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ADOLESCENCE, MENTAL RETARDATION, AND THE DEATH PENALTY: THE SIREN CALL OF *ATKINS V. VIRGINIA*

VICTOR L. STREIB*

I. INTRODUCTION

The decision in *Atkins v. Virginia*¹ appears to be one final effort to separate the death penalty's Siamese twins:² juvenile offenders³ and mentally retarded offenders.⁴ Having whipsawed our courts and legislatures for the past twenty years, these capital siblings appear to be in cahoots against the fading forces trying to maintain these age-old practices. Offenders in either category can and do commit horrible crimes that are devastating to the victim's family and to the broader community. However, the Eighth Amendment to the U.S. Constitution requires that the decision to impose the death penalty must be based both upon the nature and circumstances of the offense and upon the character and background of the offender.⁵ Juvenile or mentally retarded offenders often more than meet the first requirement but fail to meet the second requirement. The question posed by this article is whether they always fail to have a character and background sufficient to make them eligible for execution.⁶ *Atkins* has said "yes" for mentally retarded offenders,⁷ and the same answer surely must follow for juvenile offenders.

This article will first explore the evolution of constitutional law as it permits or restricts the death penalty for juvenile offenders. Following that section is a similar exploration of constitutional law and the death penalty for mentally retarded offenders. Given these background sections, the major section of this article compares and contrasts these two areas of constitutional law. The vehicle for this comparative analysis is the Supreme Court's opinion in *Atkins*, our most recent beacon in this area of law. The unavoidable conclusion is that these two categories of offenders are the Siamese twins of capital punishment, inextricably intertwined and impossible to separate without doing great damage to logic and legal analysis.

* Professor of Law, Ohio Northern University. In considering factors that might influence the author's perspective in this article, readers should know that the author has served as defense counsel for several juvenile offenders on death row, such as Jerome Allen (Florida), Paula Cooper (Indiana), Kevin Stanford (Kentucky), and Wayne Thompson (Oklahoma). An early version of this article was presented by the author at the symposium, *Beyond Atkins: A Symposium on the Implications of Atkins v. Virginia* sponsored by the NEW MEXICO LAW REVIEW and held on Oct. 19, 2002, at the University of New Mexico School of Law in Albuquerque, New Mexico.

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

2. The original Siamese twins were a set of twin boys, Chang and Eng, born in Siam in 1811. This term has now come to mean any set of twins born with their bodies joined, the successful surgical separation of which can be extremely difficult if not impossible. WEBSTER'S CONCISE ENGLISH DICTIONARY 8 (1992). Page Chichester, *A Hyphenated Life*, available at <http://blueridgecounty.com/newtwins/twins.html> (last visited Apr. 5, 2003). The same sort of inseparable connectivity can be seen between these two categories of capital offenders.

3. The term "juvenile offenders" is used throughout this article to refer to persons who committed criminal offenses when under the age of eighteen. Adolescence is a more general term referring to the stage of life between puberty and adulthood.

4. The definition of the term "mentally retarded offenders" throughout this article is taken from the Supreme Court's working definition: subaverage intellectual functioning (e.g., IQ below seventy) and significant limitations in adaptive skills, both of which became manifest before the age of eighteen. *Atkins*, 536 U.S. at 317.

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

6. See, e.g., Carol Steiker & Jordan Steiker, *Defending Categorical Exemptions to the Death Penalty: Reflections on the ABA's Resolutions Concerning the Execution of Juveniles and Persons with Mental Retardation*, 61 LAW & CONTEMP. PROBS. 89 (1998).

7. 536 U.S. at 321.

If it is cruel and unusual punishment⁸ to impose a death sentence upon mentally retarded offenders, the same conclusion must apply to juvenile offenders.

II. EVOLVING LAW OF DEATH PENALTY FOR JUVENILES⁹

A. Major U.S. Supreme Court Cases

Prior to twenty years ago, the issue of the death penalty for crimes committed by juvenile offenders had been generally ignored by American law.¹⁰ Almost no statutes and only a few lower level cases had ever addressed the issue.¹¹ The U.S. Supreme Court did not address the constitutionality of this practice until the early 1980s, and never have more than four Justices agreed completely on this constitutional issue.¹² The first case arose in 1981 when the Court considered a certiorari petition putting forward the specific issue of the constitutionality of capital punishment for an offense committed when the defendant was only sixteen years old.¹³ The Supreme Court decided *Eddings v. Oklahoma* in 1982 on a different issue, but Justice Powell's majority opinion noted in passing that "the chronological age of a minor is itself a relevant mitigating factor of great weight."¹⁴ However, that five-Justice majority opinion did not reach the constitutional issue upon which certiorari had been granted. Chief Justice Burger's four-Justice dissent would have reached that ultimate constitutional issue and would have rejected any Eighth Amendment bar to the execution of sixteen-year-olds.¹⁵ In fairness, Burger's dissent in *Eddings* devoted only a few lines to this constitutional issue, cited no legal or psychiatric authorities for its decision, and cannot be said to have fully and thoroughly explored the issue.¹⁶

After *Eddings* in 1982, the Court continued to be tempted by the issue but for several years did not grant certiorari on the question. *Burger v. Kemp*¹⁷ involved an offender who was only seventeen years old at the time of his crime, but the case did not directly raise the minimum age issue. In his dissent, Justice Powell nonetheless questioned the constitutionality of the death penalty for that seventeen-year-old

8. The Eighth Amendment to the U.S. Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST., amend. VIII.

9. This section of this article is based in large part upon the analysis in Victor L. Streib, *Executing Juvenile Offenders: The Ultimate Denial of Juvenile Justice*, 14 STAN. L. & POL'Y REV. 121 (2003).

10. For the author's general view of the history and evolution of the death penalty, see VICTOR STREIB, DEATH PENALTY IN A NUTSHELL 1-8 (2003) [hereinafter STREIB, NUTSHELL].

11. See generally VICTOR L. STREIB, DEATH PENALTY FOR JUVENILES (1987) [hereinafter STREIB, JUVENILES].

12. See *In re Stanford*, 123 S. Ct. 472 (2002) (a five-to-four decision, with only the four dissenters addressing the constitutional issue); *Patterson v. Texas*, 123 S. Ct. 24 (2002) (a six-to-three decision, with only the three dissenters addressing the constitutional issue); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (a four-one-four decision); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (a four-one-three decision); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (a five-to-four decision, with only the four dissenters addressing the constitutional issue).

13. *Eddings v. Oklahoma*, 455 U.S. 104 (1982), cert. granted, 450 U.S. 1040 (1981). Eddings was charged and convicted of first-degree murder for killing a police officer. *Id.* at 106.

14. *Id.* at 116.

15. *Id.* at 120, 128 (Burger, C.J., dissenting).

16. See *id.* at 128.

17. 483 U.S. 776 (1987). Burger kidnapped a cabdriver, physically abused him, and then killed him and was convicted of murder. *Id.* at 776, 779.

offender and lamented the majority's unwillingness to wait for a decision squarely on this constitutional issue.¹⁸

Even as *Burger* was being decided, the Court granted certiorari in the case of a fifteen-year-old offender and was to decide that case in 1988.¹⁹ In *Thompson v. Oklahoma*, the issue was couched as "whether the execution of [a death] sentence would violate the constitutional prohibition against the infliction of 'cruel and unusual punishments' because petitioner was only 15 years old at the time of his offense."²⁰ In a four-one-three ruling, the *Thompson* Court held that such an execution would be unconstitutional.²¹

Justice Stevens' plurality opinion began with consideration of the obligatory Eighth Amendment benchmark—the "evolving standards of decency that mark the progress of a maturing society."²² Such "standards of decency" require consideration of three factors: (1) current legislation on the acceptance or rejection of the death penalty for offenders younger than certain age limits; (2) jury willingness to impose death sentences on juveniles even where authorized; and (3) views of informed organizations and other nations on the acceptability of the juvenile death penalty.²³ The *Thompson* plurality concluded that the Court is the ultimate arbiter of the limits of "cruel and unusual punishment" under the Eighth Amendment to the U.S. Constitution.²⁴ Justice Stevens' opinion measured the unique culpability of juveniles and the contribution of the juvenile death penalty to the acceptable social purposes of that penalty.²⁵ The *Thompson* plurality concluded that juveniles generally have less culpability for their misdeeds and have a significant capacity for growth.²⁶ These unique characteristics, when blended with society's fiduciary obligations to its children, render retribution "simply inapplicable to the execution of a fifteen-year-old offender."²⁷ The other major criminological purpose of the death penalty—general deterrence of other similarly minded, potentially homicidal juveniles—was also discounted for juvenile offenders as inconsistent with what is known about the manner in which adolescents contemplate and evaluate the consequences of their behavior.²⁸

Because Wayne Thompson was only fifteen years old at the time of his crime, the plurality believed it had no compelling need to address Thompson's argument that eighteen was the most logical age at which to draw the line.²⁹ Whatever might be the ultimate determination of this constitutional age limitation, the *Thompson* Court held

18. *Id.* at 819, 822 n.4 (Powell, J., dissenting).

