Relying on Atkins v. Virginia as Precedent to Find the Juvenile Death Penalty Unconstitutional: Perpetuating Bad Precedent?

Audra M. Bogdanski

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RELYING ON ATKINS V. VIRGINIA AS PRECEDENT TO FIND THE JUVENILE DEATH PENALTY UNCONSTITUTIONAL: PERPETUATING BAD PRECEDENT?

I. INTRODUCTION

In June of 2002, the Supreme Court decided Atkins v. Virginia,\(^1\) thereby declaring the imposition of death sentences on mentally retarded defendants to be violative of the Eighth Amendment’s ban on “cruel and unusual punishment.”\(^2\) Atkins marked the reversal of Penry v. Lynaugh,\(^3\) decided in 1989, which held that the Eighth Amendment does not categorically preclude the execution of mentally retarded defendants, so long as juries are permitted to both “consider and give effect to mitigating evidence of mental retardation in imposing sentence.”\(^4\) The Atkins decision, which drew extensively upon the 1988 case of Thompson v. Oklahoma\(^5\) where the Court found unconstitutional the death sentence of an individual who had committed murder at the age of fifteen, has led many to wonder if the Supreme Court, and perhaps even the American populace, is growing increasingly disenchanted with capital punishment.\(^6\)

Although the Atkins court stated that the sort of national consensus that it discerned against the execution of mentally retarded individuals has apparently not yet developed with respect to juvenile offenders,\(^7\) there is, nonetheless, reason to believe that the Court will soon revisit the constitutionality of the juvenile death penalty, especially in light of the publicity that has recently surrounded the practice. On January 21, 2003, Lee Malvo, the seventeen-year-old Washington-area sniper suspect, was indicted by a Virginia grand jury for capital murder.\(^8\) Because Virginia does not

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2. The Eighth Amendment states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.
4. Id. at 340.
6. See, e.g., The Ebbing of Death, THE ECONOMIST, June 29, 2002, at 47 (suggesting that “America’s long love affair with death [may] be cooling.”).
specify a minimum age in its capital punishment statute, Malvo faced the death penalty. On December 18, 2003, a Virginia jury convicted Malvo of "capital murder, terrorism, and weapons charges." Although the jury ultimately spared Malvo's life, it was deadlocked over the decision for nine hours over the course of two days, and at least five of the twelve jurors favored a death sentence.

At least four Supreme Court Justices favor the abolition of the juvenile death penalty, as evidenced by the vigorous dissent, written by Justice Stevens and joined by Justices Souter, Ginsburg, and Breyer, from the Court's recent denial of Kevin Stanford's petition for habeas corpus relief. Stanford was seventeen years old when he committed capital murder. The dissenters asserted that the very same reasons that led the Court in Atkins to declare the execution of mentally retarded persons unconstitutional "apply with equal or greater force to the execution of juvenile offenders." The argument espoused by the dissenters, as well as by death penalty abolitionists, is that imposing capital punishment on juvenile defendants is particularly egregious, due, in part, to what they perceive to be the reduced culpability of individuals under the age of eighteen. Because adolescents are generally believed to lack the cognitive maturity of adults, they are less able to engage in reasoned value judgment, they are more susceptible to peer pressure, and they are more likely to engage in risk-taking. For these reasons, the dissenters argue, juveniles do not possess the capacity to be held fully responsible for their actions.

15. See, e.g., Richard J. Brody, Don't Kill Children, 72 A.B.A. J., June 1, 1986, at 32 (arguing that juveniles are not wholly responsible for their crimes and, thus, should not be subjected to capital punishment).
17. See id. at 970-71; see also Helene B. Greenwald, Capital Punishment for Minors: An Eighth Amendment Analysis, 74 J. CRIM. L. & CRIMINOLOGY 1471, 1492-98 (1993) (discussing the various reasons that juveniles are less responsible, and therefore, less morally blameworthy than adults. Greenwald points to an adolescent's developmental stage to buttress her argument that adolescents have a tendency to be more impulsive and less mature than adults, and they are also more likely to rebel against authority and to be influenced by the desire to fit in with their peers).
They further assert that over the course of the last thirteen years, a national consensus has developed opposing the imposition of capital punishment on anyone under the age of eighteen. Although not mentioned by the dissenters, the widespread international disapproval of the juvenile death penalty is often relied upon by death penalty abolitionists in support of their contention that the practice is repugnant and has become a human rights pariah. Thus, in light of the spirited Stanford dissent, one is left to ponder whether a Court that has just recently embraced the categorical exclusion of the mentally retarded from the death penalty may soon reconsider, and perhaps reverse, Stanford v. Kentucky, in which it refused to exempt sixteen and seventeen-year-old offenders from capital punishment.

The thesis of this Comment is simply that there is no justifiable basis on which to categorically exclude sixteen and seventeen-year-old murderers from the death penalty. Although there is a viable argument that some of the very same reasons on which the Court relied to exempt mentally retarded individuals from capital punishment also applies to adolescents, this Comment will contend that the rationale the Court has employed to carve out exceptions for mentally retarded persons and juveniles under the age of sixteen is simply

18. In re Stanford, 537 U.S. at 971 (Stevens, J., dissenting).
19. Thirteen years earlier, the Court decided Stanford v. Kentucky, 492 U.S. 361 (1989), in which it upheld the death sentences of two defendants who had committed their capital crimes at the ages of sixteen and seventeen. The Stanford Court's analysis was heavily based upon the lack of a discernable national consensus opposing the imposition of capital punishment on sixteen and seventeen-year-olds.
unpersuasive and fails to justify a constitutional restriction on a state’s ability to execute the murderers within its borders. Part II of this Comment will begin with an explanation of the Court’s decision in Atkins v. Virginia, in which it found the execution of mentally retarded persons to be “cruel and unusual.” Part III will begin with a brief history of the juvenile death penalty, followed by a summary of the plurality, concurring, and dissenting opinions in Thompson v. Oklahoma, where the Court determined that the imposition of the death penalty on anyone under the age of sixteen violates the Eighth Amendment. Part III then discusses the Stanford decision, which upheld the rights of states to execute juveniles between the ages of sixteen and eighteen. Next, Part IV highlights the similarities between the Court’s rationale in Atkins and in Thompson, and contends that the rationale in these two cases is not only convoluted, but would also be a poor basis on which to build an argument that all juveniles should be exempted from the death penalty. Finally, Part V demonstrates that there is simply no justification for categorically exempting juveniles from the death penalty because the sort of individualized consideration that is constitutionally mandated in capital cases sufficiently ensures that only the most deserving offenders, regardless of their age, are executed.

II. ATKINS V. VIRGINIA

A. The Facts and the Lower Court Holding

On the night of August 16, 1996, Daryl Renard Atkins and an accomplice, William Jones, after a day spent drinking and smoking marijuana, robbed a convenience store with a semi-automatic handgun. After driving their victim, Eric Nesbitt, to an automated teller machine and forcing him to withdraw $200, Atkins and his partner then drove to a deserted area where, according to the co-conspirator’s testimony, which the jury accepted, Atkins shot Nesbitt eight times at close range in the thorax, chest, abdomen, arms, and legs.

Atkins was charged with abduction, armed robbery, and capital murder. At the guilt phase of Atkins’s trial, Jones and Atkins essentially told the same

27. Atkins, 536 U.S. at 337 (Scalia, J., dissenting).
28. Id. at 307.
29. Id. at 337 (Scalia, J., dissenting).
30. Id. at 307.
story with one paramount variation—each claimed that the other had shot Nesbitt. The jury credited Jones’s testimony and found Atkins guilty of the murder. The State relied on Atkins’s prior felony convictions, sixteen of them to be exact; the testimony of his past victims; the photographs of Nesbitt’s dead body; and the autopsy report to prove both “future dangerousness” and “vileness of the offense” as aggravating circumstances at sentencing. The defense then introduced the testimony of a psychologist who asserted that Atkins’s IQ of fifty-nine qualified him as “mildly mentally retarded.” Although Atkins’s mental retardation became a “central issue” at the penalty phase, the jury nonetheless sentenced him to death.

Atkins argued unsuccessfully to the Virginia Supreme Court that “he [was] mentally retarded and thus, [could not] be sentenced to death.” Relying on the United States Supreme Court’s holding in Penry v. Lynaugh that mental retardation alone is insufficient to preclude the imposition of the death penalty, a majority of the Virginia court dismissed his contention, stating that it was “not willing to commute Atkins’ sentence of death to life imprisonment merely because of his IQ score.”

