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ATKINS, ADOLESCENCE, AND THE MATURITY HEURISTIC: RATIONALES FOR A CATEGORICAL EXEMPTION FOR JUVENILES FROM CAPITAL PUNISHMENT

JEFFREY FAGAN*

I. INTRODUCTION

In *Atkins v. Virginia*,[1] the U.S. Supreme Court voted six to three to bar further use of the death penalty for mentally retarded offenders. The Court offered three reasons for banning the execution of the retarded. First, citing a shift in public opinion over the thirteen years since *Penry v. Lynaugh*,[2] the Court in *Atkins* ruled that the execution of the mentally retarded is "cruel and unusual punishment" prohibited by the Eighth Amendment. Second, the Court concluded that retaining the death penalty for the mentally retarded would not serve the interest in retribution or deterrence that is essential to capital jurisprudence. *Atkins* held that mentally retarded people lacked a range of developmental capacities necessary to establish the higher threshold of culpability for the execution of murderers that the Court had established in *Furman*,[3] *Gregg*,[4] *Coker*,[5] *Woodson*,[6] and *Enmund*.[7] Third, the *Atkins* Court noted that the impairments of mental retardation lead to a "special risk of wrongful execution."[8]

The *Atkins* decision, though welcomed by both popular and legal policy audiences, naturally raises the question: what about juveniles? After all, the very same limitations in developmental capacities that characterize mentally retarded defendants also characterize a significant proportion of adolescent offenders.[9] The parallels between capital punishment for adolescents and for the mentally retarded have been echoed both in popular and legal discourse since the resumption of capital punishment following *Furman*.[10] Prior to *Atkins*, many groups protested the

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1. Atkins v. Virginia, 536 U.S. 304 (2002).
2. Penry v. Lynaugh, 492 U.S. 302 (1989).
3. Furman v. Georgia, 408 U.S. 238 (1972).
4. Gregg v. Georgia, 428 U.S. 153 (1976).
5. Coker v. Georgia, 433 U.S. 584 (1977).
6. Woodson v. North Carolina, 428 U.S. 280 (1976).
7. Enmund v. Florida, 458 U.S. 782 (1982).
8. *Atkins*, 536 U.S. at 350.
9. *See, e.g.*, Pet. for Writ of Cert. at 12-14, Patterson v. Texas, 536 U.S. 984 (2002) (No. 02-6010), *at* http://www.abanet.org/crimjust/juvjust/supreme%20court%20petition.pdf (last visited Sept. 24, 2003) (quoting App. E, Declaration of Ruben C. Gur). *See also* Juvenile Justice Center, American Bar Association, *Adolescent Brain Development and Legal Culpability*, *at* http://www.abanet.org/crimjust/juvjus/factsheets_brain_development.pdf (last visited Sept. 24, 2003).
10. The American Bar Association (ABA) resolution calling for a ban on the execution of individuals for capital crimes committed before their eighteenth birthday also calls for a ban on executions of the mentally retarded:

> The ABA has established policies against the execution of both persons with "mental retardation," as defined by the American Association of Mental Retardation, and persons who were under the age of 18 at the time of their offenses. Nevertheless, the Supreme Court has upheld the constitutionality of executions in both of those instances. While many states now bar

use of capital punishment for both types of offenders, invoking arguments against capital punishment that applied equally to each.[11] The popular coupling of concerns about adolescents with concerns about the mentally retarded seemed to naturally invite an extension of the *Atkins* Court's reasoning to juveniles by highlighting the diminished capacity for culpability common to offenders of both groups.[12] In fact, on August 30, 2002, in a rare dissent from an order declining to stay an execution, Justices Stevens, Breyer, and Ginsburg urged the Court to reconsider the constitutionality of allowing juveniles to be sentenced to death.[13] In reference to the *Atkins* decision, the Justices argued that reexamining the "juvenile" issue was warranted, thereby underscoring yet again the similarities between both cases.

Whether these Justices were referring to normative concerns or scientific evidence is unclear. Both clinical and empirical evidence suggest, however, that many of the same deficits in various cognitive competencies that define "retardation" also are markers of adolescence. In *Atkins*, the Court found that persons with mental retardation have "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[14] Recent empirical and theoretical scholarship on the developmental capacities of adolescents generally, and adolescent offenders in particular, suggests that adolescence itself is characterized by a constellation of development deficits that closely align with the developmental incapacities of the mentally retarded.[15] In fact, these characteristics may be so closely aligned as to establish their categorical similarity.

> executions of the retarded, other states continue to execute both retarded individuals and, on occasion, offenders who were under 18 at the time they committed the offenses for which they were executed.

American Bar Association, *American Bar Association Resolution and Report, reprinted in* Victor Streib, *ABA's Proposed Moratorium: Moratorium on the Death Penalty for Juveniles*, 61 LAW & CONTEMP. PROBS. 55 app. at 230 (1998).

11. However, several commentators opposed this linkage.

> For analysis, the young and the retarded should not be treated the same, and generally are not for legal and governmental purposes such as rights to vote, to drink, to marry, and the like. In actual practice,...the legislatures and courts have not treated these categories the same for purposes of the death penalty.

Victor L. Streib, *Executing Women, Children, and the Retarded: Second Class Citizens in Capital Punishment, in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 201 (James R. Acker et al. eds., 1998).

12. A May 2002 CNN/USA Today/Gallup poll, conducted one month before the *Atkins* decision, found that 64 percent of Americans support the death penalty, but 69 percent of Americans oppose executing juveniles. About 58 percent of the American population lives in states that prohibit the execution of juveniles, compared to 51 percent who live in states that opposed execution of the mentally retarded at the time that *Atkins* was decided. JUVENILE JUSTICE CENTER, AMERICAN BAR ASSOCIATION, *Cruel and Unusual Punishment: The Juvenile Death Penalty Evolving Standards of Decency, at* http://www.abanet.org/crimjust/juvjus/factsheets_evolving_standards.pdf (last visited Sept. 24, 2003).

13. *See* Patterson v. Texas, 936 U.S. 984 (2002) (Stevens, Ginsburg, & Breyer, J.J., dissenting). *See also In re* Kevin Nigel Stanford, 1235 S. Ct. 472 (2002) (mem.) (Stevens, J., dissenting). Justice Stevens once again called for an end to the execution of capital offenders who committed their crimes before reaching the age of eighteen. Citing public opinion polling results, he noted that the majority of Americans in 2001 indicated that the death penalty should not be applied to juveniles. *Id.* at 6; Adam Liptak, *3 Justices Call for Reviewing Death Sentences for Juveniles*, N.Y. TIMES, Aug. 30, 2002, at A1.

14. *Atkins*, 536 U.S. at 318.

15. *See infra* notes 42 and 85 and accompanying text.

This cluster of developmental incapacities places both adolescents and mentally retarded persons below the threshold of culpability that constitutional jurisprudence mandates in capital cases.[16] Extending the logic of *Atkins* to juveniles, then, requires analyses showing that (a) many of the developmental characteristics that establish the diminished culpability of the mentally retarded also characterize adolescents; (b) the age-specific competencies for adolescents that define maturity and in turn culpability can be identified and then reliably measured; and (c) the age at which adolescents attain these competencies and when their developmental trajectory begins—that is, the age at which adolescent development measurably departs, both substantively and permanently, from the stable and flat developmental trajectories of the mentally retarded.

The latter question further complicates the application of the *Atkins* holding to juveniles. Bright lines are not the preferred conclusions of social scientists, often to the frustration of legal scholars.[17] The age at which adolescents realize the developmental competencies that constitute culpability will vary: a significant number of juveniles will be immature and lacking in the developmental attributes of culpability well before age eighteen, and some may still lack these competencies after age eighteen: a few may have attained full maturity by the age threshold of sixteen set by the U.S. Supreme Court in *Stanford v. Kentucky*,[18] but most will not. In other words, the risk of serious reversible error is higher for adolescents due to the variability in the age at which they attain the capacities necessary for culpability. Failing to account for this fact invites the risk of executing an adolescent whose culpability does not rise to the constitutional thresholds defined in *Atkins* or other death penalty cases that set a high bar of culpability.[19] This risk is acute and more jurisprudentially challenging than the considerations that attach to mentally retarded adults.

This article addresses these questions by first examining both the jurisprudence and social science of retardation. Whereas the courts have given primacy to determinations of intelligence quotient (IQ) to assess mental retardation, clinical and epidemiological evidence suggests that retardation is a multidimensional diagnostic category and its determination is fraught with scientific judgments that carry varying degrees of error. The Court recognized this complexity in *Atkins*, pointing

16. The Court in *Atkins* also stated that mentally retarded persons are less likely to meet tests that establish their trial competence: they are more vulnerable to false confessions and less able to assist counsel at trial, they are "less likely [to] process the information of the possibility of execution as a penalty," making them vulnerable to "a special risk of wrongful execution." *Atkins*, 536 U.S. at 320-32. The Association of Retarded Citizens (ARC) points out that a mentally retarded individual may (a) pretend to understand concepts that he does not, (b) not want his condition to be viewed as a disability, (c) say what he thinks others want to hear, (d) be overwhelmed by the presence of authority, and (e) have difficulty describing the details of events to others. *See* Association for Retarded Citizens, *Several Statements about Mental Retardation*, *at* http://www.geocities.com/savepenry/statements.htm (last visited Aug. 23, 2003). These same incompetencies limit the ability of adolescents to meet the procedural standards for trial as an adult. *See generally* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE (Robert Schwartz & Thomas Grisso eds., 2000). Despite the conceptual and empirical convergence of the dimensions of competence and culpability, I focus in this article only on the question of culpability.

17. *See generally* Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2000); Robert C. Ellickson, *Trends in Legal Scholarship*, 29 J. LEGAL STUD. 517 (2000); Michael Heise, *The Importance of Being Empirical*, 29 PEPP. L. REV. 807 (1999).

18. Stanford v. Kentucky, 492 U.S. 361 (1989).

19. *See Atkins*, 536 U.S. at 318.

out the significance of social and psychological underdevelopment. Accordingly, the article begins by decomposing the diagnostic category of retardation into specific dimensions of underdevelopment. Second, the article analyzes the correspondence of these dimensions of underdevelopment among the retarded to legal standards about immaturity and culpability of adolescents. If children are in fact less "formed" developmentally than adults, they lack full capacity and therefore are "less culpable" than adults. But what characteristics define immaturity among adolescents, and how do these mirror the incapacities of retarded adults? Finally, the article addresses both the convergence of the two vectors of underdevelopment and the difficulty of establishing reliable chronological markers when such capacities attain. A substantial number of adolescents sentenced to death for crimes committed before age eighteen will reflect a pattern of developmental and cognitive incapacities that place them well below the threshold of culpability that also exempts the mentally retarded. Death penalty jurisprudence suggests that sentencing these persons to death invites the risk of serious error. These issues all highlight the conflict between normative and social science considerations of maturity, capacity, and development, which both further complicate the extension of *Atkins* to adolescents and present challenges for the imminent debate about the executions of minors.

II. THE JURISPRUDENCE OF RETARDATION

A. Penry and the Culpability of Mentally Retarded People

In *Penry v. Lynaugh*, the U.S. Supreme Court ruled that the execution of mentally retarded people convicted of capital offenses was not categorically prohibited by the Eighth Amendment.[20] Johnny Paul Penry had been convicted of the brutal rape and murder of Pamela Carpenter in her home in Livingston, Texas, in October 1979. A clinical psychologist had testified at a competency hearing before trial that Penry was mentally retarded with an IQ of 54.[21] The psychologists testified that Penry had the mental age of a six-and-one-half-year old, that his ability to function socially with the world was also that of a nine- or ten-year old, that he suffered from moderate retardation that led to poor impulse control and an inability to learn from his own experiences, and that it was impossible for him to appreciate the wrongfulness of his conduct or to change his own behavior to conform to the law due to organic brain damage he had suffered as a child.[22]

The Supreme Court's discussion of the treatment of mentally retarded persons in *Penry* focused primarily on "idiots" and "lunatics" in common law.[23] In tracing the common law prohibition against punishing "idiots" and "lunatics," the Court quoted Blackstone, who wrote,

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20. *Penry*, 492 U.S. at 280 (1989).