19. *Thompson v. Oklahoma*, 479 U.S. 1084 (1987), *granting cert. to Thompson v. State*, 724 P.2d 780 (Okla. 1986), *vacated and remanded*, *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion). Thompson was convicted of brutally murdering his former brother-in-law. *Thompson*, 487 U.S. at 819.

20. *Thompson*, 487 U.S. at 818-19 (footnote omitted).

21. *Id.* at 838 (plurality opinion), 857-58 (O'Connor, J., concurring).

22. *Id.* at 821.

23. *Id.* at 821-22.

24. *Id.* at 833.

25. *Id.*

26. *Id.* at 833-37.

27. *Id.* at 837.

28. *Id.* at 837-38.

29. *Id.* at 838.

the minimum age line was certainly no lower than sixteen.³⁰ The crucial fifth vote to reverse Wayne Thompson's death penalty was added to the *Thompson* plurality's four votes by Justice O'Connor's solitary concurring opinion.³¹ *Thompson* had only three dissenters: Chief Justice Burger, Justice White, and Justice Scalia.³²

*Stanford v. Kentucky*³³ was decided one year after *Thompson*. Justice Scalia's plurality opinion agreed with Justice Stevens' *Thompson* plurality that "evolving standards of decency" must be manifested primarily in the actions of the various legislatures and juries facing the issue.³⁴ In his plurality opinion in *Stanford*, Justice Scalia expanded upon most of the points he had made in his dissent in *Thompson*, particularly in characterizing the legislation and jury sentences for offenders ages sixteen and seventeen in comparison to the issue of fifteen-year-olds in *Thompson*.³⁵ Several states had express minimum ages of sixteen and seventeen for the death penalty in their statutes and to these Justice Scalia added those states without any express minimum ages whatsoever on the premise that they meant to include juveniles of sixteen and seventeen.³⁶ The practice of sentencing and executing offenders age sixteen and seventeen clearly was not as rare as for fifteen-year-old offenders, and Justice Scalia's plurality in *Stanford* interpreted such rarity as simply laudable prudence rather than a clear signal of an evolved standard of decency rejecting the practice.³⁷

Justice O'Connor's pivotal concurrence in *Stanford* began with a reminder that her opinion required a specific, express minimum age in the pertinent death penalty statute before an eligible offender can be executed unless such execution is clearly not forbidden by a national consensus.³⁸ Justice O'Connor concluded that the executions challenged in *Stanford* could proceed since "it is sufficiently clear that no national consensus forbids the imposition of capital punishment on 16- or 17-year-old capital murderers."³⁹

Justice Brennan's dissent in *Stanford* tracked closely the analytical scheme of Justice Stevens' plurality opinion in *Thompson*.⁴⁰ After finding the juvenile death penalty generally rejected by legislatures, juries, informed organizations, and other nations,⁴¹ the *Stanford* dissent noted the lesser moral culpability of juveniles and the failure of the juvenile death penalty to make any measurable contribution to acceptable goals of punishment under the Eighth Amendment.⁴² The four *Stanford*

30. *Id.*

31. *Id.* at 848 (O'Connor, J., concurring).

32. Justice Powell had retired the year before *Thompson* was decided, leaving the Court with only eight members. By the time *Thompson* was argued, Justice Powell's position had not yet been filled by Justice Kennedy, so only eight Justices decided the case.

33. 492 U.S. 361 (1989) (plurality opinion). Stanford was seventeen years old when he and an accomplice raped and killed a gas station attendant after robbing the store. *Id.* at 365.

34. *Id.* at 368-69.

35. *Id.* at 369-75.

36. *Id.* at 370-72.

37. *Id.* at 373-74.

38. *Id.* at 380 (O'Connor, J., concurring).

39. *Id.* at 381.

40. *Id.* at 382 (Brennan, J., dissenting).

41. *Id.* at 384-90.

42. *Id.* at 390-405.

dissenters (Justices Brennan, Marshall, Blackmun, and Stevens) would have drawn the minimum constitutional age line at eighteen.⁴³

From 1989 to 2002, the Supreme Court did not address the issue of capital punishment for juvenile offenders. As a result, the thirty-eight states and two federal jurisdictions (civilian and military) with death penalty statutes tried to gain meaning and guidance from *Eddings*, *Thompson*, and *Stanford*. This has been a daunting task. For example, in *Eddings* in 1982, four Justices (Burger, White, Blackmun, and Rehnquist) found in dissent no constitutional bar to the execution of sixteen-year-olds.⁴⁴ However, by 1988 in *Thompson*, Justice Blackmun had changed his position from *Eddings* to agree that the execution of sixteen-year-olds is barred by the Eighth and Fourteenth Amendments.⁴⁵ By the time that *Thompson* was decided, only three members of the Supreme Court (Justices Rehnquist, Scalia, and White) thought otherwise.⁴⁶

During this interim, Justice Powell retired from the Court in 1987. In one of the last opinions he authored, Justice Powell seriously questioned the constitutionality of the death penalty for seventeen-year-old offenders and lamented the majority's unwillingness to wait for a decision squarely on this issue.⁴⁷ Given his opinions in *Eddings*⁴⁸ and *Burger*,⁴⁹ and his widely-reported comments after retirement,⁵⁰ it seems reasonable to assume that Justice Powell, had he delayed his retirement just one year until 1988, would have joined Justice Stevens' plurality opinion in *Thompson*.⁵¹ With a delay in retirement until 1989, just one additional year, Justice Powell could have been expected to join Justice Brennan's opinion in *Stanford*,⁵² transforming that four-Justice dissenting opinion into a five-Justice majority ruling by the Court that execution of seventeen-year-old offenders is prohibited by the Eighth and Fourteenth amendments to the U.S. Constitution.

The result of these few opinions by the Supreme Court on this issue over a seven-year period has been to provide razor-thin majority decisions, going opposite directions in back-to-back years and being changed completely by the fortuity of Justice Powell's year of retirement. This slender and battered reed upon which this issue now rests, in combination with the continued developments and discussions since 1989, has sorely tempted the Court to reenter this arena.

In August 2002, three Justices dissented from the denial of a stay of execution of a juvenile offender in *Patterson v. Texas*.⁵³ Justice Stevens' dissent in *Patterson* reaffirmed his belief that Justice Brennan's dissent in *Stanford* had "correctly interpreted the law."⁵⁴ Justice Stevens went on to express an interesting proposition: "Given the apparent consensus that exists among the States and in the international

43. *Id.* at 405.

44. *Eddings*, 455 U.S. at 120, 128 (Burger, C.J., dissenting).

45. *Thompson*, 487 U.S. at 838 (Stevens, J., plurality opinion, joined by Blackmun, J.).

46. *See id.* at 859 (Scalia, J., dissenting, joined by Rehnquist, C.J., and White, J.)

47. *Burger v. Kemp*, 483 U.S. at 819, 822 n.4 (Powell, J., dissenting).

48. 455 U.S. at 105.

49. 483 U.S. at 817 (Powell, J., dissenting).

50. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994).

51. 487 U.S. at 818 (plurality opinion).

52. 492 U.S. at 382 (Brennan, J., dissenting).

53. 123 S. Ct. 24 (2002) (Stevens, J., dissenting).

54. *Id.*

community against the execution of a capital sentence imposed upon a juvenile offender, I think it would be appropriate for the Court to revisit the issue at the earliest opportunity.”⁵⁵

Justice Ginsburg, joined by Justice Breyer, also wrote in dissent in *Patterson*.⁵⁶ While Justice Ginsburg endorsed Justice Stevens’ reasoning, she went on to point out that the Court’s very recent ruling that the death penalty for the mentally retarded violated the Eighth Amendment⁵⁷ “made it tenable for a petitioner to urge the reconsideration of *Stanford v. Kentucky*.”⁵⁸ Nonetheless, the Court denied the stay of execution and refused to hear the case. Toronto Patterson, age seventeen at the time of his crime, was executed by Texas later on the same day as the Court’s decision, August 28, 2002,⁵⁹ quite possibly having the dubious honor of being the last juvenile offender executed in U.S. history.