B. The Majority’s Analysis and Holding

The United States Supreme Court granted certiorari to revisit Penry and to determine whether the Eighth Amendment prohibits the imposition of the death penalty on mentally retarded offenders. The majority began its

31. Id.
32. Id.
33. Id. at 339 (Scalia, J., dissenting) (Justice Scalia notes that Atkins’s prior felony convictions included robbery, abduction, use of a firearm, and maiming).
34. See id. (Justice Scalia points out that Atkins’s victims characterized him as having violent tendencies. “He slapped a gun across [one] victim’s face, clubbed her in the head with it, knocked her to the ground, and then helped her up, only to shoot her in the stomach.”).
35. Id. at 308.
36. Id. at 309.
37. Id. at 339 (Scalia, J., dissenting).
38. Id. at 309. Because the trial court had used a “misleading verdict form,” the Virginia Supreme Court ordered another sentencing hearing at which Atkins was again sentenced to death. Id.
39. Id. at 310 (quoting Atkins v. Virginia, 534 S.E.2d 312, 318 (Va. 2000)).
40. 492 U.S. 302 (1989) (holding that the imposition of the death penalty on a mentally retarded individual is not categorically precluded by the Eighth Amendment’s prohibition on cruel and unusual punishment so long as the jury is able to consider evidence of the individual’s mental retardation at sentencing).
41. Atkins, 536 U.S. at 310 (quoting Atkins v. Virginia, 534 S.E.2d 312, 321 (Va. 2000)).
42. Id.
43. The majority opinion was written by Justice Stevens who was joined by Justices O’Connor, Kennedy, Souter, Ginsburg, and Breyer.
analysis with a review of the Eighth Amendment standard, emphasizing that a punishment is deemed cruel and unusual not by the standards of times past, but rather by those "`evolving standards of decency that mark the progress of a maturing society.'" 44 According to the majority, the best indicator of currently prevailing values is found in legislative enactments. 45

Prior to 1986, in those states that sanctioned capital punishment, there was no exclusion for the mentally retarded. 46 However, in response to public disapproval of the execution of a mentally retarded offender in 1986, Georgia became the first state to ban such executions. 47 Congress followed Georgia's lead in 1988 when it reinstated the federal death penalty, but expressly exempted mentally retarded individuals. 48 In 1989, Maryland enacted similar legislation. 49 Yet in its decision that year in Penry, the Supreme Court found that the two state enactments were insufficient to establish any sort of national consensus. 50 Since 1989, however, the Court pointed out that sixteen states have adopted legislation banning the execution of the mentally retarded. 51 According to the majority, "`[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.'" 52 Not only have eighteen of the thirty-eight states that sanction capital punishment 53 explicitly exempted mentally retarded individuals, but since 1989, only five states that allow for such executions have in fact put mentally retarded offenders to death. 54 Therefore, according to the majority, "`[t]he practice . . . has become truly unusual, and it is fair to say that a national consensus has developed against it.'" 55

44. *Atkins*, 536 U.S. at 312 (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion)).
45. *Id.* at 312. The "`clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Id.* (quoting *Penry*, 492 U.S. at 331).
46. *Id.* at 313.
47. *Id.; see GA. CODE ANN. § 17-7-131(j) (Supp. 1988).*
52. *Id.* at 315.
53. *Id.* at 342 (Scalia, J., dissenting).
54. *Id.* at 316 n.20. The states that have executed mentally retarded offenders since 1989 are Alabama, Texas, Louisiana, South Carolina, and Virginia. *Id.*
55. *Id.* at 316.
In support of its finding of a national consensus against the execution of the mentally retarded, the majority cited a variety of social and professional organizations, as well as poll results, seeming to indicate additional evidence of a consistent American consensus.\textsuperscript{56} Further, the majority pointed out that the practice of executing mentally retarded persons is "overwhelmingly disapproved" by most of the world.\textsuperscript{57}

The majority concluded its analysis with an assertion that the purposes which capital punishment is meant to serve, namely retribution and deterrence, are not furthered by imposing the death penalty on mentally retarded individuals.\textsuperscript{58} The majority dismissed the retributive function, claiming that mentally retarded individuals simply are not as culpable as persons of normal intelligence and thus should not be put to death.\textsuperscript{59} With respect to deterrence, the Court explained that due to their diminished mental capacity, mentally retarded individuals are not capable of engaging in the sort of cost-benefit analysis that normally deters individuals from committing heinous crimes.\textsuperscript{60} Finally, the majority asserted that not only are mentally retarded persons less able to contribute to their defenses than defendants of normal intelligence, they also appear less remorseful to juries, and they are more apt to make false confessions.\textsuperscript{61} Thus, the Court concluded that the execution of mentally retarded individuals is categorically violative of the Eighth Amendment's ban on cruel and unusual punishment.\textsuperscript{62}

\textbf{C. The Atkins Dissent}\textsuperscript{63}

In his dissenting opinion, Justice Scalia emphasized that a punishment may be deemed cruel and unusual only if it contravenes either the standard employed at the time of the adoption of the Bill of Rights or the "'evolving standards of decency that mark the progress of a maturing society.'"\textsuperscript{64} In

\textsuperscript{56} Id. at 316 n.21.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 319-20.
\textsuperscript{59} Id. at 320.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 321.
\textsuperscript{63} Both Chief Justice Rehnquist and Justice Scalia wrote dissents, and both were joined by Justice Thomas. Rehnquist, while agreeing with Scalia, wrote separately only 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." Id. at 322 (Rehnquist, C.J., dissenting). Because Scalia also addresses this topic, this section will focus only on his more comprehensive dissent.
\textsuperscript{64} Id. at 341 (Scalia, J., dissenting) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
1791, only severely mentally retarded individuals known as “idiots” were exempt from the death penalty, and therefore, the execution of mildly or even moderately retarded individuals, like Atkins, would not have been considered cruel and unusual at the time of the adoption of the Bill of Rights. Thus, the imposition of the death penalty on the mildly mentally retarded could be found cruel and unusual only if it violated contemporary standards of decency, “as evinced by objective indicia, the most important of which is ‘legislation enacted by the country’s legislatures.’”

Justice Scalia went on to criticize the majority for discerning a national consensus when eighteen states—amounting to only forty-seven percent of the thirty-eight states which sanction capital punishment—had recently enacted legislation forbidding the execution of mentally retarded individuals. The fact that less than half of death penalty states chose to categorically prohibit the execution of mentally retarded individuals hardly constituted the sort of consensus that could justify an Eighth Amendment ban on all such executions, especially because earlier cases had required a considerably higher degree of uniformity among the states before a punishment was deemed cruel and unusual. Further, only eleven of those eighteen states had enacted “statutes prohibiting execution of mentally retarded defendants convicted after, or convicted of crimes committed after, the effective date of the legislation.” Therefore, those already sentenced to

65. Id. at 340 (Scalia, J., dissenting). Justice Scalia cites a variety of sources which identify “idiots” as having an IQ in the range of twenty-five. Id. Due to their profound mental incompetence, these individuals were deemed incapable of distinguishing right from wrong, and thus, they were not held responsible for their actions. Id.

66. Id. at 340-41 (Scalia, J., dissenting).

67. Id. at 340 (Scalia, J., dissenting) (quoting Penry v. Lynaugh, 492 U.S. 302, 330-31 (1989)).

68. Id. at 342 (Scalia, J., dissenting).

69. Id. at 341 (Scalia, J., dissenting). Scalia points, inter alia, to both Coker v. Georgia, 433 U.S. 584, 595-96 (1977), where the Court found the imposition of the death penalty on a defendant convicted of rape to be cruel and unusual when Georgia was the only jurisdiction that permitted such a sentence, and to Enmund v. Florida, 458 U.S. 782, 789 (1982), where the Court found the death sentence of a defendant whose accomplice in a robbery committed murder to be cruel and unusual because such a punishment was prohibited in seventy-eight percent of all death penalty states as examples of the level of agreement among the states that had previously been found to be indicative of a national consensus. Id.

70. Atkins, 536 U.S. at 342 (emphasis in original); see also Atkins, 536 U.S. at 342 n.1 (citing ARIZ. REV. STAT. ANN. § 13-703.02(I) (Supp. 2001); ARK. CODE ANN. § 5-4-618(d)(1) (1997); Reams v. State, 909 S.W.2d 324, 326-27 (Ark. 1995); FLA. STAT. § 921.137(8) (Supp. 2002); GA. CODE ANN. § 17-7-131(j) (1997); IND. CODE § 35-36-9-6 (1998); Rondon v. State, 711 N.E.2d 506, 512 (Ind. 1999); KAN. STAT. ANN. § 21-4623(d), 21-4631(c) (1995); KY. REV. STAT. ANN. § 532.140(3) (1999); MD. CODE ANN., Art. 27, § 412(g) (1996); Booth v. State, 608 A.2d 162 (Md. 1992); MO. REV. STAT. § 565.030(7) (Supp. 2001); N.Y. CRIM. PROC. LAW § 400.27.12(c) (McKinney Supp. 2002); 1995 N.Y. LAW. ch. 1, § 38; TENN. CODE ANN. § 39-13-203(b) (1997); Van Tran v. State, 66 S.W.3d 790, 798-99 (Tenn. 2001)).
death, as well as those sentenced prior to the effective date of the statute, could still be executed. According to Justice Scalia, this indicated not "a statement of absolute moral repugnance, but one of current preference between two tolerable approaches."  

Moreover, Justice Scalia pointed out that the legislation on which the majority's opinion hinges had existed in none of the eighteen states for more than fourteen years, and in fact over half of the statutes were only eight years old. According to Justice Scalia, basing constitutional doctrine "'upon the narrow experience of [a few] years'" is "'myopic,'" as it is yet unclear to most, if not all, of the states whether this legislation will prove to be prudent in the years to come. He also criticized the majority's assertion that "'[i]t is not so much the number of these States that is significant, but the consistency of the direction of change'" as being extremely poor evidence of a national consensus given that just fourteen years ago, the imposition of the death penalty on the mentally retarded was not prohibited in any death penalty state, and thus, there was no other direction in which change could go.  