21. This would place Penry in either the category of "mild" retardation (individuals with an IQ score range of 50-55 and 70) or "moderate" retardation (IQ scores in the range of 35-40 to 50-55), according to the AAMR classifications. *Atkins*, 536 U.S. at 309 n.3 (quoting AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992)).

22. *Penry*, 492 U.S. at 307.

23. *Id.* at 286.

> The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, viz. in an *idiot* or a *lunatic*....[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself....[A] total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses....[24]

The Court also quoted Hale on the culpability of a man born deaf and mute who "is in presumption of law an idiot...because he hath no possibility to understand what is forbidden by law to be done, or under what penalties: but if it can appear, that he hath the use of understanding,...then he may be tried, and suffer judgment and execution."[25] Having generally established mental retardation as a factor that may reduce one's culpability for a criminal act, the Court addressed the issue of whether, because of their diminished culpability, the imposition of capital punishment on individuals with mental retardation would be unconstitutional under the Eighth Amendment's protection against "cruel and unusual punishment." After reviewing state statutes, the Court held that no national consensus had emerged on the issue and that procedural safeguards that allowed sentencers to consider mitigating factors would allow for an individualized determination to be made in every case. Relying on a publication of the American Association on Mental Retardation (AAMR) that described the mentally retarded as "a heterogeneous population, ranging from totally dependant to nearly independent people," the Court stated, "In light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said on the record before us today that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty."[26]

Rejecting a categorical exclusion and acknowledging that mentally retarded individuals suffer from an impairment of certain cognitive abilities, the Court still held that the degree of culpability possessed by *Penry* and a class of individuals with similar abilities was adequate to justify the imposition of the death penalty.[27]

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24. *Id.* at 331 (quoting W. BLACKSTONE, 4 COMMENTARIES OF THE LAW OF ENGLAND 24-25 (1792)).

25. *Id.* at 332 (quoting M. HALE, 1 PLEAS OF THE CROWN 34 (1736)).

26. *Id.* at 338-39.

27. Writing for the majority, Justice O'Connor stated that "retardation has long been regarded as a factor that may diminish culpability...." *Id.* at 337 (citations omitted).

> In its most severe form, mental retardation may result in complete exculpation....Mentally retarded persons, however, are individuals whose abilities and behavioral deficits can vary greatly depending on the degree of their retardation, their life experience, and the ameliorative effects of education and habilitation. On the present record, it cannot be said that all mentally retarded people of petitioner's ability—by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility—inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty. Moreover, the concept of "mental age" is an insufficient basis for a categorical Eighth Amendment rule, since it is imprecise, does not adequately account for individuals' varying experiences and abilities, [and] ceases to change after a person reaches the chronological age of 15 or 16....

Penry, 492 U.S. at 306.

B. The Cognitive and Developmental Components of Mental Retardation

Thirteen years after *Penry*, the Supreme Court granted certiorari in *Atkins v. Virginia*[28] and once again addressed the question of whether the imposition of capital punishment on mentally retarded people was unconstitutional. In *Atkins*, however, the Court overturned the *Penry* decision citing among other factors the emergence of a national consensus against the execution of mentally retarded people. The Court stated that "the consistency of the direction of change"[29] among the state legislative enactments on the issue "provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal."[30] Note 21 in *Atkins* elaborated upon the positions taken by professional and religious organizations and even foreign nations to evidence a "broader social and professional consensus."[31] These positions focused on both subaverage general intellectual functioning (*i.e.*, low IQ) and significant limitations in social and interpersonal behaviors broadly categorized as "adaptive functioning."[32]

1. IQ as a Focal Marker of Retardation

The Supreme Court in *Atkins* initially cited a series of narrow definitions that focused heavily on IQ as a marker of retardation. For example, the American Association on Mental Retardation (AAMR) definition states,

> *Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.[33]

The American Psychiatric Association's (APA) definition also was presented in *Atkins*:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen

28. Atkins v. Virginia, 533 U.S. 976 (2001).
29. *Atkins*, 536 U.S. at 315.
30. *Id.* at 316.
31. *Id.* at 316 n.21.
32. *Id.* at 309 n.3.
33. *Id.* at 309 (quoting AMERICAN ASSOCIATION OF MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992)).

> as a final common pathway of various pathological processes that affect the functioning of the central nervous system.[34]

The World Health Organization (WHO), whose International Statistical Classification of Diseases and Related Health Problems (tenth revision) enjoys greater acceptance internationally, also focuses on IQ in its definition of mental retardation:[35] "Degrees of mental retardation are conventionally estimated by standardized intelligence tests. These can be supplemented by scales assessing social adaptation in a given environment."[36] The emphasis on intelligence noted here has been pervasive in statutory definitions of mental retardation. Virtually every state statute that prohibits the execution of "mentally retarded" persons defines such a condition as "a mental deficit that has resulted in significantly sub-average general intellectual functioning existing concurrently with significant limitations in adaptive functioning, where the onset of the forgoing conditions occurred before the defendant reached the age of eighteen."[37] In addition, about one-third of the states have set a maximum numerical IQ level for a mentally retarded individual—nearly all use a threshold of 70.[38]

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34. *Id.* (quoting AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000)).

35. WORLD HEALTH ORGANIZATION, INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS (ICD-10) 91-93 (1999).

36. *Id.* at 91.

37. *E.g.*, ARIZ. REV. STAT. § 13-703.02 (2002). All statutes prohibiting the death penalty for people with mental retardation can be found at Death Penalty Information Center, *State Statutes Prohibiting the Death Penalty for People with Mental Retardation, at* http://www.deathpenaltyinfo.org/article.php?did=138&scid=28 (last visited Sept. 24, 2003).

38. *See* James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues, at* http://www.deathpenaltyinfo.org/MREllisLeg.pdf (last visited Sept. 24, 2003). Most of the existing state legislation on this topic defines mental retardation in general terms, as "concurrent deficits in adaptive behavior," but also generally applies the definition to persons with an IQ score of 70 or below, and additionally some individuals with scores in the low 70s (and even mid-70s), depending on the nature of the testing information. *See, e.g.*, TENN. CODE ANN. § 39-13-203(a)(1)-(3) (1997); WASH. REV. CODE ANN. § 10.95.030(2)(a) (West Supp. 2002). However, the identification of the upper boundary of mental retardation cannot be stated with complete precision in terms of IQ scores. This upper boundary of IQs to classify a person as mentally retarded reflects the statistical variance inherent in all intelligence tests and the need to accommodate clinical judgment. AMERICAN ASSOCIATION ON MENTAL RETARDATION, DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 11 (1983) (This upper limit is intended as a guideline; it could be extended upward through an IQ of 75 or more, depending on the reliability of the intelligence test used. This particularly applies in schools and similar settings if behavior is impaired and clinically determined to be due to deficits in reasoning and judgment); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2000) (Thus, it is possible to diagnose mental retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.). *See generally* AMERICAN PSYCHOLOGICAL ASSOCIATION, MANUAL OF DIAGNOSIS AND PROFESSIONAL PRACTICE IN MENTAL RETARDATION (John W. Jacobson & James A. Mulick eds., 1996); NATIONAL RESEARCH COUNCIL, MENTAL RETARDATION: DETERMINING ELIGIBILITY FOR SOCIAL SECURITY BENEFITS 5 (2002). Despite the desirability of a bright line standard measurable by a single IQ test, Ellis says that other factors must be considered to inform and contextualize the clinical judgment of experienced diagnosticians. Ellis, *supra*. This fact is reflected in the *Atkins* decision, where the Court noted that "an IQ between 70 and 75 is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Atkins*, 536 U.S. at 309 n.5. *See also Implementing* Atkins, 116 HARV. L. REV. 2565 (2003) (suggesting that the perspectives of mental retardation professionals be integrated into states' legislation implementing *Atkins* to guide courts and juries in determining which defendants possess the culpability and mental capacity to face execution for their crimes); Alexis Krulish Dowling, *Post-*Atkins *Problems with Enforcing the Supreme Court's Ban on Executing the Mentally Retarded*, 33 SETON HALL L. REV. 773 (2003) (showing that the absence of standards to guide the determination of mental retardation will result in arbitrariness and bias in the imposition of the death penalty and recommending that state legislatures uniformly adopt the current AAMR definition as the standard for determining mental retardation).

The clinical, scientific, and normative issues regarding the culpability of mentally retarded individuals did not evolve much in the years between the *Penry* and *Atkins* decisions. No major advancements in the classification of mental retardation had been reported in the intervening time, and IQ remained the focal point in clinical and statutory definitions of mental retardation. The Court's reasoning in *Atkins* was focused more on the normative consensus emerging in the states and less on changing professional views of the capacities of individuals whose IQ hovers at the widely recognized threshold of 70. However, the emphasis on IQ masks important developmental competencies that are concomitant with mental retardation and form the scientific and conceptual basis for extending the inner logic of *Atkins* to adolescents. This dimensionality is examined next.

2. The Dimensionality of Mental Retardation

The Court in *Atkins* recognized the limitations of a narrow and singular definition of mental retardation and invoked a definition more consistent with the Eighth Amendment jurisprudence of *Enmund*, *Woodson*, *Coker*, and other cases.[39] Despite the hegemony of IQ as a marker of retardation in both clinical practice and state law, *Atkins* went beyond the normative consensus to articulate a jurisprudence of mental retardation that bears directly on the culpability of mentally retarded persons for criminal sanctions generally. The Court then identified their culpability relative to the higher capital standard set by *Enmund* and other cases that constitute the "death is different" capital jurisprudence.

Unlike *Penry*, which relied upon the "idiots and lunatics" jurisprudence of the common law, the characterizations of retardation in *Atkins* relied upon not just clinical definitions of mental retardation but ranged wider to embrace social science evidence that establishes characteristics of mental retardation. That is, the Court coupled the extrinsic sociopolitical *consensus* argument with a second more descriptive and straightforward approach: invoking justice. By relying on simple biological and psychological arguments to explain why mentally retarded individuals should not be held to the same standards of culpability as fully developed adults, the *Atkins* Court made an important statement about the role of accountability in capital cases.