Hauntingly, the case of Kentucky’s Kevin Stanford⁶⁰ came before the Supreme Court again in the fall of 2002. Arising in two forms, the first case was a straightforward appeal from the denial of Stanford’s habeas corpus relief at the Sixth Circuit, which the Supreme Court denied without opinion.⁶¹ The other case was an original petition for writ of habeas corpus filed by Stanford in the Supreme Court (*Stanford II*).⁶² Although also denied by the Supreme Court two weeks after the denial of the appeal from the Sixth Circuit, this original petition prompted a four-Justice dissenting opinion.⁶³ Justice Stevens’ dissent noted the unusual procedural posture of *Stanford II* but asserted that this was insufficient to bar reconsideration of the basic constitutional issue.⁶⁴ It seems probable, nonetheless, that Justice Stevens’ inability to garner sufficient votes to reconsider the juvenile death penalty issue stemmed more from the Court’s longstanding general unwillingness to grant original petitions for writs of habeas corpus than from a disinterest in the juvenile death penalty issue. Justice Stevens, joined by Justices Breyer, Ginsburg, and Souter, went on to send a very clear signal. Justice Stevens briefly noted the continuing viability of the dissent’s position in *Stanford* and the unidirectional movement of legislatures away from this practice.⁶⁵ In *Patterson*, Justice Stevens’ three-Justice dissent had modestly suggested that it would be “appropriate for the Court to revisit the issue at the earliest opportunity.”⁶⁶ In *Stanford II*, Justice Stevens’ four-Justice dissent moved well beyond a mere suggestion that the Court revisit the issue:

55. *Id.*

56. *Id.* (Ginsburg, J., dissenting).

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

58. 123 S. Ct. 24 (Ginsburg, J., dissenting).

59. See Adam Liptak, *Justices Call for Reviewing Death Sentences for Juveniles*, N.Y. TIMES, Aug. 30, 2002, at A1.

60. This is the same Kevin Stanford as the petitioner in *Stanford v. Kentucky*, 492 U.S. 361 (1989). Although age seventeen at the time of his crime in 1981, he was by this time age 39, having been on Kentucky’s death row continuously since 1982.

61. *Stanford v. Parker*, 266 F.3d 442 (6th Cir. 2001), *cert. denied*, 123 S. Ct. 136 (2002).

62. *In re Stanford*, 123 S. Ct. 472 (2002).

63. *Id.* (Stevens, J., dissenting).

64. *Id.*

65. *Id.*

66. *Patterson v. Texas*, 123 S. Ct. 24 (2002) (Stevens, J., dissenting).

All of this leads me to conclude that offenses committed by juveniles under the age of 18 do not merit the death penalty. The practice of executing such young offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society. We should put an end to this shameful practice.⁶⁷

Perhaps the most remarkable aspect of Justice Stevens' opinion in *Stanford II* was that those four Justices reached this final conclusion even without the benefit of the written briefs and oral arguments of the parties that would have been part of a full hearing on the issue. In any event, as of late October 2002, Justices Breyer, Ginsburg, Souter, and Stevens are on record as opposing the death penalty for juveniles. These are the same four Justices, along with Justices Kennedy and O'Connor, who signed the majority opinion in *Atkins v. Virginia* finding the death penalty for mentally retarded offenders to be unconstitutional.⁶⁸ Given the nearly identical analysis of these two issues, one might predict that the six Justices who joined the majority opinion in *Atkins* would join together in a juvenile death penalty case, should one come before the Court without procedural problems. They may soon get that opportunity, since as of this writing there are at least two more juvenile death penalty cases in the final briefing process about to be ripe for the Court's consideration.⁶⁹

B. State Cases and Statutes

Several state courts have recognized and enforced the Supreme Court rulings on these federal constitutional issues, as well as occasionally relying upon the provisions of their own state constitutions. For example, state court rulings in Alabama,⁷⁰ Florida,⁷¹ Indiana,⁷² and Louisiana⁷³ have enforced *Thompson*⁷⁴ and prohibited the death penalty for fifteen-year-olds. In *State v. Furman*,⁷⁵ the Washington Supreme Court went well beyond the floor established by *Thompson*⁷⁶ and *Stanford*⁷⁷ and unanimously held the entire juvenile death penalty to be prohibited by the constitution of the State of Washington. More narrowly, the Florida Supreme Court has interpreted the Florida Constitution to prohibit the death penalty for sixteen-year-old offenders.⁷⁸ Although not extensive, all of the state case law appears to be moving in the same direction.

In addition to this slow but steady evolution of state case law, the Supreme Court has always been interested first and foremost in the progression of state statutory law as a measure of the evolving standards of cruel and unusual punishment. Since

67. *In re Stanford*, 123 S. Ct. at 475 (Stevens, J., dissenting).

68. 536 U.S. 304 (2002).

69. Hain v. Gibson, 287 F.3d 1224 (10th Cir. 2002), *appeal docketed sub nom.* Hain v. Mullin, No. 02-6438 (Sept. 19, 2002); Foster v. (Mississippi), *appeal docketed*, No. _____.

70. *Flowers v. State*, 586 So. 2d 978 (Ala. Crim. App. 1991).

71. *Allen v. State*, 636 So. 2d 494 (Fla. 1994).

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

73. *Dugar v. State*, 615 So. 2d 1333 (La. 1993); *State v. Stone*, 535 So. 2d 362 (La. 1988).

74. 479 U.S. 1084 (1987).

75. 858 P.2d 1092 (Wash. 1993).

76. 479 U.S. 1084.

77. 492 U.S. 361 (1989).

78. *Brennan v. State*, 754 So. 2d 1 (Fla. 1999).

the Court's last actual holding on this issue,⁷⁹ what has been the reaction of our forty death penalty jurisdictions? This question is identical to that asked by the Court in *Gregg v. Georgia*⁸⁰ when it sought an indication of the nation's reaction to *Furman v. Georgia*.⁸¹ The Court in *Gregg* was singularly impressed that at least thirty-five states and the federal government had enacted new death penalty statutes after their previous statutes were knocked down by the impact of *Furman*.⁸² Even in the face of that very discouraging ruling in 1972 by the Supreme Court, within only a few years (1972 to 1976) the legislatures had made clear their unmistakable desire to have the death penalty.

The reactions of our forty current death penalty jurisdictions since *Stanford*⁸³ in 1989 are of equal significance. Despite questions about consistency and clarity in the 1980s cases on the juvenile death penalty, *Stanford*⁸⁴ was universally understood to have given the green light to death penalty jurisdictions wanting to impose that sanction upon offenders as young as sixteen at the time of their crimes. A predictable nationwide reaction, such as that which occurred during the period between *Furman*⁸⁵ (1972) and *Gregg*⁸⁶ (1976), would have been for almost all death penalty jurisdictions with statutory minimum ages of seventeen or eighteen to lower those minimum ages to sixteen as constitutionally permitted by *Stanford*. However, not a single death penalty jurisdiction has lowered its statutory minimum age from seventeen or eighteen to sixteen since *Stanford* was decided in 1989. If the 1972 to 1976 phenomenon was seen as embracing a national standard approving of the death penalty in general despite significant constitutional impediments, then the 1989 to 2002 phenomenon must be seen as refusing to embrace a national standard approving of the death penalty for sixteen- and seventeen-year-old offenders despite the removal of constitutional impediments.

Instead of a clear national standard of the age of sixteen emerging, American death penalty jurisdictions have moved in precisely the other direction. The most recent is Indiana, which in 2002 raised its statutory minimum age from sixteen to eighteen.⁸⁷ The Montana legislature did the same thing in 1999.⁸⁸ Kansas enacted an entirely new death penalty statute in 1994 containing a minimum age of eighteen.⁸⁹ When New York returned to the death penalty and enacted its current statute in 1995, it set a minimum age of eighteen for the death penalty.⁹⁰ In addition, at least nine other death penalty states—Arizona, Arkansas, Florida, Kentucky, Mississippi, Missouri, Pennsylvania, South Carolina, and Texas—have recently considered legislative amendments to raise their statutory minimum age for the death penalty

79. *Stanford*, 492 U.S. 361.

80. 428 U.S. 153 (1976) (plurality opinion).