Justice Scalia found further fault with the majority's contention that the fact that mentally retarded persons are so infrequently executed is evidence of a consensus against the practice. He pointed out that even if it were certain that mentally retarded persons are rarely executed, which it was not, this would not be surprising, as they account for only about one to three percent of the population. The alleged infrequency of these executions could also be a result of the constitutional mandate that mental retardation be considered as a mitigating factor at sentencing. Moreover, as was stated in <i>Stanford v. Kentucky</i> with regard to juvenile offenders, "'it is not only possible, but

71. *Atkins*, 536 U.S. at 342 (Scalia, J., dissenting).
72. *Id.* (Scalia, J., dissenting).
73. *Id.* at 343 (Scalia, J., dissenting).
74. *Id.* at 344 (Scalia, J., dissenting) (quoting Coker v. Georgia, 433 U.S. 584, 614 (1977) (Burger, C.J., dissenting) (alteration in original)).
75. *Id.* (Scalia, J., dissenting) (quoting *Coker*, 433 U.S. at 614 (Burger, C.J., dissenting)).
76. *Id.* (Scalia, J., dissenting).
77. *Id.* at 344-45 (Scalia, J., dissenting).
78. *Id.* at 346 (Scalia, J., dissenting).
79. *Id.* at 346-47 (Scalia, J., dissenting).  

Scalia pointed to various sources which suggest that a significant number of death row inmates are mentally retarded. *Id.; see, e.g.,* Raymond Bonner and Sara Rimer, *Executing the Mentally Retarded Even as Laws Begin to Shift*, N.Y. TIMES, Aug. 7, 2000, at A1 (stating that mentally retarded individuals account for ten percent of the death row population). *Atkins*, 536 U.S. at 347 (Scalia, J., dissenting).
81. *Id.* at 347 (Scalia, J., dissenting).
82. *Id.* (Scalia, J., dissenting) (citing Penry v. Lynaugh, 492 U.S. 302, 328 (1989)).
overwhelmingly probable, that the very considerations which induce [today's majority] to believe that death should never be imposed on [mentally retarded] offenders ... cause prosecutors and juries to believe that it should rarely be imposed."  

Next, Scalia lambasted the majority for its displaced reliance on the views of religious and professional organizations, the laws of other nations, and public opinion polls. He agreed with Chief Justice Rehnquist who pointed out in his dissent that the views of religious and professional organizations are not only irrelevant, but are also inappropriate foundations on which to base constitutional doctrine, as federalism demands that any constraint upon "'democratic government must [be apparent] in the operative acts (laws and the application of laws) that the people have approved." Further, Justice Scalia asserted that because only Americans must abide by the demands of the Constitution, the laws of other nations, regardless of how "'enlightened the Justices of [the] Court may think them to be'" have no application when no discernable American consensus exists. Public opinion polls are the most clearly irrelevant basis on which to build constitutional doctrine, for as pointed out by Chief Justice Rehnquist, their empirical validity is suspect at best.

Justice Scalia concluded his dissent by criticizing the majority's contention that the execution of mentally retarded individuals fails to further the two social purposes of capital punishment schemes: retribution and deterrence. After noting that the majority completely disregarded incapacitation as another legitimate social purpose, Justice Scalia argued that "culpability, and deservedness of the most severe retribution, depends not merely (if at all) upon the mental capacity of the criminal (above the level where he is able to distinguish right from wrong) but also upon the depravity of the crime." He contended that a mentally retarded person who carries out

85. Id. at 322 (Rehnquist, C.J., dissenting) (quoting Stanford v. Kentucky, 492 U.S. 361, 377 (1989) (alterations in original)).
86. Id. at 348 (Scalia, J., dissenting) (quoting Thompson v. Oklahoma, 487 U.S. 815, 868-69 n.4 (1988) (Scalia, J., dissenting)).
87. Id. (Scalia, J., dissenting)
88. Id. at 322 (Rehnquist, C.J., dissenting).
89. Id at 350-51 (Scalia, J., dissenting).
90. Id. at 350 (Scalia, J., dissenting) (citing Gregg v. Georgia, 428 U.S. 153, 183 n.28 (1976) (wherein Justices Stewart, Powell, and Stevens noted that "incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future" is a third social goal of the death penalty)).
91. Id. (Scalia, J., dissenting).
“an exquisite torture-killing”\textsuperscript{92} is surely more culpable than the “average” murderer in a domestic dispute,\textsuperscript{93} for instance, whom the Court has in previous cases deemed to lack the degree of moral blameworthiness sufficient to justify the death penalty.\textsuperscript{94} Therefore, Justice Scalia contended that so long as a mentally retarded person is capable of distinguishing right from wrong, it should be left up to the sentencer’s discretion to determine whether his mental retardation constitutes a mitigating circumstance sufficient to exempt him from the death penalty.\textsuperscript{95}

Moreover, the majority’s assertion that mentally retarded individuals are less deterred by the possibility of death does not warrant a conclusion that no mentally retarded person will be deterred.\textsuperscript{96} Justice Scalia argues that the “deterrent effect of a penalty is adequately vindicated if it successfully deters many, but not all, of the target class,”\textsuperscript{97} and thus, unless it can be demonstrated that every mentally retarded person is both incapable of understanding the threat of death, as well as unable to conform his conduct to “the law in such a rudimentary matter as murder,”\textsuperscript{98} the social goal of deterrence is furthered.

III. JUVENILE DEATH PENALTY JURISPRUDENCE

A. A Brief History of the Juvenile Death Penalty

At the time of the adoption of the Eighth Amendment in 1791,\textsuperscript{99} underlying the juvenile death penalty was the notion of criminal liability found in the English common law\textsuperscript{100} and articulated in Blackstone’s \textit{Commentaries on the Laws of England}.\textsuperscript{101} According to Blackstone, there was an irrebuttable presumption that children under age seven were unable to form criminal intent, and thus, they were absolutely protected from the death

\begin{itemize}
\item \textsuperscript{92} \textit{Id.} (Scalia, J., dissenting).
\item \textsuperscript{93} \textit{Id.} (Scalia, J., dissenting).
\item \textsuperscript{94} \textit{Id.} (Scalia, J., dissenting) (citing Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (plurality opinion)).
\item \textsuperscript{95} \textit{Id.} at 351 (Scalia, J., dissenting).
\item \textsuperscript{96} \textit{Id.} (Scalia, J., dissenting).
\item \textsuperscript{97} \textit{Id.} (Scalia, J., dissenting).
\item \textsuperscript{98} \textit{Id.} at 350 (Scalia, J., dissenting).
\item \textsuperscript{100} Greenwald, \textit{supra} note 17, at 1473.
\item \textsuperscript{101} Suzanne D. Strater, \textit{The Juvenile Death Penalty: In the Best Interests of the Child?}, 26 LOY. U. CHI. L.J. 147, 150 (1995); see also Thompson v. Oklahoma, 487 U.S. 815, 864 (1987) (Scalia, J., dissenting) (noting that Blackstone’s \textit{Commentaries on the Laws of England} were “widely accepted at the time the Eighth Amendment was adopted as an accurate description of the common law”).
\end{itemize}
penalty.\textsuperscript{102} Children between the ages of seven and fourteen benefited from a rebuttable presumption of incapacity to harbor criminal intent;\textsuperscript{103} however, if it could be shown that the child both understood the wrongful nature of his or her act and was capable of distinguishing right from wrong, the presumption could be overcome, and the death penalty could be imposed.\textsuperscript{104} Beyond the age of fourteen, children were deemed capable of forming the requisite criminal intent so as to be held fully liable for their crimes.\textsuperscript{105}

The first known execution of a juvenile in the United States occurred in 1642 when sixteen-year-old Thomas Graunger\textsuperscript{106} was hung for committing bestiality in Plymouth Colony, Massachusetts.\textsuperscript{107} A ten-year-old Cherokee, James Arcene, became the youngest person ever executed when he was hanged for robbery and murder in Arkansas in 1885.\textsuperscript{108} Since 1642, approximately 365 juvenile offenders have been executed by thirty-eight states and the federal government.\textsuperscript{109} As of April 1, 2003, there were eighty-two inmates on death row who were sentenced as juveniles.\textsuperscript{110}

\textbf{B. Thompson v. Oklahoma}\textsuperscript{111}

The Supreme Court was first presented with the issue of the juvenile death penalty in \textit{Bell v. Ohio},\textsuperscript{112} and again in \textit{Eddings v. Oklahoma},\textsuperscript{113} but in both

\footnotesize
\begin{itemize}
  \item 102. Kato, supra note 99, at 113; see also Greenwald, supra note 17, at 1473.
  \item 103. Kato, supra note 99, at 113.
  \item 104. Greenwald, supra note 17, at 1473.
  \item 105. \textit{Id.}; see also Strater, supra note 101, at 150 (noting that “[t]he law presumed that children fourteen or older had the same criminal capacity as adults”).
  \item 106. Streib, supra note 22, at 3.
  \item 108. Strater, supra note 101, at 151.
  \item 109. Streib, supra note 22, at 3. Currently, thirty-eight states and the federal government (both civilian and military) authorize capital punishment. \textit{Id.} at 6-7. Eighteen of those jurisdictions have explicitly set the minimum age for execution at age eighteen. (California, Colorado, Connecticut, Illinois, Indiana, Kansas, Maryland, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Tennessee, Washington, federal government—both civilian and military). \textit{Id.} Five states have opted for a minimum age of seventeen—Florida, Georgia, New Hampshire, North Carolina, Texas. \textit{Id.} The remaining seventeen states have permitted the execution of sixteen-year-olds, due either to an express statutory provision or to the Supreme Court’s ruling in \textit{Thompson v. Oklahoma}, 487 U.S. 815 (1988). \textit{Id.} The states that statutorily have chosen age sixteen are Alabama, Kentucky, Missouri, Nevada, Virginia, and Wyoming. The states that are required by \textit{Thompson} to set the minimum age at sixteen are Arizona, Arkansas, Delaware, Idaho, Louisiana, Mississippi, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Utah. \textit{Id.}
  \item 111. 487 U.S. 815 (1988).
  \item 112. 438 U.S. 637 (1978).
\end{itemize}
cases, it avoided the issue by deciding on other grounds. Not until 1988, in Thompson v. Oklahoma, did the Court squarely address the constitutionality of the juvenile death penalty.