At the fulcrum of this discussion are the dynamics of social and mental development. The Court posited that "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses...[mentally retarded persons] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct. Moreover, their impairments can jeopardize the reliability and fairness of capital proceedings against [them]."[40]

This reasoning presupposes a fundamental point: mentally retarded individuals are not as psychologically, mentally, and socially developed as normal adults and, therefore, do not display the same abilities of reason or culpability. There are several steps to take in arguing for this logical progression by the Court. The first and most important is to examine the various definitions of "mental retardation"

39. *Atkins*, 536 U.S. at 312-14.
40. *Id.* at 306.

found in law, medicine, and psychology to ascertain a more comprehensive understanding of what is essential in demarcating a mentally retarded individual from an average adult. Turn again to the Court's own words. The *Atkins* Court instructs,

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there 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.[41]

The logic seems self-evident: because of a stall in mental and social development, these individuals are biologically more vulnerable to outside influence, to acting on impulse, and to not thinking through the consequences of their actions. *Atkins* specifically referenced characteristics common to both the mentally retarded and juveniles: a susceptibility to influence, a lack of maturity and perspective, and a lower degree of moral culpability.[42] The Court concluded that these deficiencies may not exempt mentally retarded persons from criminal sanctions, but they do diminish the culpability well below the constitutional threshold for a death sentence.[43]

For example, adopting the recommendations of the Utah Sentencing Commission,[44] the Utah legislature recently passed Senate Bill 8, incorporating the *Atkins* decision into Utah law,[45] and the Governor signed it into law on March 15, 2003. The bill sets up a procedure to make the mental retardation determination before trial. A defendant found mentally retarded could still be tried for murder but could not be subjected to the death penalty. IQ is only one of many factors to be considered in classifying a person as mentally retarded.[46] The definition in Utah's proposed law reads that a person would be regarded as mentally retarded if the individual "has significantly subaverage general intellectual functioning that results in and exists concurrently with significant deficits in adaptive functioning that exist primarily in the areas of reasoning, judgment and impulse control" and the "subaverage general intellectual functioning and the significant deficiencies in adaptive functioning...are both manifested prior to age 22."[47]

The Utah statute also states that a person's IQ should not be the only determining factor since different IQ tests produce different results, IQ often is considered a

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41. *Id.* at 318. On this point, the Court cited social science evidence. *Id.* at 318 nn.23, 24.

42. These characteristics were defined for juveniles below the age of 18 in *Eddings v. Oklahoma*, 455 U.S. 104, 113-17 (1982). *See generally* Elizabeth Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607 (1992).

43. *Atkins*, 536 U.S. at 318.

44. *See* Utah Sentencing Commission, Minutes (Oct. 9, 2002), *at* http://www.justice.utah.gov/Minutes Agendas/sentmin/October.pdf (last visited Sept. 24, 2003).

45. 2003 Utah Laws Ch.11 (amending UTAH CODE ANN. § 76-2-305 (1953)).

46. *Id.*

47. S. 8, 2003 Leg. § 77-15a-102 (Ut. 2003), *available at* http://www.le.state.ut.us/~2003/bills/sbillenr/sb0008.pdf (last visited Sept. 24, 2003).

range rather than a fixed number and using the traditional IQ of 70 would be both overinclusive and underinclusive. The statute further states that the signs of retardation should have emerged before age twenty-two, although there was sharp internal division within the commission over this provision. Finally, the statute recommends that the death penalty should not be sought against a mentally impaired person who confesses to a crime unless there is outside corroborating evidence.

Utah may be atypical, however, where it focuses on markers other than IQ to determine degrees of mental retardation. Many current statutes in other states require two necessary elements to declare a defendant mentally retarded: low intellectual functioning and subnormal adaptive behavior.[48] These statutes typically provide a broad definition for each of these requirements. Most states, however, set the intellectual functioning standard at a specified IQ level (70 or 75) or leave the evaluation in the hands of a court appointed psychologist. Some states have not provided any definition for the adaptive behavior prong of mental retardation, leaving it open to court interpretation. South Dakota and Tennessee are examples of states using this approach.[49] Many states have taken steps to define the "adaptive behavior" element. Arizona, Connecticut, and Kansas are virtually identical in their wording in this respect.[50] North Carolina and Missouri provide more comprehensive definitions of each component of the definition. For example, Missouri statutes decompose adaptive behavior into specific components: "communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age."[51]

While there are some differences in defining the "adaptive behavior" prong of mental retardation among the various statutes on point, each state with such a definition includes one common element: the defendant lacks independence and social responsibility in relationship to others in that community or cultural group. Only the Utah statute thus far has taken the additional step to incorporate specific markers of developmental incapacities into a definition of mental retardation. Social science, and especially developmental psychology, has taken note of the specific

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48. All of the statutes prohibiting the death penalty for people with mental retardation can be found at Death Penalty Information Center, *State Statutes Prohibiting the Death Penalty for People with Mental Retardation, available at* http://deathpenaltyinfo.org/article.php?scid=28&did=138 (last visited Oct. 7, 2003).

49. For example, Tennessee statutes are typical in drawing a bright line for IQ but leaving vague the criteria for determining "adaptive" behavior. The issue of age of determination attests to the dimension of stability that informs several statutes, an inherent claim of the intractability and organic nature of the disability. The Tennessee statute states,

> "Mental retardation" means substantial limitations in functioning: (A) As shown by significantly sub-average intellectual functioning that exists concurrently with related limitations in two (2) or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work; and (B) That are manifested before eighteen (18) years of age.

TENN. CODE ANN. § 33-1-101 (2003).

50. The Connecticut statute defines mental retardation as "[s]ignificantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." CONN. GEN. STAT. § 1-1g(a) (2001). Adaptive behavior "means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for the individual's age and cultural group." CONN. GEN. STAT. § 1-1g (2001)(b).

51. MO. REV. STAT. § 565.030 (2003).

dimensions of adaptive behavior, generally offering a broader definition that includes (a) initiating, interacting, and terminating interaction with others; (b) regulating one's own behavior and controlling impulses; (c) making choices; and (d) conforming conduct to laws.[52] In this regard, the states lag well behind the social science evidence on the cognitive, emotional regulatory, and neuropsychological deficits that comprise retardation.[53]

3. The Culpability of Mentally Retarded Offenders in Capital Cases

The Court in *Atkins* stated that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability...surely does not merit that form of retribution *only the most deserving of execution* are put to death..."[54] Accordingly, even if a mentally retarded murderer does not meet the strict statutory requirements of being "significantly subaverage" in their intellectual and adaptive abilities, he or she is sufficiently subaverage on the dimensions of "adaptive behavior" to substantially challenge the assertion that a mentally retarded person should ever be considered one of "the most deserving of execution."

The bridge between legal responsibility and moral responsibility can be understood at the intersection of the two purported goals of the criminal justice system, punishment and deterrence. A minimum amount of cognitive understanding is necessary for either goal to be served in any measurable manner. If the defendant is so mentally retarded that he has no understanding of right and wrong or does not have the memory capacity to recollect the crime for which he is being held accountable, then we can assume that he will not be able to appreciate the relationship between his action and the punishment. Other similarly situated individuals, lacking the same cognitive abilities, will lack the mental capacity to understand the crime-punishment relationship or control their actions to conform to social norms. By most clinical definitions, a mentally retarded person's capacity is permanently frozen at a particular mental age.[55] Thus, if an individual lacks the capacity to make a moral judgment about right and wrong and alter their actions in accordance with their moral judgment, then it serves no function to place moral blame and punishment upon that actor.

In *Atkins*, the Court stated two significant reasons for disallowing the execution of mentally retarded offenders. First, given the characteristics of their disability,

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52. See ALAN S. KAUFMAN, ASSESSING ADOLESCENT AND ADULT INTELLIGENCE 549 (1990) for a discussion of adaptive skills. *See also* AMERICAN PSYCHOLOGICAL ASSOCIATION, MANUAL OF DIAGNOSIS AND PROFESSIONAL PRACTICE IN MENTAL RETARDATION 27 (John W. Jacobson & James A. Mulick eds., 1996).

53. *See generally supra* note 37.

54. *Atkins*, 536 U.S. at 319 (emphasis added).

55. AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 1 (Ruth Luckasson ed., 10th ed. 2002). In addition to providing the current definition of mental retardation and explaining related concepts and terminology, the 2002 edition of this manual provides valuable background on such topics as the history of classification, clinical assessment of people with mental retardation, and an extensive bibliography of references to the clinical literature. The formulation in the 2002 AAMR definition requires that the individual manifest a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. Any behavioral adjustments or changes over time by mentally retarded persons do not signify improvements in mental functioning but reflect only the ability to overcome "adaptive limitations" from life experience/habit.

mentally retarded people are not uniquely culpable under the law. While the Court in *Gregg* identified retribution and deterrence as the social purposes served by the death penalty,[56] there is substantial doubt about whether retribution in cases involving the mentally retarded is best served by executing them. In *Godfrey v. Georgia*, for example, the Court set aside a death penalty because the crimes did not reflect a consciousness materially more "depraved than that of any person guilty of murder."[57] Indeed, the *Atkins* Court similarly recognized that mentally retarded persons have diminished capacity to understand and process information, to communicate, to abstract from mistakes and learn from experience, and to control impulses.[58] Accordingly, the Court adopted a functionalist perspective, arguing that the application of capital punishment to mentally retarded offenders did not serve the retribution goal of matching the severity of the punishment to the crime.

The *Atkins* Court also held that mentally retarded persons are unlikely to realize a deterrent effect of capital jurisprudence. Explaining that the same cognitive impairments that classify individuals as mentally retarded also interfere with their ability to understand the law, the Court held that the deterrent effect of possible capital punishment is essentially lost on prospective mentally retarded offenders:

> [I]t is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.[59]

The *Gregg* Court relied on *Enmund v. Florida*, noting, "it seems likely that capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation."[60] Citing *Fisher v. United States*,[61] the *Gregg* Court continued to explain, "for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not "enter into the cold calculus that precedes the decision to act."[62] Regarding the coupling of deterrence and retribution, the *Enmund* Court found that unless the death penalty contributes to one or both of these goals, capital punishment "is nothing more than the purposeless and needless imposition of pain and suffering," and hence an

56. *Gregg*, 428 U.S. at 183.
57. Godfrey v. Georgia, 446 U.S. 420, 433 (1980).
58. *Atkins*, 536 U.S. at 318.
59. *Id.* at 320.
60. *Enmund*, 458 U.S. at 799.
61. 328 U.S. 463, 484 (1946).
62. *Gregg*, 428 U.S. at 186 (footnote omitted).

unconstitutional punishment.[63] Absent a consciousness not just of the moral wrong of murder, but of the aggravating conditions that qualify the case for death, the culpability of the average murderer is insufficient for the death penalty. Furthermore, if a mentally retarded person lacks the logical reasoning skills, the maturity, and the ability to think in long-range causal terms, as some argue, it is inconsistent to hold such a person to the higher standard of either legal responsibility or moral culpability required for a death sentence.

The Court next explained that the disabilities of the mentally retarded not only affect decision making during the commission of their crimes, but also affect them after they have been apprehended and convicted. In this respect, the Court found that the same psychological and intellectual inferiority that leads to the poor decision to commit the act in the first place also "undermines the strength of the procedural protections that our capital jurisprudence steadfastly guards."[64] If an individual is more likely to be intimidated by authority, to be poor, to have a difficult time recounting events in great detail, and to act in a manner beyond which his intellectual faculties can sustain him, the criminal process is likely to be an unjust burden.

Mentally retarded persons are, by definition, deficient in many of these areas and are therefore at a distinct disadvantage in the capital process. In addition to holding that the goals of the death penalty were not furthered by the inclusion of the mentally retarded, the *Atkins* Court overruled the *Penry* Court's holding that consideration of mitigating factors by the sentencer will adequately ensure individualized consideration in determining a mentally retarded defendant's culpability. The diminished capacity of mentally retarded persons to competently participate in the trial process contributes to the higher risk of serious error in both the trial and sentencing phases of their capital trials. It is not hard to imagine how a mentally retarded person might have a lesser ability to make a persuasive showing of mitigation. For example, citing recent exonerations involving false confessions and "the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation,"[65] the Court stated that "[m]entally retarded defendants in the aggregate face a special risk of wrongful execution."[66]

C. The Court's Role in Diagnosing Mental Retardation

Before the *Atkins* decision, mental retardation was considered as a mitigating factor to punishment in death penalty cases. If the level of mental retardation was not so severe as to affect the defendant's competency to stand trial, the courts were not required to make any special determinations or adopt any specific procedural standards when dealing with a defendant with "mild" or "moderate" mental retardation. Judges were not required to change their procedures to conform to the clinical definitions of mental retardation. Rather, juries were often presented with

63. *Enmund*, 458 U.S at 798 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).
64. *Atkins*, 536 U.S. at 317.
65. *Id.* at 320.
66. *Id.* at 321.

the testimony of expert witnesses who testified about both the IQ of defendants and their individual developmental characteristics.