81. 408 U.S. 238 (1972). This case reviews three decisions of the Supreme Court of Georgia affirming the imposition of the death penalty. *Id.* at 238.

82. *Gregg*, 428 U.S. at 180-81.

83. 492 U.S. 361.

84. *Id.*

85. 408 U.S. 238.

86. 428 U.S. 153.

87. S. 426, 112th Leg., Reg. Sess., 2002 Ind. Laws.

88. H.B. 374, 1999 Leg., Reg. Sess., 1999 Mont. Laws; MONT. CODE ANN. § 45-5-102.

89. KAN. CRIM. CODE ANN. § 21-4622 (West 2001).

90. N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2002).

from sixteen or seventeen to eighteen.⁹¹ These legislative and court actions are directly opposite of what would have been expected following *Stanford*. Instead of rushing through the door opened by *Stanford*, American death penalty jurisdictions have said “no, thank you” and have moved toward age eighteen as their minimum age.

C. Current Status of Juvenile Death Penalty Law

Thirty-eight states and the federal government (both civilian and military) currently have statutes authorizing the death penalty for capital crimes, almost all of which are forms of murder. Of those forty death penalty jurisdictions, eighteen jurisdictions (forty-five percent) have expressly included age eighteen at the time of the crime as the minimum age for eligibility for that ultimate punishment.⁹² Another five jurisdictions (thirteen percent) have included age seventeen as the minimum.⁹³ The other seventeen death penalty jurisdictions (forty-two percent) use age sixteen as the minimum age, either through an express age in the statute (five states) or by court ruling (twelve states).⁹⁴

This statutory information reminds us that the death penalty for juvenile offenders remains legally available in over half of American death penalty jurisdictions. However, the ultimate measure of the evolving standard of decency regarding the death penalty for juvenile offenders is jurisdictions’ willingness to carry such cases through to actual executions. In the years immediately prior to the *Stanford* decision in 1989, actual execution of juvenile offenders had stopped, presumably awaiting the outcome of *Thompson* and *Stanford*.⁹⁵ One might expect such executions to have returned to a “normal” level during the 1990 to 2002 time period.

Several states continued only to dabble in this practice during this thirteen-year period, sending out signals by occasionally sentencing juvenile offenders to death but never executing them. Examples include Alabama with sixteen such sentences from 1990 through 2002⁹⁶ but last executing a juvenile offender in 1961.⁹⁷ Similar is Florida, with fifteen juvenile death sentences since 1990,⁹⁸ but Florida’s most recent juvenile execution was in 1954.⁹⁹

During this thirteen-year period of 1990 to 2002, there were a total of 682 executions in the United States.¹⁰⁰ Of these 682 executions since 1990, only eighteen (2.6 percent) have been of juvenile offenders.¹⁰¹ It is of critical importance that

91. See Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973–December 31, 2002* 7 (Oct. 9, 2002) available at <http://www.law.onu.edu/faculty/streib/juvdeath.pdf> (last visited Jan. 31, 2003) [hereinafter Streib, *Death Penalty Today*].

92. See *id.* at 8, tbl. 3.

93. *Id.* at 7.

94. *Id.*

95. See *id.* at 4, tbl. 1.

96. See *id.* at 21–24.

97. STREIB, JUVENILES, *supra* note 11, at 191.

98. See Streib, *Death Penalty Today*, *supra* note 91, at 21–24.

99. See STREIB, JUVENILES, *supra* note 11, at 193.

100. See Death Penalty Information Center, *Executions in the U.S. 1976–1986, 1987–1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002* (2003), available at <http://www.deathpenaltyinfo.org> (last visited Apr. 5, 2003).

101. See Streib, *Death Penalty Today*, *supra* note 91, at 4 tbl. 1.

eleven of these eighteen juvenile executions occurred in Texas and three others occurred in Virginia.¹⁰² Looking at the rest of the United States except for Texas and Virginia, a total of thirty-one states executed a total of 353 offenders from 1990 to 2002.¹⁰³ Only four (one percent) were of juvenile offenders, executed in Louisiana (1990), Georgia (1993), Missouri (1993), and Oklahoma (1999).¹⁰⁴ However, it cannot be said that these four states are firmly in the fold of executing juvenile offenders. Prior to these recent-era juvenile executions, Louisiana last executed a juvenile in 1948, Georgia in 1957, and Missouri in 1921. Oklahoma had never executed a juvenile offender prior to 1999.¹⁰⁵

Although twenty-two states officially permit this practice, Texas and perhaps Virginia are the only two jurisdictions within the entire United States that have significantly embraced the execution of juvenile offenders since *Stanford*.¹⁰⁶ During 1990 to 2002, Texas executed 251 persons, eleven (four percent) of whom were juvenile offenders.¹⁰⁷ As of December 31, 2002, Texas had twenty-eight juvenile offenders on its death row and indicated its intent to continue to execute such offenders.¹⁰⁸ Virginia executed seventy-eight persons during 1990 to 2002, only three (four percent) of whom were juvenile offenders.¹⁰⁹ However, Virginia has sentenced only one juvenile offender to death for the past several years and has only one juvenile offender now on death row.¹¹⁰ Whether Virginia will continue to execute juvenile offenders, therefore, is not completely clear.¹¹¹ While four percent is still a very small portion of all executed offenders and thus may not be truly significant, it still might be argued that the "standards of decency" have not "evolved" in Texas and perhaps Virginia to the point of putting this practice behind them. Instead, those two states might be said to continue to embrace the death penalty for juvenile offenders. However, the operative "standards of decency" under the Eighth Amendment must flow from national practices and procedures and are not dictated by a few rogue states.¹¹² One clear indicator of a national consensus against this practice is that at the present time only one or two states can be described as continuing to embrace the actual execution of juvenile offenders.

102. Death Penalty Information Center, *supra* note 100.

103. *Id.*

104. *Id.*

105. See STREIB, JUVENILES, *supra* note 11, at 195, 197, 199, 203.

106. See Death Penalty Information Center, *supra* note 100.

107. *Id.*

108. See Streib, *Death Penalty Today*, *supra* note 91, at 30-32.

109. See Death Penalty Information Center, *supra* note 100.

110. See STREIB, NUTSHELL, *supra* note 10, at 5.

111. As of this writing (Jan. 2003), Virginia is preparing to try a very high profile juvenile offender, Lee Malvo, for capital crimes stemming from the sniper shootings in the metropolitan Washington, D.C., area in 2002. Jurisdiction over Malvo's case has been transferred to the adult criminal court where death penalty charges are expected to be filed. See Jayson Blair, *Teenager Held in Sniper Case Will Be Tried as Adult*, N.Y. TIMES, Jan. 16, 2003, at A18. Nonetheless, actual execution of Lee Malvo remains unlikely if long-term Virginia practice prevails.

112. See, e.g., *Ford v. Wainwright*, 477 U.S. 399, 408 (1986); *Solem v. Helm*, 463 U.S. 277, 300 (1983); *Enmund v. Florida*, 458 U.S. 782, 792 (1982); *Coker v. Georgia*, 433 U.S. 584, 595-96 (1977).

III. EVOLVING LAW OF THE DEATH PENALTY FOR THE MENTALLY RETARDED

Prior to juxtaposing the Court's decisions in *Thompson*,¹¹³ *Stanford*,¹¹⁴ and *Stanford II*¹¹⁵ with the Court's decision in *Atkins*, it may be helpful to consider briefly the evolution of the law of the death penalty for mentally retarded offenders. However, those seriously interested in this area of law should turn to the work of the master, Professor James Ellis, as published in this symposium issue and elsewhere.¹¹⁶

A. Characteristics of Mentally Retarded Defendants

In 1992, the American Association on Mental Retardation (AAMR) revised its definition of mental retardation to read as follows:

Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age eighteen.¹¹⁷

The component parts of this widely accepted definition are terms of art. "Significantly subaverage intellectual functioning" can be measured through intelligence tests that render an intelligence quotient (IQ) score. To meet the AAMR definition of mental retardation, one must score below 70 on an intelligence test for which the mean score is 100.¹¹⁸ In statistical terms, this means that any individual who is mentally retarded is in the lowest 2.5 percent of the population in measured intelligence.¹¹⁹

The AAMR definition also requires that an individual possess an actual disability in an "adaptive skill area" that affects everyday life.¹²⁰ This component reflects an attempt to focus the attention of public policy makers on the specific areas of disability found within the mental retardation classification. Such a focus is helpful in recognizing the wide range of behaviors affected by the disability. This awareness is especially important when assessing the ability of a mentally retarded offender to communicate and work with their defense attorney and, therefore, the lesser ability of the defense attorney to present an adequate defense for a mentally retarded client.