Thompson was fifteen years old when he was convicted and sentenced to death for participating in the brutal murder of his former brother-in-law. The Court granted certiorari to determine whether the imposition of the death penalty on a fifteen-year-old constituted "cruel and unusual punishment" in violation of the Eighth Amendment.

1. The Plurality

The plurality—Justices Stevens, Brennan, Marshall, and Blackmun—concluded that the imposition of the death penalty on any individual under the age of sixteen is always unconstitutional. They began their analysis by pointing out that the drafters of the Eighth Amendment never defined what constitutes "cruel and unusual punishment," but instead left that task to judges, who are to be guided by "the evolving standards of decency that mark the progress of a maturing society." To discern contemporary values and standards of decency, the Court has in the past considered not only "the work product of state legislatures and sentencing juries," but also "the reasons why a civilized society may accept or reject the death penalty in certain types
of cases."\(^{122}\)

The plurality reviewed the actions of state legislatures, noting the degree of uniformity among the states in the manner in which they treat juveniles under age sixteen with respect to a variety of activities.\(^{123}\) No state\(^{124}\) permitted fifteen-year-olds to vote or to serve on juries.\(^{125}\) Only one state authorized a fifteen-year-old to drive without parental consent, and all but four states mandated that a fifteen-year-old obtain parental consent before marrying.\(^{126}\) Furthermore, in every state, by legislative fiat, the maximum age for juvenile court jurisdiction was designated at no less than sixteen.\(^{127}\) The plurality concluded that this sort of legislation was "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."\(^{128}\)

Next, the plurality examined the most relevant legislative enactments—those that related to the age requirements of the various state death penalty statutes.\(^{129}\) In fourteen states, capital punishment was forbidden under any circumstances.\(^{130}\) Of the thirty-seven jurisdictions\(^{131}\) that authorized the death penalty, nineteen did not explicitly specify a minimum age.\(^{132}\) The remaining eighteen states expressly prohibited the execution of anyone under the age of sixteen.\(^{133}\)

The plurality acknowledged the potential argument that perhaps the nineteen states that had not expressly set a minimum age did so intentionally

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122. Id. (plurality opinion).
123. Id. at 823-29 (plurality opinion). The plurality stated that "[t]here is, however, complete or near unanimity among all 50 States and the District of Columbia in treating a person under 16 as a minor for several important purposes." Id. at 824 (plurality opinion).
124. Hereinafter, the District of Columbia is included within the term "states."
125. Thompson, 487 U.S. at 824 (plurality opinion).
126. Id. (plurality opinion).
127. Id. (plurality opinion).
128. Id. at 824-25 (plurality opinion).
129. Id. at 826-29 (plurality opinion).
130. Id. at 826 n.25 (plurality opinion). Those states were Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, West Virginia, and Wisconsin. Id. (plurality opinion).
131. The federal government is included within this number. Herein, for simplicity's sake, the federal government will be included within the term "states" unless otherwise noted.
132. Id. at 826-27 (plurality opinion). Those states were Alabama, Arizona, Arkansas, Delaware, Florida, Idaho, Louisiana, Mississippi, Missouri, Montana, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, and Wyoming. Id. at 828 n.26 (plurality opinion).
133. Id. at 829 (plurality opinion). Those states were California, Colorado, Connecticut, Georgia, Illinois, Indiana, Kentucky, Maryland, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Tennessee, and Texas. Id. at 829-30 n.30 (plurality opinion).
in the belief that there was no age at which the imposition of the death penalty would have been cruel and unusual. However, the plurality readily dismissed this argument, stating that "[w]e think it self-evident that such an argument is unacceptable." Thus, the remainder of the plurality's analysis was premised on the assumption that a minimum age line had to be drawn—the only question remaining was at what age to draw it. And so, the plurality "confin[ed] [its] attention to the 18 States that [had] expressly established a minimum age in their death penalty statutes," and disregarded the other nineteen states that had not done so. On this basis, the plurality concluded that "it would offend civilized standards of decency to execute a person who was less than sixteen years old at the time of his or her offense." The plurality also noted that its conclusion was consistent with the views of other Western nations, as well as with those of the American Bar Association and the American Law Institute.

Next, the plurality examined the behavior of American juries, pointing out that the last execution of an offender under the age of sixteen occurred in 1948 when Irvin Mattio, who was fifteen at the time of his crime, was executed in Louisiana. According to statistics compiled by the Department of Justice, between the years 1982 and 1986, of the 1393 persons who were sentenced to death, only five of them were under the age of sixteen when they committed their offense. While the plurality admitted that these statistics are susceptible to a variety of different interpretations, they nonetheless "suggest[ed] that these five young offenders [had] received sentences that [were] 'cruel and unusual in the same way that being struck by lightning is cruel and unusual.'"

Finally, the plurality considered whether the imposition of the death penalty on offenders under the age of sixteen "measurably contribute[d] to the social purposes that are served by the death penalty," namely retribution

134. Id. at 827-28 (plurality opinion).
135. Id. at 828 (plurality opinion).
136. Id. at 829 (plurality opinion).
137. Id. at 830 (plurality opinion).
138. Id. at 830-31 (plurality opinion).
139. Id. at 830 (plurality opinion).
140. Id. at 831-33 (plurality opinion).
141. Id. at 832 (plurality opinion) (citing VICTOR STREIB, DEATH PENALTY FOR JUVENILES 197 (1987)).
142. Id. at 832-33 (plurality opinion).
143. Id. at 833 (plurality opinion) (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982) (Stewart, J., concurring)).
144. Id. (plurality opinion) (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982)).
145. Id. (plurality opinion).
After stating that while legislative enactments and jury determinations substantially informed their analysis, the plurality declared that "it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty." The plurality then went on to point out that a punishment should be directly proportional to the offender's culpability, and the fact that juveniles were by definition less culpable than adults was "too obvious to require extended explanation." According to the plurality, due to the reduced culpability of juvenile offenders, the social goal of retribution as "an expression of society's moral outrage at particularly offensive conduct" simply was not served. Moreover, the plurality asserted that the goal of deterrence was inapplicable in this context because individuals under sixteen accounted for only two percent of all intentional homicide arrests. As for the two percent of offenders, the plurality explained that the death penalty would fail to have any deterrent effect; not only was it highly unlikely that individuals under the age of sixteen would engage in the sort of cost-benefit analysis that makes the threat of execution a deterrent, but even if an individual did so, it was equally unlikely that he or she would be deterred in light of the near nonexistence of the juvenile death penalty in the twentieth century. The plurality concluded that due to the "lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children," neither the goal of deterrence nor the goal of retribution was served by executing offenders under age sixteen. Thus, the imposition of the death penalty on these individuals is "nothing more than the purposeless and needless imposition of pain and suffering," and therefore, is unconstitutional.

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146. Id. at 836 (plurality opinion). "The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." Id. (plurality opinion) (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion)).
147. Id. at 833 (plurality opinion).
148. Id. (plurality opinion).
149. Id. at 834 (plurality opinion).
150. Id. at 835 (plurality opinion).
151. Id. at 836 (plurality opinion) (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976)).
152. Id. at 837 (plurality opinion) (citing U.S. DEPT. OF JUSTICE, Uniform Crime Reports: Crime in the United States 174 (1986)).
153. Id. (plurality opinion).
154. Id. at 837-38 (plurality opinion).
155. Id. at 836-37 (plurality opinion).
156. Id. at 838 (plurality opinion) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).
157. Id. (plurality opinion).
2. Justice O’Connor’s Concurring Opinion

While she accepted the proposition that there exists some age below which the imposition of the death penalty is unconstitutional, and also the precedent that this age must be determined according to the “evolving standards of decency that mark the progress of a maturing society,” Justice O’Connor was reluctant to conclude, “as a matter of constitutional law,” that a national consensus set the minimum age of execution at age sixteen in the absence of more unequivocal evidence. Justice O’Connor recognized that it seemed very likely that a national consensus did exist, but she nonetheless acknowledged the remaining nineteen states that had remained silent on the issue; in Justice O’Connor’s opinion, these nineteen states undermined the national consensus that the plurality had found. While recognizing the qualitative differences between juveniles and adults, Justice O’Connor pointed out that the characteristics of juveniles that lead legislatures to treat them differently from adults “vary widely among different individuals of the same age, and [she] would not substitute [the Court’s] inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the Nation’s legislatures.”

Justice O’Connor then pointed out that rulings premised on a societal consensus are inherently dangerous because of the risk of misperception by the Court. For instance, had the Court found a societal consensus against the death penalty in 1972 when it was considering *Furman v. Georgia*, it would have been mistaken, and more importantly, its “mistaken premise . . . would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.”