In *Penry*, a clinical psychologist testified at a competency hearing before trial that Mr. Penry was mentally retarded with an IQ of 54.[67] The psychologists testified that based on his evaluation, Mr. Penry had the mental age of a six-and-one-half-year old and that his ability to function socially with the world was also that of a nine- or ten-year old. However, Mr. Penry's moderate to mild levels of mental retardation did not weigh heavily enough in the eyes of the jury to prevent him from adequately representing his interests and the jury found Penry competent to stand trial.

At trial, Penry's attorneys raised an insanity defense (one alternative for mentally retarded defendants who are not so severely impaired as to be deemed unable to stand trial) and the testimony of another psychiatrist was introduced. The psychiatrist testified that the defendant suffered from moderate retardation that led to poor impulse control and an inability to learn from his own experiences. In addition, the psychiatrist testified that because of the organic brain damage Mr. Penry suffered at an early age, it was impossible for him to appreciate the wrongfulness of his conduct or to change his own behavior to conform to the law.

The state presented testimony of two psychiatrists in rebuttal. One psychiatrist testified that the defendant was not suffering from any mental defect or illness at the time of the crime, while the other testified that he had personally diagnosed Penry as mentally retarded in both 1973 and 1977, but that Mr. Penry was legally sane at the time of the crime. In the face of the dueling testimonies of the three psychiatrists, the jury rejected Mr. Penry's insanity defense and rendered a guilty verdict.

Good law during the *Penry* case did not require the jury to categorically exempt Mr. Penry from capital punishment simply by virtue of his mental retardation. Rather, the defense was permitted to present testimony about his mental development, such as his violent upbringing, that the jury would weigh along side other mitigating factors. Accordingly, in this case, the jury was allowed to consider the testimony of different expert witnesses who delivered competing testimony supporting claims that the defendant was or was not mentally retarded. Given the inconsistency of the psychological evaluations, the jury chose not to heavily weigh Mr. Penry's mental development.

In most cases, prosecuting attorneys use this ambiguity to their advantage. In *Wills v. Texas*, the prosecuting attorney was quoted during closing of the original trial as urging the jury not to "have any sympathy for the defendant because he's a little slow or he's borderline mentally retarded....Don't say 'Poor Old Bobby Joe, he's a little slow, he's borderline mentally retarded. Let's give him a break.'"[68]

As the dueling expert witnesses in *Penry* show, there is considerable disagreement among mental health professionals when rendering a diagnosis of mental retardation in individual cases. Historically, the courts have not been

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67. This would place Penry in either the category of "mild" retardation (individuals with an IQ score range of between 50 or 55 and 70), or "moderate" retardation (IQ scores in the range from a low of 35-40 to 50-55), according to the AAMR classifications. *See supra* note 55.

68. Wills v. Texas, 511 U.S. 1097 (1994) (citing Pet. for Cert. at 10).

required to resolve questions about a defendant's possible mental retardation. Rather, the role of the courts has been to provide a forum for the presentation of multiple diagnoses. Although this apparent inconsistency in the reliability of mental retardation diagnoses has made its way into the courtroom, the lack of a categorical exemption for people with mental retardation has temporarily provided a way for the criminal justice system to avoid addressing the threshold question of exactly when someone is mentally retarded. As in *Penry*, the challenge of understanding a defendant's mental condition has been pushed onto the jury, consistent with the recent Supreme Court decision in *Apprendi v. New Jersey*[69] and *Ring v. Arizona*.[70] This becomes a very difficult task, however, where ordinary citizens are forced to evaluate the mental development of a defendant in situations where reasonable mental health professionals themselves disagree.

The Supreme Court's decision in *Atkins* has fundamentally changed the order in which this inquiry will occur. By granting a categorical exemption from capital punishment to people who are mentally retarded, the threshold question of exactly who qualifies as "mentally retarded" now looms before the Court. Although the actual process by which this will occur will develop cumulatively in individual cases over time, judges and juries will have to answer this question in a definitive manner.[71]

Presently, there are two paths the criminal justice system can take in creating a legal threshold for mental retardation. First, the clinical definitions of mental retardation are well established, and these definitions may be accepted wholesale. Here, the advantages are three-fold. One advantage is that clinical definitions already exist and are in wide circulation. Examples include definitions offered by the AAMR; the APA in its publication, *Diagnostic and Statistical Manual of Mental Disorders*, fourth edition (DSM-IV); and the WHO, in its publication, *The International Statistical Classification of Diseases and Related Health Problems*, tenth revision (ICD-10).[72] A second advantage is that the scientific method is used when conducting clinical evaluations. This is a widely accepted analytic method and enjoys broad acceptance both by the judiciary and prospective jurors. Lastly, the scientific research underlying clinical definitions endows these classifications with a certain amount of legitimacy. Where dueling expert witnesses testify, however, a court would nonetheless be faced with a credibility determination.

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69. 530 U.S. 466, 490 (2001). In *Apprendi*, the U.S. Supreme Court ruled that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum, *other than the fact of a prior conviction*, must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* As a matter of due process, any fact that might lead to an enhanced sentence that would increase the maximum penalty may be found by a jury using a reasonable doubt standard.

70. 536 U.S. 584 (2002). *See also infra* notes 72-76.

71. The Court's decision in *Atkins* makes clear that its holding extends to all defendants who fall within the range of mentally retarded offenders about whom there is a national consensus. *Atkins*, 536 U.S. at 347-48. This means that while states are free to adopt variations in the wording of the definition, they cannot adopt a definition that encompasses a smaller group of defendants, nor may they fail to protect any individuals who have mental retardation under the definition embodied in the national consensus. Both judge and jury will have significant roles in the determination of whether a defendant is mentally retarded. *See Ring*, 536 U.S. 584.

72. The AAMR's definition is most widely accepted within the United States, but the WHO's definition is most widely used internationally.

The second path the courts may take is creating a legal definition of mental retardation, perhaps to be determined in a separate hearing much like the modern pre-trial competency hearings. The obvious criticism that would arise is that lawyers and judges are endowing themselves with the ability to make psychiatric diagnoses. This would create a problem similar to what existed when juries were allowed to independently weigh mental retardation as a mitigating factor.

The Court in *Atkins* offered an analysis of the value of clinical definitions of mental retardation when imported into the world of criminal culpability:

> [C]linical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there 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. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.[73]

The presentation of these clinical definitions provided the Court with objective clinical and medical criteria that it could rely upon for its analysis of reduced legal culpability. This language may prove to be a starting point for courts in choosing the path ahead.

Finally, *Ring v. Arizona*[74] raised additional questions as to whether the judge or the jury makes the determination whether the defendant is mentally retarded. *Ring* involved a Sixth Amendment challenge to Arizona's judge-sentencing capital punishment scheme. Defendant Ring argued that the Sixth Amendment requires that any finding of fact that makes a defendant eligible for the death penalty must be unanimously made by the jury beyond a reasonable doubt.[75] While *Ring* dealt specifically with statutory aggravating circumstances, it included "factfinding necessary to put [a defendant]...to death."[76] Applying *Ring*, a mentally retarded defendant is now constitutionally ineligible for the death penalty.[77] Since mental retardation is now a factual issue upon which a defendant's eligibility for death turns, that fact must be "submitted to a jury, and proven beyond a reasonable doubt."[78]

While *Ring* would seem to put the task of determining whether a defendant is mentally retarded into the jury's hands, the trial judge also has a very important role

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73. *Atkins*, 536 U.S. at 318 (citations omitted).
74. 536 U.S. 584 (2002).
75. *Id.* at 597 n.4.
76. *Id.* at 609.
77. *Atkins*, 536 U.S. at 321.
78. *Ring*, 536 U.S. at 600.

to play.[79] In *Atkins,* the Court prohibited execution of the mentally retarded in part by recognizing that retarded persons suffer in litigating issues in front of juries, which in turn exposes them to "a special risk of wrongful execution."[80] Trial courts are obligated to conduct hearings on the admission of evidence regarding the defendant's possible mental retardation. Both the defense and the prosecution would have the opportunity to present evidence, including expert testimony. After considering the evidence, the court should find the defendant to be not-death-eligible if it finds, by a preponderance of the evidence, that the defendant has mental retardation.[81] If the defendant is found to be not-death-eligible because of mental retardation, the trial could proceed as a non-capital trial, and, if convicted, the defendant could be sentenced to any penalty available under state law, other than death. If, on the other hand, the court finds that the defendant is not mentally retarded, and thus potentially eligible for the death penalty, the case could proceed as a capital trial.[82] Thus, both judge and jury participate in the determination of the classification of mental retardation, in effect constructing and administering a gate through which capital defendants must pass should the prosecution seek the death penalty.

III. ADOLESCENCE, DEVELOPMENT AND CULPABILITY

A. The Social and Legal Construction of Childhood

> [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.[83]

Traditionally, many areas of law have recognized the unique status of children. The common law allowed for special treatment of children in almost all areas of law, including contracts, family law, criminal justice, and numerous other fields of

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79. *See generally* John H. Blume & Pamela Blume Leonard, *Principles of Developing and Presenting Mental Health Evidence in Criminal Cases, at* http://dpa.state.ky.us/library/advocate/jan02/mentalh.html (last visited Sept. 24, 2003).

80. *Atkins,* 536 U.S. at 320-21 (noting, (1) the difficulty a mentally retarded person may have in testifying; (2) the possibility that a mentally retarded person's "demeanor may create an unwarranted impression of lack of remorse"; and (3) the possibility that the mental retardation evidence may enhance the likelihood that future dangerousness will be found by the jury).

81. A court could decide that the prosecution would have the burden of establishing that the defendant is not mentally retarded by a higher burden, *e.g.*, clear and convincing evidence or beyond a reasonable doubt. While a higher burden may not be constitutionally *required* at this stage, it would serve to save the costs of going through a capital trial in cases where it is likely the jury will ultimately determine, using the constitutionally required higher standard, that the defendant is mentally retarded at step two. *See* Blume & Leonard, *supra* note 79.

82. As in *Jackson,* the bifurcated approach makes sense because its two prongs address two separate (although factually related) questions. The first, to be addressed by the judge, is the *legal* issue of whether the defendant is a person who is eligible for the death penalty. If the court does not find the defendant death-eligible because of mental retardation, it would be unconstitutional to proceed with a capital trial. The second inquiry, by the jury, is whether the prosecution has demonstrated that the defendant is *factually* an individual upon whom the death penalty may be imposed. Condemning a defendant to death who has properly raised the issue of mental retardation then becomes contingent on the finding of *fact* that is a necessary precondition to a capital sentence. *Ring,* 536 U.S. 584.

83. Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).

governmental regulation. It is nearly universal in the law to assume that children are immature and unable to protect themselves from others and from their own mistakes and, therefore, are in need of adult supervision.[84] Their immaturity often is accompanied by dependencies on adults for basic survival needs, such as food, shelter, health care, and education. As Professor Elizabeth Scott shows, two dimensions of immaturity—cognitive development and judgment—make children incompetent to reason and make rational choices.[85] Children also are assumed to be plastic and thus vulnerable to both influence and harm from others.

