried as adults leave room for inconsistencies in the application of the juvenile death penalty. Judges have significant discretion when it comes to deciding whether to waive a juvenile into adult court.²²⁸ This level of discretion creates a risk of masking discrimination of minority offenders.²²⁹ In addition, many times the decision to transfer a minor may be based on bureaucratic reasons, rather than on an individual determination

224. *Id.* at 320–21.

225. AMNESTY INTERNATIONAL, *supra* note 141, at 17. Without a lawyer present, seventeen year-old Toronto Patterson gave police a statement where he implicated himself but did not admit to murdering the victims. *Id.* at 22. The police then aggressively interrogated him. Patterson asked for a lawyer and for the interrogation to be recorded. The police did not oblige him. After four hours of being incommunicado he confessed to the murders. *Id.* A month later, another suspect confessed to the same crime after the same police officers employed similar tactics. That suspect’s confession was later deemed false and he was exonerated. The jury in Patterson’s case was not allowed to hear the evidence of this other suspect’s confession. Patterson maintained his innocence until he was executed on August 28, 2002. *Id.*

226. *Id.* at 19.

227. See Simmons Brief, *supra* note 202, at 23.

228. See Federle, *supra* note 42, at 448.

229. See *generally id.* (addressing the inherent flaws of the current juvenile waiver system and the implications on the application of the death penalty).

of blameworthiness.²³⁰ In short, there are no guarantees that only the most culpable minors will be tried as adults.²³¹ Thus, the youthfulness of an offender may often act as an aggravator during the penalty stage of prosecution. Nevertheless, the Supreme Court has repeatedly glossed over the issue of the juvenile waiver system when addressing the legitimacy of the juvenile death penalty.²³²

D. Necessity of a Legislative Consensus

In conformity with its earlier opinions, the *Atkins* Court stated that the additional factors considered “are by no means dispositive” The Court further explained, however, that their “consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.”²³³ In other words, it seems that the Court will only consider these factors (opinions of professional groups, the approach of foreign nations, degree of culpability, penological utility, and lack of procedural protection) as persuasive *after* a legislative consensus has been established. Yet one question remains—what will it take for the Court to finally recognize that a consensus exists? The Court has declined to find one thus far. Half of the states had already prohibited the execution of juveniles when *Stanford* was decided, yet this was not sufficient.²³⁴ Although the movement against the juvenile death penalty is not as dramatic as the movement against the execution of the mentally retarded, the direction and consistency of the change is the same.

230. *See id.*

231. A development of this theory could pave the way for a *Furman* type argument. Conceivably, if the Court accepts that the juvenile death penalty is applied inconsistently, i.e., in an “arbitrary and capricious manner,” *Furman v. Georgia*, 408 U.S. 238 (1962), it could be suspended. The hope would be that during this suspension a number of the remaining death penalty states would change their approaches and eventually ban the execution of minors. This, of course, would lead the Court to determine that a consensus has developed. Thus, it would allow the Court to make the next move in step with its *Atkins* decision—declaring executions of minors to be unconstitutional.

232. Federle, *supra* note 42, at 452. In fact, the Supreme Court has not examined the constitutionality of the waiver system since the 1966 decision in *Kent v. United States*. *Id.*

233. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

234. *See supra* text accompanying notes 140-43.

V. CONCLUSION

Thus, despite any arguments that establish that juveniles are in an analogous position to that of the mentally retarded, it is clear from the Supreme Court's stance that, as a practical matter, the key to destroying the juvenile death penalty lies with state legislatures. Once a national "consensus is established" the rest will fall into place.

The legitimacy of this approach, however, is questionable because it "return[s] the task of defining the contours of Eighth Amendment protection to political majorities."²³⁵ The purpose of the Bill of Rights was to remove certain fundamental rights from the reach of the political process and elevate them to the highest level of protection.²³⁶ "The promise of the Bill of Rights goes unfulfilled when we leave '[c]onstitutional doctrine [to] be formulated by the acts of those institutions which the Constitution is supposed to limit.'"²³⁷

It is ironic that only after a consensus is established by the states will the Court look closely at what should be the focal point of the Eighth Amendment analysis—culpability and penological utility. The Court, however, has clearly indicated that it will not consider these factors until after the states have taken their positions. By using this approach, the Court has limited its authority—circumventing its inherent power to elevate its definition of what is truly cruel and unusual above the definition given by a consensus of the states.

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235. *Stanford v. Kentucky*, 492 U.S. 361, 391 (1989) (Brennan, J., dissenting).

236. *See id.* (citing *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("[T]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.")).

237. *Id.* at 392.

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