Finally, Justice O’Connor pointed out that because Oklahoma statutorily permitted fifteen-year-old offenders to be treated as adults under some circumstances, but also failed to explicitly specify a minimum age in its death penalty statute, there was a danger that Oklahoma had not afforded sufficient reflection to the possibility that a fifteen-year-old could be executed under its

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158. *Id.* at 848 (O’Connor, J., concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).
159. *Id.* at 849 (O’Connor, J., concurring).
160. *Id.* (O’Connor, J., concurring).
161. *Id.* at 850 (O’Connor, J., concurring).
162. *Id.* (O’Connor, J., concurring).
163. *Id.* at 854 (O’Connor, J., concurring).
164. *Id.* at 855 (O’Connor, J., concurring).
165. 408 U.S. 238 (1972).
statutory scheme.\textsuperscript{167} Thus, Justice O’Connor concluded that the imposition of the death penalty on an offender under a scheme that failed to specify a minimum age was unconstitutional.\textsuperscript{168} However, Justice O’Connor left unresolved the broader question of whether the Eighth Amendment forbade states from executing offenders under the age of sixteen in all circumstances, choosing instead to leave that question to the state legislatures.\textsuperscript{169}

3. The Dissent

Writing for the dissenters,\textsuperscript{170} Justice Scalia began by elucidating the particularly aggravating facts of Thompson’s case and then dove into his rebuttal of the plurality opinion.\textsuperscript{171} First, Justice Scalia pointed to the trend, both at the state and federal levels, of lowering the age at which juveniles could be transferred to adult court and be held criminally liable.\textsuperscript{172} He then emphasized that it would certainly be odd “to find the consensus regarding criminal liability of juveniles to be moving in the direction the plurality perceives for capital punishment, while moving in precisely the opposite direction for all other penalties.”\textsuperscript{173}

Justice Scalia went on to criticize the plurality for confining its analysis to the eighteen states that have expressly set sixteen as the minimum age in their death penalty statutes, thereby ignoring the federal government and the other nineteen states, which in fact comprised a majority, at least for those states that sanctioned capital punishment.\textsuperscript{174} Because the federal government and almost forty percent\textsuperscript{175} of the states sanctioned the very practice that the plurality claimed there was national consensus against, Justice Scalia pointed out that the plurality was mistaken in discerning a societal consensus in the United States anyway,\textsuperscript{176} and its reliance on the practices of other nations was entirely inappropriate.\textsuperscript{177} Justice Scalia stated that “it is a Constitution for the United States of America that we are expounding.”\textsuperscript{178} He relegated to a

\begin{itemize}
\item \textsuperscript{167} Id. at 857 (O’Connor, J., concurring).
\item \textsuperscript{168} Id. (O’Connor, J., concurring).
\item \textsuperscript{169} Id. at 858-59 (O’Connor, J., concurring).
\item \textsuperscript{170} Chief Justice Rehnquist and Justice White joined Justice Scalia’s dissent.
\item \textsuperscript{171} Thompson, 487 U.S. at 859-63 (Scalia, J., dissenting).
\item \textsuperscript{172} Id. at 865-68 (Scalia, J., dissenting). For instance, Congress had recently passed legislation lowering the age at which a juvenile could be tried and punished as an adult from sixteen to fifteen. Id. at 865 (Scalia, J., dissenting).
\item \textsuperscript{173} Id. at 866 (Scalia, J., dissenting).
\item \textsuperscript{174} Id. at 867-68 (Scalia, J., dissenting).
\item \textsuperscript{175} Id. at 868 (Scalia, J., dissenting).
\item \textsuperscript{176} Id. (Scalia, J., dissenting).
\item \textsuperscript{177} Id. at 868 n.4 (Scalia, J., dissenting).
\item \textsuperscript{178} Id. (Scalia, J., dissenting).
\end{itemize}
footnote his discussion of the plurality’s reliance on the various state statutes that prohibit persons under the age of sixteen from voting, marrying without parental consent, and purchasing cigarettes, among other things. His response to the plurality was as follows:

It 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.

Next, the dissent criticized the plurality not only for focusing on execution as opposed to sentencing statistics, but also for assuming that a trend that arguably has existed only since 1948 is sufficient “to justify calling a constitutional halt to what may well be a pendulum swing in social attitudes.” Justice Scalia pointed out that there are a number of reasons why fifteen-year-olds are rarely sentenced to death, including Lockett v. Ohio’s requirement that death sentences be imposed only on an individualized basis as well as society’s increasing unwillingness to impose death sentences at all. According to Justice Scalia, the fact that these juveniles are rarely sentenced to death by no means indicates that they never should be, and more importantly, does not justify a constitutional ban on all such executions. Furthermore, he pointed out, there is simply “no rational basis for discerning [from the fact that our society has decided that executions of individuals under the age of sixteen should be rare] . . . a societal judgment that no one so much as a day under 16 can ever be mature and morally responsible enough to deserve that penalty.”

Finally, Justice Scalia wholeheartedly rejected the plurality’s assertion that “it is for us ultimately to judge whether the Eighth Amendment permits

179. Id. at 871 n.5 (Scalia, J., dissenting).
180. Id. (Scalia, J., dissenting).
181. Id. at 869 (Scalia, J., dissenting) (noting that the plurality finds the fact that no person under the age of sixteen has been executed since 1948 to be dispositive, instead of focusing on sentencing trends, such as the fact that in only two years; between 1984 and 1986, five persons under sixteen were sentenced to death).
182. Id. (Scalia, J., dissenting).
184. Thompson, 487 U.S. at 870 (Scalia, J., dissenting) (citing Lockett v. Ohio, 438 U.S. 586 (1978)).
185. Id. (Scalia, J., dissenting).
186. Id. (Scalia, J., dissenting).
187. Id. (Scalia, J., dissenting).
imposition of the death penalty," insofar as the plurality is relying on its own "perceptions of decency." Justice Scalia pointed out that the Eighth Amendment only forbids those punishments that are cruel and unusual in the eyes of American society, not in the eyes of the Court.

C. Stanford v. Kentucky

In Stanford v. Kentucky, a 1989 decision, the Court consolidated two cases to confront the issue of whether the Eighth Amendment permitted the execution of an individual who committed a capital crime at the age of sixteen or seventeen. Kevin Stanford was seventeen years and four months old on January 7, 1981, when he and an accomplice raped and sodomized Barbel Poore while they robbed the gas station she worked at. After netting 300 cartons of cigarettes, two gallons of gas, and a negligible amount of cash, they drove Poore to a secluded area where Stanford shot her at point-blank range in the face and in the back of the head. Due not only to the severity of the crime, but also to the juvenile system's numerous unsuccessful rehabilitative attempts to effectively deal with Stanford in the past, the juvenile court certified him to stand trial as an adult. After being convicted of "murder, first-degree sodomy, first-degree robbery, and receiving stolen property," a Kentucky jury sentenced Stanford to death.

The second petitioner, Heath Wilkins, was sixteen years and six months old when he and an accomplice murdered Nancy Allen on July 27, 1985, at the convenience store that she owned and operated. While his accomplice restrained Allen, Wilkins repeatedly stabbed her in the chest and left her to die, but only "[a]fter helping themselves to liquor, cigarettes, rolling papers, and approximately $450 in cash and checks." Due to the particularly violent nature of his crime, and also because the juvenile system had repeatedly failed to effectively treat Wilkins for past delinquency, the juvenile

188. Id. at 873 (Scalia, J., dissenting) (quoting plurality opinion at 833 (citing Enmund v. Florida, 458 U.S. 782, 797 (1982))).
189. Id. (Scalia, J., dissenting).
190. Id. (Scalia, J., dissenting).
192. Id. (plurality opinion).
193. Id. at 365 (plurality opinion).
194. Id. (plurality opinion).
195. Id. (plurality opinion).
196. Id. (plurality opinion).
197. Id. at 366 (plurality opinion).
198. Id. (plurality opinion).
199. Id. (plurality opinion).
200. Id. (plurality opinion).
court certified him as an adult. After pleading guilty to "first-degree murder, armed criminal action, and carrying a concealed weapon," Wilkins was sentenced to death.

Writing for the plurality, Justice Scalia found both capital sentences to be in accordance with "the evolving standards of decency that mark the progress of a maturing society," and therefore, not forbidden by the Eighth Amendment's prohibition against cruel and unusual punishment. The plurality began its analysis by pointing out that neither death sentence at issue would have been considered cruel and unusual at the time of the adoption of the Bill of Rights, as anyone over the age of seven could theoretically be executed. Thus, Stanford and Wilkins could argue only that their punishments violated contemporary standards of decency. Emphasizing that the Court's role is to say what these "evolving standards" are, not what the nine justices think they should be, Justice Scalia looked first to legislative enactments as "objective indicia that reflect the public attitude toward a given sanction." Nineteen of the thirty-seven states that authorized capital punishment did not specify a minimum age, while twelve states precluded the execution of anyone under the age of eighteen. An additional three states exempted offenders under seventeen. According to Justice Scalia, these numbers simply did not "establish the degree of national consensus [the] Court [had] previously thought sufficient to label a particular punishment..."