These disabilities—incompetence, vulnerability, and dependency—are expressed in several areas of legal regulation: the right to vote, consent to medical procedures, drink alcohol, drive motor vehicles, accept employment, enter into contracts,[86] join the military, marry, and go to prison. Professor Scott points out that adolescents' First Amendment free speech rights—that is, their access to regulated speech as well as their rights to expression—are more limited than those of adults, in part, because the U.S. Supreme Court assumed that children may be vulnerable to the potentially harmful effects of some forms of speech.[87] Children are subject to curfews that would be unconstitutional for adults.[88] This longstanding framework of legal regulation of adolescence suggests that both law and policy view children as a group whose unique traits and circumstances warrant a special protective and regulatory scheme.

Historically, there has been no definitive age for determining when children have attained the capacities to function as adults. Rather, externalities—changes and developments in society—often have had an effect on raising and lowering the age standard. That is, the assignment of age-specific competencies tends to reflect contemporary social constructions of adolescence. Just as the context and meaning of adolescent behaviors shift, so too do the age boundaries for the corresponding behavior. For example, the moral panic surrounding teenage drunk driving animated a sudden and sharp increase in the minimum legal drinking age.[89] In the United

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84. *See generally* Scott, *supra* note 42; FRANKLIN E. ZIMRING, CHANGING LEGAL WORLD OF ADOLESCENCE 36 (1982).

85. *See generally* Elizabeth Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 550-62 (2000).

86. Minors are liable only on contracts for necessaries. Under the traditional rule, minors can disaffirm other contracts, at their option, returning consideration in possession, but with no liability for use or damage. Under the modern (minority) rule, minors can disaffirm but must compensate the contracting party for use or damage, unless overreaching by the other party is involved. *See* SAMUEL L. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS 101-06 (2d ed. 1997).

87. Thus, for example, the Supreme Court has held that the state can restrict children's access to obscene material that would be protected speech for adults, and that public school officials can censor material in school newspapers. Ginsberg v. New York, 390 U.S. 629 (1968) (upholding New York statute restricting sale of "obscene material" to minors); Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (upholding the prior restraint of a school newspaper).

88. Courts recognize that curfew ordinances would violate the rights of adults to move about in public but uphold carefully tailored ordinances that are directed at juveniles. *E.g.*, Schleifer v. City of Charlottesville, 963 F. Supp. 534 (W.D. Va. 1997), *aff'd* 159 F.3d 843 (4th Cir. 1998).

89. According to Goode and Ben-Yehuda, "A moral panic is characterized by the feeling, held by a substantial number of the members of a given society, that evil-doers pose a threat to the society and to the moral order as a consequence of their behaviour and, therefore, 'something should be done' about them and their behavior." ERICH GOODE & NACHMAN BEN-YEHUDA, MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE 31 (1994). Evidence of an increase in traffic accidents related to alcohol in the late 1970s created pressure on state

States, the upward trend in the age of capacity for children has been linked to industrialization, growing societal wealth, and an accompanying interest in education.[90] These developments together have contributed to the greater ability of American society to invest more resources in the education and upbringing of our youth.

The law has expressed the boundaries of childhood by setting categorical boundaries that reflect broad and sometimes changing norms in a series of age-specific competencies. These boundaries have anticipated and balanced the social need to integrate children into civil society with the need to protect them from concomitant harms. This is true even though such "bright line" rules may not exactly mirror the developmental age when children attain those functions. Scott suggests that there is little evidence that, in most contexts, the interests of adolescents are harmed by a regime of binary classification or a bright line demarcating the attainment of adult competence.[91] These boundaries did, though, balance several objectives. Often, legal regulation that lowered or raised the threshold of legal adulthood served both a broader public interest and the interest of the adolescents who were classified as adults.[92] The granting of adult responsibility assumed that enough children had reached the threshold age to tolerate the mistakes of the percentage who were granted the freedoms or responsibilities but who had not yet attained the developmental capacity by that age to perform that function well. In other words, "legal policy facilitates the transition to adulthood through a series of bright line rules that reflect society's collective interest in young citizen's healthy development to productive adulthood."[93]

B. A Brief History of the Doctrine of Diminished Culpability of Children

Establishing bright line thresholds for granting adult status and responsibility to adolescents has worked less well in the realm of adult criminal responsibility.

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legislatures to raise the legal drinking age. From September 1976 through January 1983, sixteen states raised the legal age to 21. Then, because of more pressure in 1984, the federal government enacted the Uniform Drinking Age Act and any states that did not raise the legal drinking age to 21 would receive reduced federal highway construction funds. *See* 23 U.S.C. 158 (2000).

90. *See* MARY CLEMENT, THE JUVENILE JUSTICE SYSTEM: LAW AND PROCESS (Butterworth-Heinemann, 2d ed. 2002).

91. Professor Scott claims that the binary classification works well, regardless of whether behavior-specific boundaries depart from the reality of developmental maturity. Sharp boundaries provide a clear signal of the attainment of adult legal status, and by varying the age at which adult rights and duties are granted for different functions (drinking, driving, marriage, work, military service, consent to medical procedures, entering into contracts, freedom from curfew), adolescents transit from childhood to adulthood gradually, without creating an intermediate category for adolescence. Scott, *supra* note 85, at 560-62.

92. *Id.* Perhaps the best counterfactual for gradualism in granting adult responsibilities is the case of abortion. In *Bellotti v. Baird*, the Supreme Court required that a minor be given the opportunity (through a hearing) to demonstrate her maturity and ability to make an autonomous decision. 443 U.S. 622 (1979). The judicial by-pass hearing prescribed in *Bellotti v. Baird* created a quasi-judicial forum for a pregnant teenager to demonstrate that she should be allowed to make the abortion decision without involving her parents and is a central element of abortion regulation. In that context, Professor Scott notes the burdensome procedural requirements that create social and administrative costs involving parental notification and multiple visits, with little evidence that the welfare of adolescents is advanced through the creation of such an intermediate category of responsibility. Scott, *supra* note 85, at 558.

93. Scott, *supra* note 85, at 577.

An examination of early English laws reveals that below a certain age threshold, usually age seven or so, children were considered to be incapable of criminal acts because they were incapable of forming the necessary element of criminal intent.[94] Although youth was not a complete excuse for criminal acts, the young age of an offender often provided grounds for the commutation or elimination of punishment.[95] At the same time, for children aged seven and higher, there was a rebuttable presumption of incapacity. Generally, in early American colonial history, the burden was on the prosecution to overcome this presumption, however no exact standard of proof ever emerged.[96] Various courts over time had used differing terminology in their attempt to measure a child's culpability, including the following: having "a guilty knowledge,"[97] "fully aware of the nature and consequences of the act,"[98] "plainly showed intelligent malice,"[99] and "mentally capable of distinguishing between right and wrong."[100]

By 1825, the first refuge was opened where children served sentences in a separate institution from adults.[101] Nonetheless, the juvenile justice system had not yet been established and children were still processed through the adult criminal court system.[102] Eventually, parental neglect began to be recognized as one of the causes of juvenile delinquency and destitution; this discovery animated the idea that children were to be reformed and not punished.[103]

Beginning in 1899, Illinois began a nation-wide legislative movement that established separate jurisdiction for juvenile courts. The juvenile court institutionalized into law and procedure the notion that children who broke the law lacked the skills and maturity of adults and, therefore, rehabilitative services could restore them toward maturity and a functional adult life.[104] The new juvenile courts built a jurisprudence and institutional structure around this new jurisprudence.[105] By the

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94. W. BLACKSTONE, 4 COMMENTARIES OF THE LAW OF ENGLAND 23-24 (1792); M. HALE, 1 PLEAS OF THE CROWN 25-28 (1682).

95. *See generally* A.W.G. Kean, *The History of the Criminal Liability of Children*, 53 LAW Q. REV. 364 (1937).

96. Godfrey v. State, 31 Ala. 323, 327-28 (1858).

97. Watson v. Commonwealth, 57 S.W.2d 39, 40 (Ky. 1933).

98. Martin v. State, 8 So. 858 (Ala. 1891).

99. *Id.*

100. Miles v. State, 54 So. 946, 946 (Miss. 1911).

101. *See generally* DAVID ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980); ANTHONY PLATT, THE CHILD SAVERS; THE INVENTION OF DELINQUENCY (1969).

102. ROTHMAN, *supra* note 101, at 10.

103. *See supra* note 101.

104. *See e.g.*, Lamar Empey, *The Progressive Legacy and the Concept of Childhood, in* JUVENILE JUSTICE: THE PROGRESSIVE LEGACY AND CURRENT REFORMS 3 (Lamar Empey ed., 1979). The creation of the juvenile courts modernized and institutionalized the notion of immaturity inherent in the infancy defense. *See* Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 510-12 (1984).

105. In separating child from adult offenders, the juvenile court system also rejected the jurisprudence and procedure of adult criminal prosecutions. Courtroom procedures were modified to eliminate any implication of a criminal proceeding; a euphemistic vocabulary and a physically separate court building were introduced to avoid the stigma of adult prosecutions. To avoid stigmatizing a youth, hearings were confidential, access to court records limited, and children were found to be delinquent rather than guilty of committing a crime. Juvenile court proceedings concentrated on the child's background and welfare rather than the details surrounding the commission of a specific crime. *See, e.g.*, PLATT *supra* note 101. The juvenile court movement rejected the punitive regime of the adult criminal justice system, favoring a flexible system where the court intervened paternalistically to identify the causes of delinquency and target services to cure these problems. By rejecting the formality of the adult courts,

time the federal government passed the Juvenile Court Act in 1938,[106] there existed a separate and distinct, formalized judicial forum and procedure for youthful offenders in every state.[107] Even after the 1967 U.S. Supreme Court decision in *Gault* allocated procedural rights to juveniles,[108] including the right to counsel, the Court narrowly defined these rights to the judicial fact-finding hearing, continued to embrace the unique procedures for treating juveniles separately from adults, and rejected the right to a jury trial for juveniles.[109]

Despite the juvenile court's flexibility in determining the causes of misconduct and its individualization of punishment, some juveniles were expelled from the juvenile court and their cases were transferred to criminal court, an act that attached the assumption of culpability to the adolescent offender and exposed them to criminal punishments.[110] These expulsions created a categorical status of adult culpability for those juvenile offenders. The expulsion—actually a waiver or transfer process—offered a method for the juvenile court to decide which adolescent offenders were sufficiently blameworthy to face adult punishment. These juveniles were deemed culpable as adults if their characters and behaviors merited the harsher conditions of punishment traditionally reserved for adults.[111]

In *Kent v. United States*, the Supreme Court reviewed its first juvenile case.[112] Although the *Kent* decision preserved the waiver of juveniles into adult court, it also created a different standard of procedural reliability and fairness in juvenile cases. *Kent* held that children were entitled to representation by counsel, a hearing, and access to the information upon which the wavier decision was based, including a statement of the reasons supporting the transfer. In addition, the *Kent* Court set out a series of factors that the juvenile court judge was required to consider in making

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the juvenile court also made the proceedings confidential so as not to socially stigmatize young offenders, excluded juries and lawyers from juvenile court proceedings, and rejected the rules of evidence and formal procedures for confronting witnesses.

106. Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 (2000). Prior to 1938, there was no federal legislation providing for special treatment for juveniles. In 1938, the Federal Juvenile Delinquency Act was passed with the essential purpose of keeping juveniles apart from adult criminals. The original legislation provided juveniles with certain important rights including the right not to be sentenced to a term beyond the age of twenty-one. This early law also provided that an individual could be prosecuted as a juvenile delinquent only if the Attorney General in his discretion so directed. The 1938 Act gave the Attorney General the option to proceed against juvenile offenders as adults or as delinquents except with regard to those allegedly committing offenses punishable by death or life imprisonment. The Juvenile Delinquency Act was amended in 1948, with few substantive changes.