"Mental age" is an additional technique used to assess the severity of a person's mental retardation.¹²¹ It is an attempt to compare the intellectual functioning of the

113. 487 U.S. 815 (1988).

114. 492 U.S. 361 (1989).

115. *In re Stanford*, 123 S. Ct. 472 (2002).

116. See, e.g., James W. Ellis, *Disability Advocacy and the Death Penalty: The Road from Penry to Atkins* 33 N.M.L. REV. 173 (2003).

117. AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT 5 (9th ed. 1992) (relied upon by *Atkins*, 536 U.S. at 309 n.3).

118. *Id.*

119. *Atkins*, 536 U.S. at 309 n.5.

120. *Id.*

121. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 434 (1985).

individual being tested with that of a mentally typical person.¹²² This is accomplished by identifying for each item on an IQ test the age level at which a typical person can successfully answer the question.¹²³ For example, if a person with a chronological age of twenty receives a similar IQ score as a non-retarded child with a chronological age of eleven, the twenty year old is said to have a mental age of eleven.¹²⁴ The death penalty arguments that flow from this mental age assessment of mentally retarded defendants are obvious. If an extremely mature murderer with the chronological age of fifteen or lower is not eligible for the death penalty under *Thompson*, then a mentally retarded murderer with the mental age of fifteen or lower should similarly be ineligible for the death penalty.

The perceived inability of the mentally retarded to adequately negotiate the workings of the judicial system is often cited as a justification for their exclusion from the death penalty.¹²⁵ Research on the moral development of the mentally retarded establishes that some mentally retarded individuals possess incomplete or immature concepts of blameworthiness and causation.¹²⁶ As a result, a mentally retarded defendant may plead guilty to a crime he did not commit simply because he thinks that blame should be delegated to someone, and he is unable to master the idea of causation and his role in the incident.¹²⁷ Similarly, a mentally retarded defendant may eagerly assume blame in an effort to please an accuser, which may result in an unfounded confession.¹²⁸

Further difficulties confront a mentally retarded defendant when he seeks to deny his disability or enhance his status in the courtroom.¹²⁹ Such a defendant may boast of his strength or how he outsmarted the victim, when neither assertion is true. Few mentally retarded defendants acknowledge their disability when arrested or at any other time during their encounter with the criminal justice system.¹³⁰ This halted moral development also is a factor in assessing culpability.¹³¹ Opponents of the death penalty for mentally retarded offenders argue that when a mentally retarded defendant's full moral reasoning ability is compromised, he cannot be held to have the level of culpability that would justify punishment by death.¹³²

B. Evolving Case Law and Statutes on the Death Penalty for Mentally Retarded Offenders

The exemption of the mentally retarded from the death penalty apparently was firmly established in English and American common-law jurisprudence.¹³³ Early

122. *Id.*

123. *Id.*

124. *Id.*

125. *See, e.g., Atkins*, 536 U.S. at 320.

126. *See generally* Ellis & Luckasson, *supra* note 121.

127. *Id.*

128. *See* Caroline Everington & Solomon Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 MENTAL RETARDATION 212, 212-13, 535 (1999).

129. Ellis & Luckasson, *supra* note 121, at 430.

130. *Id.*

131. *Id.*

132. AMERICAN ASSOCIATION OF MENTAL RETARDATION, *supra* note 117, at 8.

133. *See, e.g.,* David L. Rumley, *A License to Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty*, 24 ST. MARY'S L.J. 1299 (1993).

definitions of "idiocy" focused on both intellectual impairment and its resulting impact on functional ability, making these definitions not dissimilar from today's AAMR definition. The basic point of disagreement has always been in the determination of what level of mental disability is sufficient for exemption from criminal responsibility. The sixteenth century "counting-twenty-pence" test defined an idiot as one who could not count to twenty, identify his parents, or cite his age.¹³⁴ Early eighteenth century courts promulgated the "wild beast" test, which exonerated from the death penalty those individuals whose awareness of their actions was no more than that of an infant, brute, or wild beast.¹³⁵

Prior to 1986, apparently no death penalty statute had addressed mental retardation either as a mitigating circumstance or as a precluding factor.¹³⁶ The Georgia legislature amended its death penalty statute in 1986 to preclude the death penalty for mentally retarded offenders, due in large part to extensive media coverage of Georgia's 1986 execution of Jerome Bowden, who had an IQ of 65.¹³⁷ The federal death penalty statute followed suit in 1988,¹³⁸ and Maryland enacted a similar provision in 1989.¹³⁹ However, all other death penalty jurisdictions in the United States as of that time made no mention of mental retardation.

The Supreme Court first considered this issue in 1989 in *Penry v. Lynaugh*.¹⁴⁰ Johnny Paul Penry was sentenced to death for rape and murder in Texas.¹⁴¹ Evidence that Penry was mentally retarded and brain damaged was presented, but he was found competent to stand trial.¹⁴² John Paul Penry had an IQ of 50 and a mental age of under seven, never having finished the first grade.¹⁴³ In *Penry*, however, the Supreme Court found no constitutional bar to the death penalty for mentally retarded capital defendants, primarily because at that time (1989) only three death penalty jurisdictions expressly prohibited it.¹⁴⁴ This did not constitute a national consensus opposing the death penalty for the mentally retarded under the Supreme Court's "evolving standards of decency" analysis.¹⁴⁵

However, the issue did not fade away after 1989. An intensive political action campaign kept the death penalty for the mentally retarded in the news media, and state legislatures in death penalty states were asked to address the issue. As a result, nearly half of the death penalty jurisdictions amended their death penalty statutes in the 1990s to exclude mentally retarded offenders, generally using an IQ cutoff of 70, and this legislative movement continued to grow steadily into the early years of the

134. Ellis & Luckasson, *supra* note 121, at 416-17.

135. Rumley, *supra* note 133, at 1307.

136. *Atkins*, 536 U.S. at 313-14.

137. *Id.*

138. *Id.* at 314.

139. *Id.*

140. 492 U.S. 302 (1989).

141. *Id.* at 302.

142. *Id.*

143. *Id.* at 307-08.

144. *Id.* at 308.

145. *Id.* at 335.

twenty-first century.¹⁴⁶ Mentally retarded defendants in death penalty cases continued to litigate this issue, and the Supreme Court entered this arena once again.

The Supreme Court's 2002 ruling in *Atkins*¹⁴⁷ moved Eighth Amendment law on this issue. Daryl Atkins and an accomplice had committed a robbery-murder, but Atkins had an IQ of 59 and the mental age of a nine- to twelve-year-old child.¹⁴⁸ Concluding that the flurry of legislative activity, in conjunction with other indicators, establishes a national consensus opposing the death penalty for the mentally retarded, the Supreme Court in *Atkins* held that the application of capital punishment is now cruel and unusual under the Eighth and Fourteenth amendments.¹⁴⁹ In addition to being rejected by a growing number of state legislatures, the actual imposition of death sentences and actual executions upon mentally retarded offenders is quite rare even in states that permit it, providing yet further indication of a national consensus against it.¹⁵⁰ One lesser issue involved the opposition to this practice found in public polls, in the positions of leading organizations, and in comparative and international law.¹⁵¹ The majority in *Atkins* relied in small part on these findings,¹⁵² but the three dissenting Justices thought that a "national consensus" in constitutional law should not be built upon the whims of public opinion or upon the practices of other countries.¹⁵³

In establishing this national consensus under the evolving standards of decency, the Court in *Atkins* also measured it against the social purposes served by the death penalty: retribution and deterrence of capital crimes by prospective offenders.¹⁵⁴ The Court held that mentally retarded offenders have less culpability for their crimes and therefore do not merit maximum retribution.¹⁵⁵ The Court in *Atkins* also evaluated potential offenders' ability to deliberate and premeditate their murders, finding "that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders."¹⁵⁶ Given this basic truth, they were unlikely to be deterred from murderous conduct.¹⁵⁷

While *Atkins* held that the Eighth and Fourteenth amendments prohibit execution of the mentally retarded, the Supreme Court left to the states the task of developing ways to define this category in more detail.¹⁵⁸ This smacks of a macabre game of "you can't execute them but we won't tell you who they are," but it is the same approach used by the Court in regard to executing the insane.¹⁵⁹ Following *Atkins*, the nation can expect a flurry of state legislative activity to amend death penalty

146. *Atkins*, 536 U.S. at 314-15. See also J.L. Bing, *Protecting the Mentally Retarded from Capital Punishment: State Efforts Since Penry and Recommendations for the Future*, 22 N.Y.U. REV. L. & SOC. CHANGE 59 (1996).