201. Id. at 367 (plurality opinion).
202. Id. (plurality opinion).
203. Id. (plurality opinion).
204. Justice O'Connor wrote a concurring opinion in which she contended that the Court has a constitutional obligation, imposed by the Eighth Amendment, beyond its duty to examine the enactments of the nation's legislatures, to engage in a proportionality analysis to ensure that there is a sufficient "nexus between the punishment imposed and the defendant's blameworthiness." Id. at 382 (O'Connor, J., concurring) (quoting Enmund v. Florida, 458 U.S. 782, 825 (1982) (O'Connor, J., dissenting)).
205. Id. at 369 (plurality opinion) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).
206. Id. at 379 (plurality opinion).
207. Id. at 368 (plurality opinion); see also supra notes 99-105 and accompanying text.
208. Stanford, 492 U.S. at 378 (plurality opinion).
210. Id. at 371 n.3 (plurality opinion).
211. Id. at 370 n.2 (plurality opinion). These states were California, Colorado, Connecticut, Illinois, Maryland, Nebraska, New Jersey, New Hampshire, New Mexico, Ohio, Oregon, and Tennessee. Id. (plurality opinion).
212. Id. (plurality opinion). These states were Georgia, North Carolina, and Texas. Id. (plurality opinion).
cruel and unusual."^213

Justice Scalia then rejected Wilkins and Stanford's argument that the reluctance of juries to impose capital sentences on juveniles indicated a consensus.^214 Conceding that relatively few death sentences were imposed on juveniles,^215 Justice Scalia countered by pointing out that relatively few capital crimes were perpetrated by sixteen and seventeen-year-olds.^216 Further, Justice Scalia asserted that even if a significant discrepancy did exist between the number of capital crimes committed by individuals under the age of eighteen and the number of those offenders sentenced to death, that does not inevitably lead to the conclusion that the juries find death sentences for offenders under age eighteen to be "categorically unacceptable."^217 Rather, Justice Scalia pointed out that "the very considerations which induce [Stanford and Wilkins] and their supporters to believe that death should never be imposed on offenders under 18 cause prosecutors and juries to believe that it should rarely be imposed."^218

Justice Scalia, as he did in his Thompson dissent, again emphasized the irrelevance of statutory schemes which specify the legally permissible age for engaging in certain activities, such as voting and marrying, at eighteen.^219 He pointed out that the maturity level required to "drive carefully, to drink responsibly, or to vote intelligently"^220 is far greater than the level of maturity needed to both understand that murder is wrong and also to "conform one's conduct to that most minimal of all civilized standards."^221 Furthermore, eighteen merely represents a legislative estimate of the age at which most individuals are capable of engaging in certain activities; there is no system to make an individualized determination as to each potential driver's, drinker's, or voter's maturity level.^222 By contrast, "individualized consideration [is] a constitutional requirement"^223 in every capital sentencing proceeding, and in each case, a sentencer must be permitted to consider the

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^213. Id. at 371 (plurality opinion). By way of contrast, in Coker v. Georgia, 433 U.S. 584 (1977), the Court overturned the death sentence of a convicted rapist in large part because Georgia was the only state that permitted capital punishment in rape cases. Id. at 592-96.

^214. Stanford, 492 U.S. at 373-77 (plurality opinion).

^215. Id. at 373 (plurality opinion).

^216. Id. at 374 (plurality opinion).

^217. Id. (plurality opinion).

^218. Id. (plurality opinion).

^219. Id. (plurality opinion).

^220. Id. (plurality opinion).

^221. Id. (plurality opinion).

^222. Id. (plurality opinion).

^223. Id. at 375 (plurality opinion) (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)) (alteration in original).
defendant's age as a mitigating factor. Justice Scalia asserted that such an individualized system fails to pass constitutional muster only if a demonstrable societal consensus that no sixteen or seventeen-year-old is mature enough to be held fully responsible for murder exists. Such a consensus is derived not from voting or drinking statutes, but from "the ages at which the States permit their particularized capital punishment systems to be applied."  

Finally, Justice Scalia addressed the contention that capital sentences imposed on sixteen and seventeen-year-olds fail to further the penological goals of the criminal justice system, namely deterrence and retribution. Stanford and Wilkins pointed to evidence, which suggested that due to their not yet fully developed cognitive skills, juveniles are undeterred by the threat of capital punishment because they generally are less fearful of death than adults are. Furthermore, because juveniles are not as mature and responsible, and therefore not as culpable as adults, the execution of sixteen and seventeen-year-olds fails to vindicate and justify society's legitimate retributive impulse. Justice Scalia dismissed the argument, stating that the evidence presented by the petitioners simply did not demonstrate that "no 16-year-old is 'adequately responsible' or significantly deterred." He rejected the invitation to substitute the Court's "informed judgment" for that of society's, as the role of the Court is not to decide what the "evolving standards of decency" ought to be, but rather to identify what they in fact are. Because the actions of sentencing juries and the enactments of the nation's legislatures evidenced no discernable societal consensus against the execution of sixteen and seventeen-year-old offenders, the plurality concluded that such punishments are consistent with the demands of the Eighth Amendment.

IV. DOES ATKINS REQUIRE THAT STANFORD BE REVISITED AND PERHAPS OVERTURNED?

A. The Similarities Between Thompson and Atkins

The Atkins majority employed reasoning very similar to that of the

224. Id. (plurality opinion) (citing Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982)).
225. Id. at 376-77 (plurality opinion).
226. Id. at 377-78 (plurality opinion).
227. Id. at 378 (plurality opinion).
228. Id. (plurality opinion)
229. Id. (plurality opinion)
230. Id. at 380 (plurality opinion).
Thompson plurality, and hence, the Court could potentially rely on this line of reasoning to revisit its decision in Stanford and find the imposition of the death penalty on anyone under the age of eighteen to be cruel and unusual. Certainly there has not been the sort of "consistency of the direction of change" in state statutory schemes that led the Atkins court, at least in part, to find a national consensus opposing the execution of mentally retarded individuals. However, as the dissenting justices recently pointed out in In re Stanford, twenty-eight states currently refuse to execute juvenile offenders, only two less than the number that refused to execute mentally retarded offenders. Furthermore, since 1989, the year that Stanford was initially decided, Indiana, Montana, New York, and Kansas have all passed legislation prohibiting the execution of juvenile offenders. Certainly there is an argument to be made that although the juvenile death penalty is not currently prohibited in twenty-two states, and the practice was considered acceptable at the time that the Bill of Rights was ratified, there may be a growing national consensus against it.

As discussed by both the majority in Atkins and the plurality in Thompson, not only at the national, but also at the international level, the execution of juveniles is widely disapproved of, much like the execution of mentally retarded persons. Since 1990, only seven countries in the world, Iran, Pakistan, Yemen, Saudi Arabia, Nigeria, Democratic Republic of the Congo, and the United States have been known to execute juveniles. The United Nations Convention exempts individuals under the age of eighteen from the death penalty, and the United States is the only country in the world that has

233. Id. at 968 (Stevens, J., dissenting). The In re Stanford dissenters include within this number the twelve states that do not impose the death penalty under any circumstances. These states are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. For a listing of the death penalty jurisdictions that expressly set eighteen as the minimum age, see Streib, supra note 22, at 7 (reporting that California, Colorado, Connecticut, Illinois, Indiana, Kansas, Maryland, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Tennessee, Washington, and both the federal government and the military statutory specify eighteen as the minimum age at which death may be imposed).
234. In re Stanford, 537 U.S. at 968.
235. Id. at 968-69; see id. at 969 nn.1-5 (citing IND. CODE ANN. § 35-50-2-3, § 3(b)(1)(A) (West Supp. 2002); 2002 Ind. Pub. L. 117-2002 § 1; MONT. CODE ANN. § 45-5-102(2) (1997); 1999 Mont. Laws; N.Y. PENAL LAW § 125.27 (West Supp. 2002); KAN. STAT. ANN. § 21-4622 (1995); State v. Furman, 858 P.2d 1092, 1103 (Wash. 1993) (holding that juveniles may not be sentenced to death for any crime)).
refused to ratify this international agreement.\textsuperscript{237} As pointed out by Richard Dieter, the executive director of the Death Penalty Information Center, the United States may be isolating itself from its allies by continuing to impose death sentences on juveniles in spite of an international climate largely opposed to the practice.\textsuperscript{238}

Moreover, both the \textit{Atkins} majority\textsuperscript{239} and the \textit{Thompson} plurality\textsuperscript{240} found that the social purposes of the death penalty are not adequately vindicated when mentally retarded individuals and juveniles below the age of sixteen are executed. Like mentally retarded individuals, juveniles, at least those under the age of sixteen, are simply not as morally culpable for their crimes as are offenders over the age of sixteen, and therefore, society does not have the same retributive impetus to execute them.\textsuperscript{241} Just as a mentally retarded person’s crimes can be attributed, at least in part, to a deficient level of cognitive reasoning, so too can a juvenile’s crimes be partially blamed on the failure of society and parents to adequately nurture and rehabilitate the child.\textsuperscript{242} One may argue that neither mentally retarded persons nor juveniles are completely responsible for their crimes, and thus, because society’s “interest in seeing that the offender gets his ‘just deserts’”\textsuperscript{243} is directly related to the individual culpability of the offender,\textsuperscript{244} the retributive rationale for the death penalty fails.