107. *See generally* STEVEN L. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF PROGRESSIVE JUVENILE JUSTICE (1977).

108. *In re Gault*, 387 U.S. 1, 14-17 (1967).

109. *Id.* at 13, 22.

110. Scott, *supra* note 85. *See also* David S. Tanenhaus, *The Evolution of Transfer Out of the Juvenile Court*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 13 (Jeffrey Fagan & Franklin E. Zimring eds., 2000); Franklin Zimring, *The Punitive Necessity of Waiver*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 207 (Jeffrey Fagan & Franklin E. Zimring eds., 2000); Jeffrey Fagan & Franklin E. Zimring, *Editors' Introduction*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 1 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

111. *See generally* FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE (1981); BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT (1999); Tanenhaus, *supra* note 110; Zimring, *supra* note 110; Fagan & Zimring, *supra* note 110.

112. Kent v. United States, 383 U.S. 541 (1966).

a waiver determination: the seriousness and type of offense; the manner in which the crime was committed; the maturity of the juvenile; the upbringing, home situation, and lifestyle of the juvenile; his or her record and history; the possibility of rehabilitating the youth; and concerns regarding the protection of the public.[113] Thus, the Court's initial protection of juveniles was weakened where, after considering mitigating and aggravating circumstances, a court was nonetheless allowed to subject juveniles to the very same punishments as adults.

Following *Kent*, nearly every state has either lowered the age at which juveniles can be transferred to the juvenile court, redistributed discretion to effect such waivers or transfers from judge to prosecutors on a case-by-case basis[114] (or to legislatures via statutory exclusion),[115] or pursued both paths to criminalizing delinquency. Under current statutes, the states assign criminal liability to wrongdoing at no more than age eighteen, and most mark the age of responsibility at even younger ages for specific crimes.[116] For some offenses and offenders, the threshold drops as low as thirteen years of age in New York and fourteen in California.[117]

The categorical status of juveniles as culpable adults obscures the developmental realities of adolescence. Many commentators have noted the difficulty and social costs of this interstitial regime and suggested a range of alternative standards and strategies for conferring adult responsibility on adolescents who violate the criminal law.[118] But the reality of these laws is to expose a broad range of juveniles ages sixteen and above to the option of capital punishment in cases of homicide.

C. Jurisprudence of the Juvenile Death Penalty

Executions of youths below the age of eighteen, in (what eventually became) the United States, were recorded in the earliest colonial times.[119] The number of

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113. *Id.* at 566-67.

114. *See* Robert O. Dawson, *Judicial Waiver in Theory and Practice*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 45 (Jeffrey Fagan & Franklin E. Zimring eds., 2000). *See also* Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 473-78 (1987).

115. *See* Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 83 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

116. *See id.*

117. For example, the New York Juvenile Offender Law, enacted in 1978, mandates that 14 and 15 year olds indicted for any one of 15 felony offenses—"JO eligible offenses"—and 13 year olds indicted for homicide are excluded from family court and processed in criminal court. *See* Merrill Sobie, *The Juvenile Offender Act: Effectiveness and Impact on the New York Juvenile Justice System* 26 N.Y.L. SCH. L. REV. 677 (1981). *See also* CAL. WELF & INST. § 707(a)(2) (2003) (expanding the list of serious charges that will "automatically transfer" a juvenile who is over 14 years old to criminal court). Moreover, Section 18 lowers the age requirement for automatic transfers from 16 to 14, further increasing the number of juveniles who will be transferred to criminal court without any judicial determination. This expansion ultimately shifts the power to determine which court will judge an accused from the judge to the prosecutor, who has the unreviewable discretion to select the charge. For example, if the prosecutor charges manslaughter, the juvenile stays in the juvenile justice system; if the prosecution charges murder, the same conduct gets tried in criminal court.

118. Franklin E. Zimring & Jeffrey Fagan, *Transfer Policy and Law Reform*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 407, 408-13 (Jeffrey Fagan & Franklin E. Zimring eds., 2000). *See also* Scott, *supra* note 85, at 581-86.

119. *See* ROBERT D. HALE, A REVIEW OF JUVENILE EXECUTIONS IN AMERICA (1997). The first recorded execution of a juvenile (below age 18 at the time of execution) was in 1642, by the Massachusetts Bay Colony. The

executions remained very low until the resumption of executions following *Furman*[120] in 1973. By 2002, at least 365 individuals in the United States had been executed for crimes they committed when they were juveniles, dating back to the first execution in 1642.[121] Twenty-one of these 365 executions for juvenile crimes have been carried out during the current era (1973–2002), 2.6 percent of the total of 820 executions during this period.[122] Almost two-thirds of the recent executions of juvenile offenders have occurred in Texas, with no other jurisdiction in the world actively involved in this practice.[123] A total of 224 juvenile death sentences have been imposed since 1973, with Texas, Florida, and Alabama accounting for half of them.[124] Of these, eighty remain currently in force and are still being litigated.[125] Of the other 144 sentences finally resolved, twenty-one (fifteen percent) have resulted in execution and 123 (eighty-five percent) have been reversed or commuted.[126] Among the thirty-eight death penalty states, nineteen set the minimum age at sixteen years, six at age seventeen, and thirteen set the age at eighteen. Since the 1989 *Stanford* decision, five states have legislatively or by case law raised or established the minimum age at eighteen.[127] No state since *Stanford* has lowered the age of execution from eighteen to seventeen, although *Stanford* allowed states to do so.

In practice, the execution of juveniles is either formally prohibited or a rare occurrence,[128] a pattern acknowledging that young offenders are not fully responsible for their crimes, at least not to the extent of deserving the ultimate

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last occurred in 1957. Between those dates, 331 juveniles were executed. Juvenile executions reached unprecedented high numbers in the fifty years immediately following the Civil War.

120. Furman v. Georgia, 408 U.S. 238 (1972). By 1967, the federal courts had imposed a prohibition on capital punishment so that a series of challenges to the principles and procedures could be decided. In *Furman*, the court ruled that state laws that delegated to the jury the choice of execution or imprisonment for specific crimes without any clear guidelines were unconstitutional. States began passing laws that complied with *Furman* in 1973, culminating in the decision in *Gregg v. Georgia*, 428 U.S. 153 (1976), which found that a jurisprudence of aggravating and mitigating circumstances in the commission of murders as weighed by the jury was an acceptable structure for guiding a jury in the choice of death or imprisonment. *See* FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 8, 9 (2003).

121. Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973–June 30, 2002*, *at* http://www.law.onu.edu/faculty/streib/juvdeath.htm (last visited Sept. 24, 2003).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. In 2002, Indiana became the most recent state to raise the minimum age for death penalty eligibility to eighteen. *See* IND. CODE ANN. §§ 35-50-2-3, 3(b)(1)(A) (West Supp. 2002); 2002 IND. PUB. L. 117-2002, § 1. Montana also legislatively raised the minimum age for the death penalty. *See* MONT. CODE ANN. § 45-5-102(2) (1997); 1999 MONT. LAWS, ch. 523. Two other states, Kansas and New York, have done so by newly reinstating the death penalty, but only for those offenders who were 18 or older at the time of their offense. *See* KAN. CRIM. CODE ANN. § 21-46622 (Vernon 2001) and N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2002). The Washington Supreme Court has also held that its death penalty statute cannot be construed to authorize imposition of the death penalty for crimes committed by juvenile offenders. *See* Washington v. Furman, 858 P.2d 1092, 1102-03 (Wash. 1993).

128. *Id.* See discussion of state statutes regulating juvenile death penalty in *Thompson v. Oklahoma*, 487 U.S. 815 (1988) and *Stanford v. Kentucky*, 492 U.S. 361 (1989). It is interesting to note that only a handful of other countries authorize the execution of juveniles.

punishment.[129] The constitutionality of such a penalty, however, has come before the Supreme Court several times in recent years, most notably in the 1980s in *Eddings v. Oklahoma*,[130] *Thompson v. Oklahoma*,[131] and *Stanford v. Kentucky*.[132] The U.S. Supreme Court has not revisited this question since *Stanford* and the constitutionality of applying the death penalty to juvenile offenders appears to be settled.

Using Eighth Amendment jurisprudence, arguments were made in *Eddings*, *Thompson*, and *Stanford* that, given the reduced culpability and capacity of juveniles, their execution was unconstitutionally harsh under the Cruel and Unusual Clause. In his plurality opinion in *Thompson*, Justice Stevens focused on the immature judgment of adolescents in explaining why juvenile executions violate the principle of proportionality under the Eighth Amendment's prohibition of cruel and unusual punishment:

> [L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis of this conclusion is too obvious to require extensive explanation. Inexperience, less intelligence and less education make a teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons that juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.[133]

In deciding Eighth Amendment cases, the Supreme Court applies a three part test and requires that (a) the original framers of the Constitution understood the punishment to be cruel and unusual, (b) a societal consensus exists that the punishment offends civilized standards of human decency, and (c) the punishment is either (i) grossly disproportionate to the severity of the crime or (ii) makes no measurable contribution to the accepted goals of punishment.[134] This claim about the harshness of the death penalty for juveniles is a proportionality claim: juveniles (and mentally retarded persons) should be exempted from execution because they categorically lack the degree of culpability necessary for the courts to invoke the

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129. For a brief period in the early twentieth century in the United States, social and legal responses to homicides committed by adolescents were dramatically different compared to the contemporary American landscape of automatic transfer to the criminal court for adolescents charged with homicide and eligible for capital punishment at age 16. *See* FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE (2000). Historical research by Professors David Tanenhaus and Steven Drizin revealed that sixty juvenile homicide offenders in Chicago from 1900 to 1930 were exonerated by the Coroner's Jury. David S. Tanenhaus & Steven A. Drizin, *Owing to the Extreme Youth of the Accused: The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 653 (2002). The vast majority of these cases (52, or 83 percent) involved either a child or adolescent shooting somebody "accidentally" with a handgun. In verdicts, the coroner's juries often voiced their concerns about the availability of guns. *Id.* at 654. Tanenhaus and Drizin quote criticisms of the early twentieth century social reformer Jane Addams of the easy availability of guns as a reaction to the frequency of juvenile gun homicides: "[t]here is an entire series of difficulties directly traceable to the foolish and adventurous persistence of carrying loaded firearms,...this tale could be duplicated almost every morning; what might be merely a boyish scrap is turned into tragedy because some boy has a revolver." *Id.* at 653.

130. 455 U.S. 104 (1982) (Burger, C.J., dissenting).

131. 487 U.S. 815 (1988).

132. 492 U.S. 361 (1989).

133. *Thompson*, 487 U.S. at 835.

134. *See, e.g.*, *Gregg*, 428 U.S. 153; *Coker*, 433 U.S. 584; *Enmund*, 458 U.S. 782.

ultimate sanction according to contemporary community standards.[135] That is, the Court's jurisprudence beginning with *Furman* relied on a narrowing requirement that justified the imposition of a death penalty on a defendant based on his or her culpability relative to others found guilty of murder.[136] In the cases below, the threads of this proportionality argument are briefly examined.