147. 536 U.S. 304.

148. *Id.* at 308-09.

149. *Id.* at 321.

150. *Id.* at 315-16.

151. *Id.* at 316 n.21.

152. *Id.*

153. *Id.* at 321-24 (Rehnquist, C.J., dissenting); *id.* at 346-48 (Scalia, J., dissenting).

154. *Id.* at 318-19.

155. *Id.* at 318-20.

156. *Id.*

157. *Id.*

158. *Id.* at 317.

159. See *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

statutes, both to prohibit the execution of the entire category of mentally retarded offenders and to define who is and is not in that category. *Atkins* endorsed the common definition of mental retardation as having an IQ under 70 and having significant limitations in adaptive functioning in skill areas such as communication, self-care, home-living, and work.¹⁶⁰ The several hundred apparently mentally retarded inmates on death row at the time *Atkins* was decided also will have to litigate their cases individually to see if they fall within the protection of *Atkins*.

IV. COMPARING ADOLESCENT CHARACTERISTICS TO THE *ATKINS* FACTORS FOR THE MENTALLY RETARDED

The *Atkins* Court found sufficient factors concerning the death penalty for mentally retarded offenders to conclude that the evolving standards under the Eighth Amendment now prohibit that ultimate sanction for this specific class of offenders.¹⁶¹ The analytical process followed by the Court in coming to this conclusion is the now-entrenched approach of first looking to various objective indicia of any possibly evolved standard, next measuring this punishment against the broad social purposes served by the death penalty in general, and finally bringing to bear the Court's own judgment as to the acceptability of this punishment. The Court has been divided over the weightiness and even the appropriateness of some of these factors in an Eighth Amendment analysis, but *Atkins* makes clear that there are six Justices who subscribe to the same view. This section sets out the essential *Atkins* factors for mentally retarded offenders and contrasts them with comparable factors for juvenile offenders.

A. Legislation

If the "standards of decency" have evolved sufficiently to find a new Eighth Amendment prohibition, then this evolution may be most apparent in the changing legislation among the death penalty states. Indeed, all nine members of the Court have made it clear that this is the most important factor to consider.¹⁶² In *Atkins*, the Court relied specifically upon the following points concerning legislation addressing the death penalty for mentally retarded offenders:

No death penalty statute had prohibited the death penalty for mentally retarded offenders prior to 1986.¹⁶³

Between 1986 and 2001, a total of eighteen state legislatures and the federal Congress enacted provisions prohibiting this practice.¹⁶⁴

160. *Atkins*, 536 U.S. at 308 n.3.

161. *Id.* at 309-21.

162. The *Atkins* majority reaffirmed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Id.* at 312 (citing with approval *Penry*, 492 U.S. at 331). This same reaffirmation appeared in the two dissenting opinions. *Id.* at 322-23 (Rehnquist, C.J., dissenting); *id.* at 339-40 (Scalia, J., dissenting).

163. *Id.* at 313-14.

164. *Id.* But see *id.* at 342 (Scalia, J., dissenting) ("18 States—less than half (47%) of the 38 states that permit capital punishment (for whom the issue exists)—have very recently enacted legislation barring execution of the mentally retarded.").

Similar legislation passed at least one house of three additional state legislatures in 2001–2002 but was not finally enacted.¹⁶⁵

Legislative change has been consistently in the direction of prohibiting this practice.¹⁶⁶

The legislative history relevant to the death penalty for juvenile offenders has been even more impressive. Instead of the absolute void prior to 1986 for mentally retarded offenders, a total of twelve of the thirty-six death penalty states as of 1986 had express statutory provisions that prohibited the death penalty for offenders under the age of eighteen.¹⁶⁷ Therefore, Justice Scalia's pejorative comment about the provisions concerning mentally retarded offenders being "very recently enacted legislation"¹⁶⁸ certainly does not apply to juvenile offenders. Also, as of 2001, a total of eighteen state statutes and the federal statute included express provisions excluding mentally retarded offenders.¹⁶⁹ Comparing that to the provisions for juvenile offenders, as of late 2002 a total of sixteen state statutes and the federal statute prohibit this practice.¹⁷⁰ Admittedly, a total of sixteen states is less than eighteen states, but it appears that provisions for juvenile offenders are only slightly behind provisions for mentally retarded offenders. The *Atkins* Court was also impressed that three additional state legislatures (Nevada, Texas, and Virginia) had come close to passing mental retardation amendments to their death penalty statutes.¹⁷¹ Matching this number, three states (Florida, Kentucky, and Texas) have come close to passing juvenile offender amendments in the past few years.¹⁷² Finally, the Court was impressed that the direction of legislative change for mentally retarded offenders was consistently in the direction of prohibiting that practice.¹⁷³ Similarly, the direction of legislative change for juvenile offenders has been consistently in the direction of setting a minimum age of eighteen.¹⁷⁴ Justice Scalia commented in *Atkins* that legislative change for mentally retarded offenders, having begun with no provisions at all, could only go in one direction.¹⁷⁵ Statutory prohibitions of the death penalty for juvenile offenders began with twelve and grew to sixteen, and they obviously could have gone in the opposite direction, particularly given the Court's holding in *Stanford v. Kentucky*.¹⁷⁶ Therefore, when legislation is used as an indicator of an evolved standard of decency, it appears that juvenile offenders fare at least as well as do mentally retarded offenders.

165. *Id.* at 315.

166. *Id.* But see *id.* at 344 (Scalia, J., dissenting) (pointing out that this is the only direction in which change could have taken place).

167. *Stanford*, 492 U.S. at 370.

168. *Atkins*, 536 U.S. at 340 (Scalia, J., dissenting).

169. *Id.*

170. Streib, *Death Penalty Today*, *supra* note 91, at 8 tbl. 3.

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

172. Streib, *Death Penalty Today*, *supra* note 91, at 7.

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

174. See, e.g., Amnesty International, *UNITED STATES OF AMERICA; Indecent and internationally illegal; The death penalty against child offenders* 9-14 (Sept. 25, 2002) (AI-index: AMR 51/143/2002), abridged version available at <http://web.amnesty.org/library/index/ENGAMR511442002> (last visited Apr. 5, 2003).

175. *Atkins*, 536 U.S. at 344-45 (Scalia, J., dissenting).

176. 492 U.S. 361 (1989). See *supra* note 83-91 and accompanying text.

B. Death Verdicts by Juries and Actual Executions

Next in importance to legislative provisions are the individual decisions of juries in death penalty cases.¹⁷⁷ As an extension of such jury verdicts, actual execution of mentally retarded offenders would also be important to consider. In *Atkins*, the Court relied specifically upon the following points concerning jury verdicts and actual executions:

Although the Court's analysis was limited by the scarcity of reliable data concerning jury verdicts for mentally retarded capital defendants, it was estimated that about ten percent of death row inmates are mentally retarded.¹⁷⁸

Apparently, twelve states executed thirty-five mentally retarded offenders from 1984 to 2000.¹⁷⁹

There is little need to pursue legislation barring the execution of mentally retarded offenders in those states which authorize such executions but in which the practice is uncommon.¹⁸⁰

How do these points compare to the same measures for juvenile offenders? Perhaps the most striking contrast is between the ten percent of death row inmates who are mentally retarded as compared to the only two percent who are juvenile offenders.¹⁸¹ The contrast goes somewhat the other way for inmates executed from 1984 to 2000, with twelve of those inmates having been mentally retarded offenders but seventeen having been juvenile offenders.¹⁸² However, while the age of the juvenile offenders has been documented accurately, it is probable that the mental retardation of some other executed offenders has been missed, making that actual number higher than twelve. The discounting of those states that authorize the practice but do not actually carry out executions also seems significant for juvenile offenders. Although twenty-two states currently authorize the death penalty for juvenile offenders, only seven states have actually carried out such executions since 1973, and since 2000 Texas stands alone in this practice.¹⁸³ Therefore, as with legislation as an indicator, the practice of jury verdicts and actual executions seems to place juvenile offenders in about the same position as mentally retarded offenders.