Furthermore, as contended by both the \textit{Atkins} majority and the \textit{Thompson} plurality, because both mentally retarded individuals and juveniles are less deterred by the threat of death than are adults of normal intelligence, the imposition of the death penalty on these individuals fails to promote the social goal of deterrence.\textsuperscript{245} The deterrence rationale is “predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from

\textsuperscript{237} Streib, \textit{supra} note 22, at 8.
\textsuperscript{238} Dieter, \textit{supra} note 21.
\textsuperscript{239} Atkins v. Virginia, 536 U.S. 304, 318-21 (2002); \textit{see also supra} notes 59-62 and accompanying text.
\textsuperscript{240} Thompson v. Oklahoma, 487 U.S. 815, 833-38; \textit{see also supra} notes 144-57 and accompanying text.
\textsuperscript{241} \textit{Thompson}, 487 U.S. at 836-37. The plurality concluded that the “proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult . . . is too obvious to require extended explanation.” \textit{Id.} at 835.
\textsuperscript{243} Atkins, 536 U.S. at 319.
\textsuperscript{244} \textit{Id.}
\textsuperscript{245} \textit{See supra} notes 59-62 and 144-57 and accompanying text.
carrying out murderous conduct, and thus, to be effectively deterred, a murderer must weigh the benefits of carrying out the desired murder against the potential cost of execution. For the very same reasons that make them less culpable—namely their reduced cognitive capability, as well as their inability to learn from experience, to reason logically, and to control their impulses—mentally retarded persons are less likely to engage in the sort of calculus that the theory of deterrence presumes, and therefore, they are less deterred by the prospect of death. Similarly, the prospect of execution deters juveniles less than adults not only because the notion of death is so foreign and distant to them, but also because of the reduced likelihood that they will consider the long-term consequences of their actions and "attach [] any weight to the possibility of execution."

B. What is Wrong With Using Atkins and Thompson to Abolish the Juvenile Death Penalty?

As the foregoing discussion demonstrates, both the Atkins majority and the Thompson plurality espoused a seemingly persuasive rationale on which to build an argument that the imposition of the death penalty on individuals under the age of eighteen is cruel and unusual as measured by "the evolving standards" test dictated by the Eighth Amendment. The discussion is not intended to suggest that a perfectly symmetrical analogy may be drawn between mentally retarded persons and adolescents, for there are clearly qualitative differences between the two groups. However, the Atkins majority drew heavily upon the Thompson plurality’s analysis, thereby indicating that at least six members of the Supreme Court find the rationale for exempting offenders under the age of sixteen from the death penalty to be applicable with regard to mentally retarded persons, and further suggesting that the Court may use this very same rationale to exclude juveniles from capital punishment altogether.

Premising further constitutional precedent on the shaky ground upon which Atkins and Thompson were decided is dangerous. The Court largely

246. Atkins, 536 U.S. at 320.
247. Id.
248. Id.
249. Id.
250. See Brody, supra note 15, at 33 (noting that Victor Streib, a well-known expert and vocal opponent of juvenile executions, has suggested that death is "often a vague and distant notion to adolescents").
justified both decisions on what it perceived to be a marked shift in the "evolving standards of decency that mark the progress of a maturing society," as evidenced by a national consensus that it somehow discerned. In both cases, the Court was able to find a consensus only by including the states that prohibit capital punishment altogether within its calculation to arrive at a "majority" of states that oppose the execution of mentally retarded individuals and juveniles under the age of sixteen. Likewise, the dissenters in In re Stanford point out that twenty-eight states refuse to execute juveniles while failing to acknowledge the fact that twelve of these states do not authorize capital punishment under any circumstances. The problem is that neither the execution of mentally retarded individuals nor the execution of juveniles is an issue for any of these twelve states, for they have determined that the imposition of the death penalty on anyone is wrong. Because the issue is "not whether capital punishment is thought to be desirable, but whether persons under 18 are thought to be specifically exempt," the views of the twelve states that prohibit capital punishment altogether have no bearing. As pointed out by Justice Scalia in his Atkins dissent, the fact that forty-seven percent of death penalty jurisdictions have recently passed legislation outlawing the execution of the mentally retarded hardly constitutes a national consensus, especially because the legislation was only prospectively effective for eleven of those states. Likewise, if the Court were to discern a national consensus from the fact that sixteen of the thirty-eight states (forty-two percent) that authorize the death penalty refuse to impose it on juveniles, it would be mistaken, as it was in Atkins, for it would be using the wrong denominator. Finally, just as the majority in Atkins found the "consistency of the direction of change" in state statutory schemes to be indicative of a consensus against the execution of the mentally retarded, one could argue, as did the dissenters in In re Stanford, that the
five states that have recently set eighteen as the minimum age at which the death penalty may be imposed are evidence of a consensus against the juvenile death penalty. If a simple majority opposing the execution of juveniles cannot be discerned, however, it is unclear how the recent legislation of five states is relevant, particularly because "[i]t is 'myopic to base sweeping constitutional principles upon the narrow experience of [a few] years.'"

Moreover, the Court's reliance on an international consensus against the death penalty for mentally retarded individuals and juveniles was inappropriate in both Atkins and in Thompson. First of all, if in fact a national consensus exists, it is unnecessary to examine the views of the international community. If on the other hand, there is no discernible national consensus, the views of other nations, however strongly held, cannot replace those of the American people. Any reliance on the perspectives of professional and religious organizations is equally misplaced, for it certainly is not clear whether their views are at all representative of the American people. Furthermore, opinion polls are even more uncertain ground upon which to base constitutional law, especially in light of all of the evidence demonstrating the potentially high margin of error.

Although legislative enactments are the ""most reliable objective evidence of contemporary values,"" the actions of sentencing juries are also highly relevant. Beyond noting that "among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since [1989],"" the Atkins court failed to address how the behavior of juries helped lead to the conclusion that the execution of mentally retarded individuals

264. Id. at 968-69 (Stevens, J., dissenting); see supra note 235 and accompanying text.
266. See id. at 324-25 (Rehnquist, C.J., dissenting).
267. See id. at 347-48 (Scalia, J., dissenting).
268. See id.
269. See id. at 322 (Rehnquist, C.J., dissenting).
270. Id. at 322-23 (quoting Penry v. Lynaugh, 492 U.S 302, 331 (1989)).
271. See Thompson v. Oklahoma, 487 U.S. 815, 822 n.7 (1988) (stating that "capital punishment jurisprudence has consistently recognized that contemporary standards, as reflected by... juries, provide an important measure of whether the death penalty is 'cruel and unusual'").
272. Atkins, 536 U.S. at 316. As pointed out at note 80 supra, there is much evidence to suggest that in fact a significant number of death row inmates are mentally retarded. See, e.g., Human Rights Watch, Beyond Reason: The Death Penalty and Offenders With Mental Retardation, at http://www.hrw.org/reports/2001/ustat (2001) (suggesting that up to three hundred inmates currently on death row may be mentally retarded and noting that since 1976, at least thirty-five mentally retarded offenders have been executed.)
violated contemporary standards of decency. The Thompson court relied upon the fact that the last juvenile execution took place in 1948 to demonstrate the reluctance of juries to impose death on juveniles.\textsuperscript{273} Since Thompson was decided, however, at least twenty-one juveniles have been executed,\textsuperscript{274} and thus, the practice, while certainly not commonplace, is also not extinct. Furthermore, the relative infrequency with which death sentences are imposed on juveniles can be attributed to several different factors having nothing to do with a moral determination by the nation’s juries that the execution of juveniles is categorically wrong. One explanation\textsuperscript{275} for this is the “individualized sentencing” requirement of Lockett v. Ohio.\textsuperscript{276} Lockett mandated that every capital defendant be given individualized consideration and be permitted to introduce, and have considered, any mitigating evidence.\textsuperscript{277} Because juries now are required to consider and give weight to mitigating evidence of age or mental retardation, the result is that fewer individuals in these groups are sentenced to death.\textsuperscript{278} This sort of individualized consideration is sufficient to ensure that only the most deserving defendants, even those between the age of sixteen and eighteen and those with low IQs, are executed. Furthermore, as pointed out by Justice Scalia, it is very likely that the very same reasons which lead death penalty opponents to conclude that juvenile death sentences should never be imposed also lead juries to rarely impose death upon juvenile offenders.\textsuperscript{279}

Finally, the argument, relied on by both the Atkins and the Thompson courts, that neither the execution of mentally retarded individuals nor the execution of juveniles measurably contributes to the social goals of retribution and deterrence is simply not supported by objective evidence,\textsuperscript{280} and thus, it may not be employed to justify a categorical exclusion of anyone under the age of eighteen from the death penalty. With respect to the social goal of

\textsuperscript{273} Thompson, 487 U.S. at 832.

\textsuperscript{274} See Streib, supra note 22, at 5.

\textsuperscript{275} See Kato, supra note 99, at 133-34.

\textsuperscript{276} 438 U.S. 586, 605 (1978).

\textsuperscript{277} Id.

\textsuperscript{278} See Kato, supra note 99, at 133-34.


\textsuperscript{280} See Kato, supra note 99, at 136-37 (noting that the Thompson plurality failed to conduct an objective inquiry into whether retribution and deterrence were in fact well-served by the juvenile death penalty and asserting that the plurality instead relied on its own subjective beliefs to conclude that executing juveniles failed to contribute to either retribution or deterrence). But see Lawrence A. Vanore, The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles, 61 IND. L.J. 757, 787-90 (1986) (asserting that juveniles are less blameworthy, and thus less deserving of punishment, than their adult counterparts and also that because the possibility of death is so remote and because juveniles are unlikely to adjust their behavior based solely on the threat of execution, the death penalty fails to deter juveniles).
retribution, the argument fails because although it may be true that juveniles are *oftentimes* less responsible, and therefore less culpable for their crimes,\(^\text{281}\) it cannot be said with certainty that there is not a single sixteen or seventeen-year-old that fully contemplates the inherent evil in murder of another human being.\(^\text{282}\) Moreover, both the *Atkins* and the *Thompson* courts erred by concentrating only on the personal responsibility of the offender.\(^\text{283}\) The principle of retribution revolves around the notion that murderers deserve their punishment not only due to their moral blameworthiness, but also due to the particular heinousness of their crimes.\(^\text{284}\) Thus, as long as sixteen and seventeen-year-olds who have committed capital crimes fully understand the wrongfulness of murder,\(^\text{285}\) they should not be exempted from the death penalty simply because they have not yet reached their eighteenth birthdays when they make the very grave and irreversible decision to take another's life.