1. *Eddings v. Oklahoma*

Monty Lee Eddings was sixteen-years old when he was found guilty of the first-degree murder of an Oklahoma Highway Patrolman. In *Eddings v. Oklahoma*, the Court initially granted certiorari on the sole question of whether the execution of a child who was sixteen at the time of the crime constituted cruel and unusual punishment under the Eighth Amendment.[137] An "eleventh hour claim" was presented to the Supreme Court on behalf of the petitioner, asking whether the Court should review the trial court's refusal to consider mitigating evidence—a practice that violated the holding in *Lockett v. Ohio*.[138] This "eleventh hour claim" ultimately formed the basis for the decision, attracting the five votes necessary to reverse and remand Eddings' death sentence.[139] Thus, the Court avoided deciding the substantive age issue by vacating the defendant's death sentence on procedural grounds. Further, Justice O'Connor's separate concurring opinion distinctly stated that the *Eddings* decision was not intended to resolve whether the imposition of the death penalty on juveniles is a constitutional practice. The language in *Eddings*, however, has become significant as the Court instructed that the chronological age of a juvenile offender is an important factor that must be considered in death penalty cases.[140] After a few years, the Court returned to the specific issue of the constitutionality.

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135. Carol Steiker & Jordan Steiker, *ABA's Proposed Moratorium: 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. PROB. 89, 91 (1998).

136. *See, e.g.*, Zant v. Stephens, 462 U.S. 862, 877 (1983). In *Woodson v. North Carolina*, 428 U.S. 280 (1976), for example, the Court used its ability to regulate the administration of the death penalty to narrow its use to those cases where the circumstances warrant such a severe punishment. In effect, the Court created a category of criminals that were so beyond rehabilitation and humanity that the only appropriate punishment would be that which is final and severe while also bolstering the illusion of a system of heightened procedural scrutiny so that the public can be assured that only criminals who truly deserve the death penalty will be subject to it. *See Woodson*, 428 U.S. at 305.

137. *Eddings*, 455 U.S. 104.

138. Lockett v. Ohio, 438 U.S. 586 (1978). Lockett argued that the statute was unconstitutional due to the fact that it did not allow the sentencing judge to consider mitigating factors in capital cases, as required by the Eighth and Fourteenth Amendments. The decision was seven and one-half to one-half. Chief Justice Burger announced the opinion of the Court, concurrences were by Justices Blackmun and Marshall, Justice Rehnquist in part concurred and in part dissented, and Justice Brennan opted not to participate. The Court also noted that a law that prohibits one from considering mitigating factors creates the risk that the death penalty will be imposed, when in fact the crime may call for a lesser penalty. "The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors required by the Eighth and Fourteenth Amendments." *Id.*

139. *Eddings*, 455 U.S. 104.

140. The Court concluded that "[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.* at 115-16.

2. *Thompson v. Oklahoma*

After a few years, the Court returned to the specific issue of the constitutionality in *Thompson v. Oklahoma*.[141] In *Thompson*, a plurality of the Supreme Court held that imposing the death penalty on a defendant who was fifteen-years old at the time of his crime was unconstitutional under the cruel and unusual punishment clause of the Eighth Amendment. At fifteen, William Wayne Thompson participated in the murder of his brother-in-law, who had a history of abusing the boy's sister. In a five-to-three decision, the Court vacated Thompson's death sentence. Relying on the positions taken by professional organizations and foreign nations, the majority found that "it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense." As evidence of changing societal attitudes, the Court noted that since the 1940s, juries infrequently imposed the death penalty on young offenders, stating, "The road we have traveled during the past four decades—in which thousands of juries have tried murder cases—leads to the unambiguous conclusion that the imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the consciousness of the community."[142]

Reviewing American case history and an array of social scientific literature, the Court documented the special treatment of children in the legal system. The Court identified several different areas where the law treats juveniles differently from adults, areas including the right to vote, right to serve on a jury, right to drive, right to marry, right to purchase pornographic materials, and the right to participate in legalized gambling.[143] Social science research cited in the opinion's notes further elaborated upon the characteristics of adolescence that contribute directly to the reduced culpability of juvenile offenders. Note 43 in *Thompson* cited numerous sources that demonstrate the reduced developmental abilities of children.[144]

The majority in *Thompson* also revived the discussion of the twin goals of the death penalty elaborated upon in *Gregg v. Georgia*: retribution and deterrence of capital crimes by future offenders.[145] The Court rejected both the retribution and deterrence rationale in *Thompson*. With regard to the retribution goal, the Court instructed that "[g]iven the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children, the retributive value component of the Eighth Amendment is simply inapplicable to the execution of a fifteen year old offender."[146] Relying on the three-part test, the majority in *Thompson* held that the execution of individuals who were minors at the time of their crime is cruel and unusual punishment.[147]

The impact of the *Thompson* decision was restricted, however, by the fact that only four justices reached the conclusion that the execution of a fifteen year old was

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141. 487 U.S. 815 (decision announced by Stevens, J., and joined by Brennan, Marshall, and Blackmun, J.J., with O'Connor, J., concurring in judgment).

142. *Id.* at 832.

143. *Id.* at 823.

144. *Id.* at 835 n.43.

145. *Gregg*, 428 U.S. 153.

146. *Thompson*, 487 U.S. at 836-37.

147. *Id.* at 815.

unconstitutional. Again, Justice O'Connor wrote a separate concurring opinion that stopped short of recognizing a national consensus opposing the execution of juveniles. Instead, Justice O'Connor vacated the sentence on the grounds that there was a considerable risk that the Oklahoma legislature did not consider the possibility that its death penalty statute would apply to a death-eligible fifteen-year-old.[148] Thus, the practical effect of *Thompson* was that the execution of a juvenile who had committed the crime prior to age sixteen was unconstitutional unless the state had proscribed a minimum age limit in its death penalty legislation.

3. *Stanford v. Kentucky*

One year later, the Court confronted a similar issue in *Stanford v. Kentucky* and *Wilkins v. Missouri*; in these cases, however, the defendants were sixteen and seventeen, respectively, when they committed their crimes.[149] *Stanford* involved the rape, sodomy, and shooting murder of a twenty-year-old gas station attendant by petitioner Kevin Stanford when he was seventeen years and four months old. *Wilkins* involved the stabbing death of a convenience store worker during the commission of a robbery by Heath Wilkins when he was approximately sixteen years and six months of age. In these decisions, the Court expressly held that the imposition of the death penalty on defendants aged sixteen or seventeen at the commission of their crime was not unconstitutional.

In deciding the case, Justice Scalia reviewed each of the arguments set forth in *Thompson*. Rejecting the international comparisons made in *Thompson*, the majority emphasized, "it is *American* conceptions of decency that are dispositive."[150] The Court reviewed past and current legislative developments and found the petitioners in both cases did not meet their burden to establish an adequate basis to find a national consensus against the juvenile death penalty. In response to the majority's argument in *Thompson*—that the behavior of juries indicated disapproval of the execution of children—the majority in *Stanford* held that the infrequent application of capital punishment is indicative of the prosecutors' and juries' beliefs that capital punishment should *rarely* be imposed, not *never*.

As a final point, the Court held that there was no basis for comparison between the imposition of capital punishment on juveniles and laws regulating other realms of juvenile legal responsibility. Citing *Lockett v. Ohio*,[151] the Court explained,

> It is, to begin with, absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards...These laws set the appropriate ages for the operation of a system that makes its determination in gross, and that does not conduct individualized maturity tests for each driver, drinker, or voter. The criminal justice system,

148. *Id.* at 857.

149. Stanford v. Kentucky, 492 U.S. 361 (1989) (Stanford's and Wilkins' cases were consolidated) (decision announced by Scalia, J., and joined by Rehnquist, White, O'Connor & Kennedy, J.J.).

150. *Id.* at 369 n.1.

151. 438 U.S. at 605.

> however, does provide individualized testing. In the realm of capital punishment in particular, "individualized consideration is a constitutional requirement."[152]

Accordingly, in *Stanford*, the majority relied upon the procedural safeguards developed through the thread of death penalty jurisprudence following *Furman* to protect defendants from the arbitrary and discriminatory application of capital punishment. The *Stanford* Court argued that the capacity determination regarding adolescents and deterrence had already been completed, and thus all other constitutional claims related to capacity had been addressed.[153] In other words, those less culpable were filtered out earlier in the course of trial and hence were not exposed to the possibility of a death sentence at the lower standard of blameworthiness. The danger in this approach is that the role of procedural due process is conflated with the deliberation required for substantive factual determinations such as maturity or culpability, and the result would be an incomplete examination of the substantive constitutional issues underlying the application of the death penalty on juveniles. The mere fact that procedural due process was met does not automatically lead to the conclusion that the substantive issues have been settled.

Although the *Thompson* and *Stanford* Courts recognized that children are incomplete decision makers, judgmentally immature and unable to fully regulate all of their behavior, the precedent in *Stanford* is based heavily on procedural dimensions, not substantive considerations about the capacities or blameworthiness of juveniles at any age. This perspective sustains today's climate that permits capital punishment of children ages sixteen or seventeen. However, *Atkins* creates a competing precedent that opposes the imposition of capital punishment when defendants have diminished culpability, a return to the jurisprudential perspective that places primacy on substantive considerations of reduced culpability, capacity, and understanding.

D. Rethinking Culpability of Juveniles

In much of criminal law doctrine, punishment determinations require a measurement of the wrong that is done and the blameworthiness of the individual.[154]

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152. *Stanford*, 492 U.S. at 374-75 (quoting *Lockett*, 438 U.S. at 605).

153. *Id.* at 378-79.

154. *See generally* ROBERT NOZIK, PHILOSOPHICAL EXPLANATIONS (1981); GEORGE FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT (1996); RICHARD J. BONNIE ET AL., CRIMINAL LAW (1997). In his chapter "Retributive Punishment," Nozick articulates a formulaic approach for establishing proportionality of punishment in a retributivist society. His basic algorithm is that P (punishment) = r (responsibility) * H (wrongness of act). For example, under retributive punishment for S's act A: (1) Someone believes that S's act A has a certain degree of wrongness; (2) and visits a penalty upon S; (3) which is determined by the wrongness H of the act A, or by r * H; (4) intending that the penalty be done because of the wrong act A; (5) and in virtue of the wrongness of the act A; (6) intending that S know the penalty was visited upon him because he did A; (7) and in virtue of the wrongness of A; (8) by someone who intended to have the penalty fit and be done because of the wrongness of A; (9) and who intended that S would recognize (he was intended to recognize) that the penalty was visited upon him so that 1-8 are satisfied, indeed so that 1-9 are satisfied.

Nozick extends this doctrine in several ways. First, he points out that in many cases a wrongdoer's punishment includes other costs (compensating the victim, confronting wrongness of his act, etc)—these are proxied by c. In this case, P = (r * H) - c. Second, Nozick points to the teleological notions of retributivism that aim at "matching punishment." This rests on the notion that punishment should aim to inform or alert S of the wrongness of A. This is an "optimistic hypothesis about what another person will or can come to know" and suggests a major problem when S is incapable of learning or realizing that his act was wrong to the same r that an

Common law assumes that children are immature, and because of that immaturity, they are less blameworthy than adults, so the punishments for their crimes should be proportionately less than those for a fully competent adult.[155] Distinguishing the immature adolescent from the mature offender who is fully responsible for his or her crimes requires a careful examination of the developmental capacities and processes that are relevant to both adolescent criminal choices and the ways in which immaturity mitigates responsibility.[156]

The most critical difference between adolescents and adults, whether in crime or in choices involving everyday social or personal behaviors, is that teenagers are less competent decision makers than adults.[157] Their judgment is immature because they have not yet attained several dimensions of psychosocial development that characterize adults as mature, including the capacity for autonomous choice, self-management, risk perception, and the calculation of future consequences.[158] The attainment of these developmental capacities is perhaps one reason why crime rates peak in late adolescence but subsequently decline as adolescent development progresses toward maturity.[159]

Notwithstanding the fact that different adolescents develop at different rates, adolescence, generally, serves as a bridge between childhood and adulthood with regard to developing psychosocial capacity. For example, cognitive capacities for reasoning and understanding are well formed by mid-adolescence and approximate

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average person would. Juveniles and mentally defective individuals are arguably susceptible to this effect. Third, capital punishment generally should be reserved for those truly monstrous cases (he mentions Hitler) because if we are to be connected to S's value (the value of the wrongness of his act and the attempt to show him its significance through punishment), killing S would nullify any attempt at matching punishment. Finally, he touches briefly on defining r and H, specifically. He reaches no concrete conclusions in this regard but does illustrate the need to have them defined by separate and distinct characteristics, so as to avoid circularity. Indeed, it is often difficult to separate the seriousness of the offense (H) and the responsibility (r) that the perpetrator should have with regard to it. Most importantly Nozick contends that r is best defined as the degree to which S flouts correct values, and that if defects in character contribute to this flouting, there is less flouting than there appeared to be, and r is consequentially decreased.