C. Broader Community Considerations

The Court in *Atkins* made it clear that legislative trends, as well as actual death verdicts and executions, are important indicia of any evolving standard of decency under an Eighth Amendment analysis.¹⁸⁴ However, *Atkins* also clarified the murky

177. *Atkins*, 536 U.S. at 315, 322-23 (Rehnquist, C.J., dissenting) ("[D]ata concerning the actions of sentencing juries, though entitled to less weight than legislative judgments, 'is a significant and reliable index of contemporary values'." (quoting *Coker v. Georgia*, 433 U.S. 584, 596 (1977))).

178. *Id.* at 324-25 (Rehnquist, C.J., dissenting); *Id.* at 346-47 (Scalia, J., dissenting).

179. *Id.* at 346-47 (Scalia, J., dissenting).

180. *Id.* at 316 ("Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon.... Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States.").

181. Streib, *Death Penalty Today*, *supra* note 91, at 13.

182. *Id.* at 2 tbl. 1.

183. *Id.*

184. *Atkins*, 536 U.S. at 312.

issue of the relevance of broader community considerations. The six-Justice majority opinion in *Atkins* relegated such considerations to a long footnote,¹⁸⁵ but the significant result is that now a majority of the Court believes that they are to be considered at all.¹⁸⁶ Within these broader community indicia of an evolved standard, the Court in *Atkins* specifically noted the following:

The death penalty for mentally retarded offenders is opposed by "several organizations with germane expertise."¹⁸⁷

It also is opposed by "widely diverse religious communities."¹⁸⁸

Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.¹⁸⁹

Polling data indicates widespread consensus "that executing the mentally retarded is wrong."¹⁹⁰

On these broader community considerations, the indicia for juvenile offenders are even stronger than those for mentally retarded offenders. The death penalty for juvenile offenders was opposed by an enormous number of such organizations when *Stanford* was decided,¹⁹¹ and that number has continued to grow.¹⁹² Similarly, opposition to the death penalty for juvenile offenders can be found in nearly every organized religion in the world.¹⁹³ As for "disapproval" within the world community, every nation in the world now opposes the death penalty for juvenile offenders.¹⁹⁴ Indeed, only Texas and perhaps Virginia can be said to be continuing this practice.¹⁹⁵ Finally, the recent polling data available indicates that only about one-quarter of Americans support the death penalty for juvenile offenders.¹⁹⁶ In fact, public support for the death penalty for juvenile offenders and other younger offenders has always been very low: 1936: 26% support the death penalty for persons under age twenty-one; 1965: 21% support the death penalty for persons under age eighteen; 2002: 26% support the death penalty for persons under age eighteen.¹⁹⁷

185. *Id.* at 316 n.21.

186. *Id.* ("Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion...."). The three dissenters did not think such information should play any role at all. *Id.* at 320-21 (Rehnquist, C.J., dissenting); *Id.* at 346-48 (Scalia, J., dissenting).

187. *Id.* at 316 n.21.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Stanford*, 492 U.S. at 389 n.4 (Brennan, J., dissenting).

192. The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* 11 (2001), available at <http://www.ConstitutionProject.org/dpi/index.html> (last visited Apr. 5, 2003).

193. *Stanford*, 492 U.S. at 389 n.4.

194. See Connie de la Vega, *Amici Curiae Urge the U.S. Supreme Court to Consider International Human Rights Law in Juvenile Death Penalty Case*, 42 SANTA CLARA L. REV. 1041, 1046 (2002).

195. Amnesty International, *supra* note 174, at 19-20.

196. Gallup News Service, *Slim Majority of Americans Say Death Penalty Applied Fairly* (May 20, 2002), available at <http://www.gallup.com/poll/releases> (last visited Apr. 5, 2003).

197. *Id.*

D. Personal Characteristics of the Mentally Retarded

Before turning to a more general analysis of the excessiveness of the death penalty for certain categories of offenders regardless of their crimes, the *Atkins* Court discussed the relevant personal characteristics of the mentally retarded. In the first sentence of its opinion, the Court accepted that mentally retarded persons can and should be convicted and punished for their crimes.¹⁹⁸ However, the Court went on to point out several characteristics of the mentally retarded militating against their eligibility for the death penalty:

Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct.¹⁹⁹

They have diminished capacities to understand and process information, to communicate, to abstract from mistakes and to learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.²⁰⁰

[T]here is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.²⁰¹

The mentally retarded are "childlike."²⁰²

The "symptoms of this condition can readily be feigned."²⁰³

One simplistic characterization of mental retardation is that it is comparable to being "childlike"²⁰⁴ or to having the mental age of a child.²⁰⁵ In comparison, juvenile offenders are not "childlike"—they actually are children. And, even if Justice Scalia's concerns were accurate that the conditions of mental retardation "can readily be feigned,"²⁰⁶ then surely he and the other members of the Court would be heartened by the fact that, given modern birth records, being under the age of eighteen at the time of the crime can almost never be feigned.

Moving to each of the common characteristics of the mentally retarded, it is beyond dispute that adolescent behavior includes being impulsive and having a diminished capacity to learn from experience and to employ adult-level reasoning and judgment. Indeed, these descriptions of the mentally retarded fit almost perfectly the descriptions commonly used for juvenile offenders, and our legal

198. *Atkins*, 536 U.S. at 306.

199. *Id.* The Court generally accepted the definition from AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed.1992):

Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.

Atkins, 536 U.S. at 308 n.3.

200. *Id.* at 317-20.

201. *Id.* at 317-18.

202. *Id.* at 350-52 (Scalia, J., dissenting).

203. *Id.* at 352-54 (Scalia, J., dissenting).

204. *Id.* at 350-52 (Scalia, J., dissenting).

205. Ellis & Luckasson, *supra* note 121.

206. *Atkins*, 536 U.S. at 352-53 (Scalia, J., dissenting).

system has long recognized this truism.²⁰⁷ Although crimes by adolescents can be extremely harmful, “they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.”²⁰⁸ The plurality in *Thompson* observed that “[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.”²⁰⁹

The Court’s judicial notice of the characteristics of adolescent behavior simply repeats what has been observed by the parents of teenagers everywhere and is increasingly substantiated by the findings of scientific research. The organic brains of seventeen-year-olds are not fully developed physically, particularly as to judgment and impulse control.²¹⁰ The agreement between the age of relatively complete maturation of the frontal lobes and the age of social maturity is probably more than coincidental. Without the explicit benefit of neuroscience, but through cumulative everyday common sense, society recognizes that an individual assumes adequate control over his or her impulses, drives, and desires only by a certain age. Until that age, an individual cannot be held fully responsible for his actions in either a legal or a moral sense. It further appears that adolescents caught up in capital murder cases typically do not come up even to the standards of their seventeen-year-old peers. Other factors in their lives often hold back their mental development even further, making them even less mentally culpable than others their age.²¹¹

E. Social Purposes Served by the Death Penalty in General

In *Atkins*, the Court returned to the two well-established social purposes served by the death penalty: “retribution and deterrence of capital crimes by prospective offenders.”²¹² The Court’s application of these two principles to mentally retarded offenders resulted in the following conclusions:

[T]he lesser culpability of the mentally retarded offender surely does not merit that form (death sentence) of retribution.²¹³

Justifications for the deterrence principle assume premeditation, deliberation, and a cold calculus by the prospective offender, and “that sort of calculus is at

207. *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982)

[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, especially in their earlier years, generally are less mature and responsible than adults.

Id.

208. *Id.* at 115 n.11 (citing TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, *CONFRONTING YOUTH CRIME* 7 (1978)).

209. *Thompson*, 487 U.S. at 835 (plurality opinion).

210. *See, e.g.*, ELKHONON GOLDBERG, *THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND* (2001).

211. *See, e.g.*, AMERICAN BAR ASSOCIATION TASK FORCE ON YOUTH IN THE CRIMINAL JUSTICE SYSTEM, *YOUTH IN THE CRIMINAL JUSTICE SYSTEM* 39-46 (2001).

212. *Atkins*, 536 U.S. at 318-19 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

213. *Id.*

the opposite end of the spectrum from behavior of mentally retarded offenders."²¹⁴

If the retribution purpose served by the death penalty does not apply to the mentally retarded due to their "lesser culpability," then surely the same can be said for juvenile offenders.²¹⁵ In addition, *Thompson* rejected the deterrence rationale as simply unacceptable for young offenders.²¹⁶ Seventeen-year-olds simply do not and cannot have a sufficient level of personal culpability to fully deserve the maximum adult punishment known to our legal system.