Just as there is no evidence to prove with any degree of certainty that juveniles are never capable of fully understanding, and thus, being held fully responsible for murder, there is also no reason to believe that juveniles will never be deterred by the threat of the death penalty. In *Atkins* and *Thompson*, the Court posited that neither mentally retarded persons nor juveniles below the age of sixteen would be adequately deterred by the existence of the death penalty so as to make its imposition justifiable.\(^\text{286}\) In both cases, the Court essentially contends that in order for the death penalty to deter, the offender

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\begin{align*}
281. & \text{See Greenwald, supra note 17, at 1492-98 (listing a number of reasons why juveniles are less responsible, and therefore, less culpable than adults for their crimes); see also Horowitz, supra note 242, at 163-66 (asserting that minors are fundamentally different and also less responsible than adults for their crimes).} \\
282. & \text{See Thompson v. Oklahoma, 487 U.S. 815, 870 (1988) (Scalia, J., dissenting) (stating that "[t]here is no rational basis for [concluding] ... that no one so much as a day under 16 can ever be mature and morally responsible enough to deserve [the death] penalty").} \\
283. & \text{Atkins v. Virginia, 536 U.S. 304, 319 (2002) ("With respect to retribution—the interest in seeing that the offender gets his 'just deserts'—the severity of the appropriate punishment necessarily depends on the culpability of the offender."); Thompson, 487 U.S. at 834 ("It is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant.'" (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring))). While both of these propositions are true, both the *Atkins* and the *Thompson* courts fail to consider the depravity of the offender's crime as part of the focus of the social goal of retribution.} \\
284. & \text{See Atkins, 536 U.S. at 351 (Scalia, J., dissenting) (stating that "[s]urely culpability, and deservedness of the most severe retribution, depends not merely (if at all) upon the mental capacity of the criminal (above the level where he is able to distinguish right from wrong) but also upon the depravity of the crime ...").} \\
285. & \text{Whether or not a juvenile fully contemplates, and thus can be held responsible for, the inherent evil of murder will be sufficiently determined by the sort of individualized consideration mandated by *Lockett v. Ohio*, 438 U.S. 586 (1978), and therefore, it is unnecessary to categorically preclude the execution of every sixteen and seventeen-year-old offender.} \\
286. & \text{Atkins, 536 U.S. at 318-19; Thompson, 487 U.S. at 837-38.}
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must engage in cost-benefit analysis, weighing the benefits of the envisioned murder against the costs of potential execution. There is a high degree of premeditation involved in such a calculation, and because mentally retarded individuals lack the level of cognitive ability, and juveniles lack the forethought and appreciation of long-term consequences necessary to engage in this sort of analysis, they will not be deterred by the possibility of execution; therefore, imposing death sentences on them constitutes nothing more than "'purposeless and needless . . . pain and suffering.'" Or so the argument goes. There simply is not enough evidence to demonstrate that no sixteen or seventeen-year-old who is contemplating carrying out a murder will consider the possibility of execution and be deterred by it. It defies reason to conclude that someone who is seventeen years and eleven months old is absolutely incapable of engaging in the sort of cost-benefit analysis anticipated by the deterrence rationale, but upon his eighteenth birthday, he miraculously engenders this ability.

As the foregoing discussion suggests, both in Atkins and in Thompson, the Court mistakenly concluded that the imposition of the death penalty on all mentally retarded individuals and juveniles below the age of sixteen must be categorically proscribed. Using this same line of reasoning to overturn Stanford v. Kentucky and to thereby justify an absolute ban on the execution of all juvenile offenders would only serve to perpetuate an already convoluted line of precedent.

V. INDIVIDUALIZED SENTENCING AS A SOLUTION TO THE ERROR OF LINE-DRAWING

A. Delineating an Age Below Which Capital Punishment May Not Be Imposed Is a Mistake

Both in Atkins and in Thompson, the Court found that the fact that the

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287. Atkins, 536 U.S. at 318-19; Thompson, 487 U.S. at 837-38.
288. Atkins, 536 U.S. at 320; see also Human Rights Watch, supra note 272 (noting the significant cognitive limitations of mentally retarded individuals, and asserting that due to these deficiencies, mentally retarded individuals should not be eligible for the death penalty).
289. Thompson, 487 U.S. at 837-38; see also Greenwald, supra note 17, at 1510-13 (suggesting that juveniles lack both the "intellectual capacity to understand the threat of punishment [as well as the] control mechanisms to conform to that understanding" in part due to their tendency to disregard the consequences of their actions).
290. Thompson, 487 U.S. at 838 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).
292. See generally Joseph L. Hoffmann, On the Perils of Line-Drawing: Juveniles and the Death Penalty, 40 HASTINGS L.J. 229 (1989) (discussing the reasons why drawing a bright-line rule with respect to the age at which death may be imposed is unjust and unnecessary).
death penalty is rarely imposed on mentally retarded individuals and juveniles is evidence that juries find capital punishment to be cruel and unusual with respect to these individuals. Using this rationale, one could argue that because women and elderly persons are infrequently executed, they too should be exempted from the death penalty.293 One could even argue that because death sentences are rarely imposed on American citizens, the death penalty is always cruel and unusual punishment.294 But this surely cannot be the case because our society has determined that the death penalty is appropriate in certain limited circumstances.295

The sort of bright-line drawing that both the Atkins and the Thompson court engaged in is inherently unfair, and if the Court revisits and overturns Stanford, as at least four justices have urged,296 this very same line-drawing would only serve to produce unjust results. One may envision a scenario in which two individuals, one aged eighteen and one month and the other aged seventeen and nine months, commit a grisly murder.297 If Stanford were to be overturned, the eighteen-year-old would be eligible for the death penalty in a state which allows for capital punishment, while the seventeen-year-old, who may have more responsibility for the murder, and thus more deserving of punishment, would be exempt from death.298 It certainly seems unfair that an individual who commits a heinous crime may escape death merely because he has yet to reach his eighteenth birthday, while another individual possessing equal, or even less culpability, may receive a death sentence.

B. Individualized Sentencing as an Answer to this Apparent Injustice

Although there is no doubt that mentally retarded individuals and juveniles frequently lack the degree of culpability necessary to warrant a death sentence, it cannot be said with any degree of certainty that these individuals are never deserving of the death penalty. As long as our society deems capital punishment to be appropriate and constitutionally permissible under certain circumstances, it is unjust for the Court to continue to carve out exemptions for various groups of people. The better approach, and the

294. Id.
295. See id.
296. See In re Stanford, 537 U.S. 968, 972 (2002) (wherein Justices Stevens, Souter, Ginsburg, and Breyer assert that the juvenile death penalty is "a shameful practice" and should be declared unconstitutional).
297. See Hoffman, supra note 292, at 244-47 (discussing actual cases, similar to the hypothetical, in which a bright-line age distinction would have worked unjust results).
298. See id.
approach mandated by the Court's own precedent,299 is individualized consideration at sentencing.

All capital defendants have a constitutional right to have their cases considered on an individual basis by the jury,300 and therefore, it is unnecessary for the Supreme Court to step in and categorically prohibit the execution of a mentally retarded individual or a juvenile if a jury, upon careful consideration of the particular facts of the offender's case, decides that a death sentence is warranted. Before a juvenile may stand trial as an adult, most states require that the juvenile court certify him after reviewing his past criminal record, his ""criminal sophistication,"301 and whether there is any possibility of rehabilitation among other things.302 Furthermore, if the juvenile is certified to stand trial as an adult, at sentencing he has a constitutional right to introduce, and the jury has a constitutional duty to consider,303 his age as well as his "background and mental and emotional development"304 and any other factors as mitigating evidence. Thus, it is simply not necessary, and it is even unfair, for the Court to delineate an age at which the death penalty may never be imposed because the individualized consideration mandated by the Court's own precedent is sufficient to ensure that only the most deserving juveniles are put to death.

VI. CONCLUSION

This Comment is intended to be neither an endorsement nor an indictment of capital punishment. It is intended, however, to be an assertion that if we as a society have determined that capital punishment is an appropriate remedy for murder in some circumstances, it is imperative that we impose this most harsh and irrevocable of penalties in a fair and impartial manner. There is no justifiable basis on which the Supreme Court may categorically preclude from death individuals whom it believes to be undeserving when state legislatures and sentencing juries, all of whom are in a far better position to assess the propriety of a capital sentence in a given case, have deemed the death penalty to be warranted. Wholesale exemption of juveniles from the death penalty is both unnecessary and potentially grossly unfair, at least from the perspective of an offender over the age of eighteen. Rather than providing juveniles with

299. See Lockett v. Ohio, 438 U.S. 586 (1978) (holding that individualized consideration in death penalty cases is a constitutional requirement).
300. Id.
301. Kato, supra note 99, at 141 (quoting CAL. WELF. & INST. CODE § 707 (West 1997)).
302. Id.; see also Greenwald, supra note 17 at 1476-82 (discussing the procedure whereby a juvenile is transferred from juvenile to adult court).
303. See Kato, supra note 99, at 142.
absolute immunity, as the Court has done for mentally retarded offenders, each juvenile offender should be accorded individualized consideration, and age should be a mitigating, but not necessarily an exculpatory, factor.

AUDRA M. BOGDANSKI