F. Due Process and Procedural Fairness

Beyond the excessiveness of the death penalty as punishment for the crimes of mentally retarded offenders, the *Atkins* Court expressed two more Due Process concerns:

The enhanced possibility of false confessions.²¹⁷

Mentally retarded defendants...are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.²¹⁸

These fears where mentally retarded offenders are involved also apply with nearly full force to cases with adolescent offenders. Only very rarely will a juvenile offender be the match for a skilled police interrogator, and they run a great risk of being led into simply a confirmation of the interrogator's story.²¹⁹ On the second point, particularly male juveniles tend to be anxious to demonstrate their masculinity and to avoid any indication of fear or weakness. Regardless of their actual feelings about having taken the life of the victim, they cannot be expected to demonstrate remorse at their public trial.²²⁰

G. The Court's Own Judgment and Independent Evaluation

In the final and perhaps most controversial paragraphs of the *Atkins* opinion, the Court compares and contrasts the objective indicia of the evolving standards of decency with its own views of the acceptability of the death penalty for mentally retarded offenders:

[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.²²¹

214. *Id.*

215. *Thompson*, 487 U.S. at 835 ("Less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.") (footnote omitted).

216. *Id.* at 837-38.

217. *Atkins*, 536 U.S. at 318-20.

218. *Id.* at 320-21.

219. See Jeffery Fagan, *Atkins, Culpability and the Jurisprudence of Adolescent Punishment*, 33 N.M. L. REV. 207 (2003).

220. See *id.*

221. *Atkins*, 536 U.S. at 312 (quoting *Coker*, 433 U.S. at 597).

"Our independent evaluation of the issues reveals no reasons to disagree with the judgment" of the legislatures.²²²

Including mentally retarded offenders won't measurably advance the deterrent or retributive purpose of the death penalty.²²³

The arrogance of this assumption of power takes one's breath away.²²⁴

The first point above indicates that a six-Justice majority of the Court has now put behind them the controversy of whether the members of the Court should add their own judgments as to the "standards of decency," neither making them determinant of the outcome nor ignoring them altogether. Three Justices continue to reject this factor as irrelevant, with perhaps the most outspoken member of the Court being left breathless.²²⁵ If such judgments are relied upon in part in considering the death penalty for mentally retarded offenders, then it presumably would go without challenge that they would be relied upon in part for juvenile offenders.

A more difficult task is discerning what the individual views of the nine Justices might be vis-à-vis the death penalty for juvenile offenders. The four Justices who joined the *Stanford II* dissent did not elaborate on this point expressly, but their personal judgments are clearly implied by their characterizations of the juvenile death penalty as a "shameful practice"²²⁶ that is a "relic of the past"²²⁷ and that is "inconsistent with evolving standards of decency in a civilized society."²²⁸ The additional Justices whose views might be unclear are Justices Kennedy and O'Connor. In *Atkins*, these two key votes were cast for rejecting the death penalty for the mentally retarded, based in small part upon their "own judgment."²²⁹ It seems more likely than not that they would also be cast for rejecting the death penalty for juvenile offenders. The final element is advancing the general deterrent and retributive purposes of the death penalty. For the same reasons that these purposes are not served by executing mentally retarded offenders, the Court would be expected to decide the same way for juvenile offenders.

V. CONCLUSIONS AND PROGNOSIS

The race to do away with the death penalty for juvenile offenders has now reached the last lap. State by state, legislatures are amending their death penalty statutes to require a minimum age of eighteen for eligibility for this ultimate punishment.²³⁰ County by county and parish by parish, trial juries are shying away from sentencing juvenile offenders to death.²³¹ Globally, the death penalty for juvenile offenders has essentially disappeared, except for Texas and perhaps Virginia.²³² By the time the Supreme Court gets around to prohibiting this sanction

222. *Id.* at 320-22.

223. *Id.*

224. *Id.* at 348-50 (Scalia, J., dissenting).

225. *Id.*

226. *In re Stanford*, 123 S. Ct. at 474 (Stevens, J., dissenting).

227. *Id.*

228. *Id.*

229. *Atkins*, 536 U.S. 312 (quoting *Coker*, 433 U.S. at 597).

230. See *supra* notes 70-78 and accompanying text.

231. See *supra* notes 138-144 and accompanying text.

232. See *supra* notes 79-91 and accompanying text.

as cruel and unusual under the Eighth Amendment, it may have almost faded away on its own. It indeed is now a "relic of the past,"²³³ and future generations of lawyers will read about it and wonder what we were thinking. However, this case-by-case, jurisdiction-by-jurisdiction eradication of this "shameful practice"²³⁴ seems to be taking forever, and meanwhile it still is claiming victims, at least in Texas.²³⁵

Therefore, the Supreme Court should heed the siren call of *Atkins*. The Court's method for assessing the evolving standards of decency for Eighth Amendment purposes is now part of the bedrock of modern death penalty law. *Atkins* is the most recent application of this assessment method, and it resulted in a conclusion that our evolved standards of decency no longer permit the death penalty for mentally retarded offenders.²³⁶ Application of precisely the same assessment method to the death penalty for juvenile offenders would result in precisely the same conclusion.

Legislation prohibiting the death penalty for juvenile offenders is nearly as common as legislation prohibiting the death penalty for mentally retarded offenders.²³⁷ More telling, juvenile age limits in death penalty statutes originated well over a century ago in some key death penalty states and certainly cannot be seen as just a passing fancy as it might have been for mentally retarded offenders.²³⁸ Another key indicator of the standards within local communities, juries are even less willing to sentence juvenile offenders to death than they have been for mentally retarded offenders.²³⁹ The final measure, actual execution of condemned prisoners, is apparently no more common for juvenile offenders than for mentally retarded offenders.²⁴⁰

The *Atkins* Court reflected a strong majority commitment to including broader community considerations within this constitutional assessment of the evolving standards of decency.²⁴¹ Compared to the opposition to the death penalty for mentally retarded offenders, imposing such sentences for juvenile offenses is even more commonly opposed by organizations with relevant expertise, by religious communities, and by the world community.²⁴² Even measures as commonplace as public polls indicate that only about one-fourth of the public has supported the death penalty for juvenile offenders for the entire two-thirds of a century during which these polling data have been gathered.²⁴³

When the *Atkins* Court turned to consider the personal characteristics of mentally retarded offenders, they characterized them as impulsive and childlike.²⁴⁴ It seems beyond doubt that juveniles are equally as impulsive, and they are not just childlike, they actually are children. These personal characteristics led the Court to conclude that retribution and deterrence simply do not apply as forcefully to mentally retarded

233. *In re Stanford*, 123 S. Ct. at 474.

234. *Id.*

235. See Streib, *Death Penalty Today*, *supra* note 91, at 4 tbl. 1.

236. *Atkins*, 536 U.S. at 317-18.

237. See *supra* notes 124-137 and accompanying text.

238. *Id.*

239. See *supra* notes 138-142 and accompanying text.

240. See *supra* notes 143-144 and accompanying text.

241. *Atkins*, 536 U.S. at 316 n.21.

242. See *supra* notes 145-156 and accompanying text.

243. Gallup News Service, *supra* note 196.

244. See *supra* notes 158-171 and accompanying text.

offenders,²⁴⁵ and the same conclusion is unavoidable for juvenile offenders. Mentally retarded offenders and juvenile offenders also share the same limitations in working with defense counsel and dealing with several other essential aspects of the criminal justice process.²⁴⁶

Given these many levels of analysis, the constitutionality of the death penalty for mentally retarded offenders cannot be distinguished in a principled manner from the constitutionality of the death penalty for juvenile offenders. If the former is cruel and unusual punishment, then the latter is cruel and unusual punishment. The question is not whether the Court will arrive at this conclusion, but when. As the Court sifts through the constant stream of petitions before it for just the right juvenile death penalty case on which to impose its now-standard constitutional assessment method, yet more juvenile offenders are slipping closer and closer to their dates with the executioner. As of this writing, the last one to die was Toronto Patterson in Texas on August 28, 2002.²⁴⁷ He slipped away just hours after falling one vote short before the Court.²⁴⁸ Will Toronto Patterson be the last juvenile offender to be executed or will one or two more die before the right case gets before the Court? Does any State Governor want to be known as the last in American history to execute a juvenile offender?

245. See *supra* notes 172-176 and accompanying text.

246. See *supra* notes 177-180 and accompanying text.

247. See *supra* notes 45-51 and accompanying text.

248. See *Patterson v. Texas*, 123 S. Ct. 24 (2002); Liptak, *supra* note 59.