Nozick's framework illustrates that punishment is (or ought to be) a product of harm and culpability, the latter being vulnerable to mitigating factors associated with being a juvenile, a mentally retarded individual, or another person whose disabilities constitute a cascade of mitigators in the jurisprudence of capital punishment. If the goal of this jurisprudence is to "ensure that only the most deserving of execution are put to death," (as Justice Stevens declared again in *Atkins*), then even a slightly mitigated r value should bring the punishment (P) under this threshold.

155. *See* Franklin Zimring, *Penal Proportionality for the Young Offender*, *in* YOUTH ON TRIAL (R. Schwartz & T. Grisso eds., 2000).

156. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 800 (2002). *See also* Jeffrey Fagan, *Context and Culpability of Adolescent Violence*, 6 VA. J. SOC. POL'Y & L. 507, 535-38 (discussing how choices to engage in or reject criminal activity in specific event circumstances are proscribed by the immediate contexts in which the choice is made, and how those choices differ for adolescents in high versus low crime neighborhoods).

157. *See* Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 229-35 (1995) (describing developmental factors that contribute to immature judgment); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescent Decision Making*, 20 LAW & HUM. BEHAV. 249 (1996) (describing domains of psychosocial development as autonomy, perspective, and temperance).

158. *See* Steinberg & Cauffman, *supra* note 157.

159. *See* Robert J. Sampson & John H. Laub, *Understanding Desistance from Crime*, 28 CRIME AND JUSTICE 1, 46-48 (2001) (reviewing literature on the robust finding that crime peaks in late adolescence and declines for most persons sharply during developmental transitions from adolescence to adulthood).

the skills shown by most adults.[160] But teens are less able to use these skills to make real-life decisions.[161] Adolescents also mature more slowly in other areas that contribute to immature judgment and the tendency of adolescents to make choices that are harmful to themselves or others.[162] Finally, adolescence is characterized by incomplete identity formation, a process that, when mixed with poor judgment and decision making, leads to exploration, behavioral experimentation, and fluctuations in self-image.[163] As psychologist Laurence Steinberg shows, "This movement, over the course of adolescence, from a fluid and embryonic sense of identity to one that is more stable and well-developed is paralleled by developments in the realms of morality, values, and beliefs."[164] That these three dimensions of development render most adolescents immature—and therefore less than fully culpable for their behaviors, whether they be criminal or conventional—reflects striking parallels with the incompetencies of mentally retarded persons that should be obvious.

1. Understanding and Reasoning

Cognitive development—reasoning and understanding—among adolescents differs substantially from adults. Basic skills, such as information processing, attention, short and long-term memory, and organization are acquired steadily through adolescence.[165] Although social science evidence suggests that adolescents' capacities for understanding and reasoning in making decisions roughly approximate those of adults by mid-adolescence, most of the research leading to these conclusions was done in unstressful and decontextualized laboratory situations.[166] It is uncertain whether these results would be obtained in ambiguous situations or be the same under arousal in unstructured settings where peer dynamics have a strong influence on adolescent choices. Scott and Steinberg conclude that the empirical evidence is uncertain whether adolescent cognitive capacity as it affects choices relevant to criminal conduct is comparable to that of adults.[167]

2. Judgment Factors in Decision Making

Even when adolescent cognitive capacities approximate the levels of adults, other developmental dimensions that progress more slowly lead to immature judgment

160. *See* Steinberg & Cauffman, *supra* note 157.

161. *See* S. Ward & W. Overton, *Semantic Familiarity, Relevance, and the Development of Deductive Reasoning*, DEVELOPMENTAL PSYCHOL. 26, 488-93 (1990).

162. *See* Scott et al., *supra* note 157; Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 165-66 (1997).

163. *See* LAURENCE D. STEINBERG, ADOLESCENCE (6th ed. 2002).

164. *Id.*

165. *See, e.g.*, Daniel P. Keating, *Adolescent Thinking*, *in* AT THE THRESHOLD: THE DEVELOPING ADOLESCENT 54 (S. Shirley Feldman & Glen R. Elliott eds., 1990).

166. The claim is tentative because it is supported by a group of small research studies conducted in laboratory settings that for the most part involved white middle class subjects and no adult control groups. Tasks often are artifactual and are not performed under conditions of stress or arousal that are typical of the situations in which adolescents often find themselves when they must decide to engage in a criminal act. Scott & Steinberg, *supra* note 156, at 813-14. *See also* William Gardner, *Asserting Scientific Authority: Cognitive Development and Adolescent Legal Rights*, 44 AM. PSYCHOLOGIST 895 (1989). *See also* Fagan, *supra* note 156.

167. *See* Scott & Steinberg, *supra* note 156.

and poor decision making. The psychosocial factors most relevant to differences in judgment include (a) peer orientation, (b) attitudes toward and perception of risk, (c) temporal perspective, and (d) capacity for self-management.[168] "Whereas cognitive capacities shape the process of decision-making, immature judgment can affect outcomes, because these developmental factors influence adolescent values and preferences, that in turn drive the cost-benefit calculus in the making of choices."[169]

Parents and developmental psychologists have both long known that adolescents are more responsive to *peer influence* than are adults, that these influences are greatest in mid-adolescence, and that these influences decline slowly during the high school years.[170] Peer influence affects adolescent judgment both directly and indirectly. In some contexts, adolescents might make choices in response to direct peer pressure. Adolescents' desire for peer approval affects their choices, even without direct coercion. *Future orientation* is the extent to which individuals consider both long-term and short-term consequences of their actions in making choices. Compared to adults, adolescents tend to telescope the future, placing it farther into the background of decision making than do adults, while at the same time disproportionately weighing the short-term consequences of decisions—both risks and benefits—in making choices.[171]

Adolescents also perceive and weigh *risk* differently from adults.[172] Adolescents take more risks with health and safety than do older adults, such as unprotected sex,[173] drunk driving,[174] and other questionable behaviors.[175] Peer influence interacts with risk taking: empirical evidence shows that people generally make riskier decisions in groups than they do alone.[176] Adolescents seem to be less risk averse than adults because they overstate rewards while underestimating risks.[177]

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168. *See id.*; Steinberg & Cauffman, *supra* note 157.

169. Scott & Steinberg, *supra* note 156.

170. B. Bradford Brown, *Peer Groups and Peer Cultures*, *in* AT THE THRESHOLD: THE DEVELOPING ADOLESCENT 171 (S. Shirley Feldman & Glen R. Elliott eds., 1990).

171. Steinberg & Cauffman, *supra* note 157; Scott & Steinberg, *supra* note 156 (citing William Gardner & Janna Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, *in* ADOLESCENTS IN THE AIDS EPIDEMIC 24 (William Gardner et al. eds., 1990). Scott and Steinberg cite several explanations for this age gap in future orientation.

> First, owing to cognitive limitations in their ability to think in hypothetical terms, adolescents simply may be less able than adults to think about events that have not yet occurred (i.e., events that may occur sometime in the future). Second, weaker future orientation of adolescents may reflect their more limited life experience. For adolescents, a consequence five years off may seem very remote; they may simply attach more weight to short term consequences because they seem more salient to their lives. How far out in time individuals are able to project events may be proportionate to their age; ten years represents one-fifth of the lifespan for someone who is 50, but two-thirds for someone who is 15.

William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking*, *in* ADOLESCENT RISK TAKING 78-79 (Nancy J. Bell & Robert W. Bell eds., 1993).

172. *See* Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 1-2 (1992) (presenting a rational decision-making model of adolescent risky behavior).

173. *See* William Gardner & Janna Herman, *supra* note 171.

174. Furby & Beyth-Marom, *supra* note 172.

175. *See, e.g.*, Alida Benthin et al., *Adolescent Health-Threatening and Health-Enhancing Behaviors: A Study of Word Association*, *in* THE PERCEPTION OF RISK (Paul Slovic ed., 2000).

176. Scott & Steinberg, *supra* note 156.

177. Steinberg & Cauffman, *supra* note 157. Scott and Steinberg note that this may relate in part to limits on youthful time perspective; taking risks is more costly for those with a stake in the future. Finally, adolescents may have different values and goals than do adults that lead them to calculate risks and rewards differently. For

Impulsivity and poor self-management also appear to be greater in adolescents than in adults. Impulsivity increases between middle adolescence and early adulthood and declines thereafter, as does sensation-seeking.[178] Emotional regulation also is more erratic among adolescents than adults,[179] and adolescents may have more difficulty regulating their moods, impulses, and behaviors than do adults.[180]

Some of the differences between adults and adolescents may reflect not just psychosocial development, but also its underlying organic structure. The disjuncture between physical maturity and uneven maturity in different parts of the brain that regulate different functions creates an imbalance in adolescents that can adversely influence their judgment and decision making. Scott and Steinberg summarize this process as it pertains to this developing area of research:

> At puberty, changes in the limbic system B, a part of the brain that is central in the processing and regulation of emotion B, may stimulate adolescents to seek higher levels of novelty and to take more risks; and may contribute to increased emotionality and vulnerability to stress. At the same time, patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving planning and decision-making, suggest that these higher-order cognitive capacities may be immature well into middle adolescence. One scientist has likened the psychological consequences of brain development in adolescence to "starting the engines without a skilled driver."[181]

Recent studies suggest that there are functions and regions of the brain regulating long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward, and these functions and regions continue to mature over the course of adolescence, and perhaps beyond age twenty and well into young adulthood.[182] Functional brain imaging and postmortem studies suggest that frontal lobes do not

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example, the danger of risk taking could constitute a reward for an adolescent but a cost to an adult. Moreover, peer rejection is likely to be weighed more heavily in adolescent than adult choices. For instance, whereas an adult might simply weigh the pleasant effects of experimenting with an illicit drug against criminal apprehension or potential health risks, an adolescent might weigh the peer acceptance or rejection that might result from the choice. *See also* L.L. Lopes, *Between Hope and Fear: The Psychology of Risk*, 20 ADVANCES EXPERIMENTAL SOC. PSYCH. 255 (1987).

178. Steinberg & Cauffman, *supra* note 157.

179. Research on brain development indicates that the organic bases of functions such as long-term planning, regulation of emotion, impulse control, and the evaluation of risk and reward are not fully mature by the end of adolescence. *See* Patricia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVS. 417 (2000) (reviewing animal and human research on brain maturation during puberty and indicating that "remodelling of the brain" during adolescence occurs among different species) (cited in Scott & Steinberg, *supra* note 156 n.71).

180. *See, e.g.*, Reed Larson et al., *Mood Variability and the Psycho-Social Adjustment of Adolescents*, 9 J. YOUTH & ADOLESCENCE 469, 488 (1980) (presenting a study finding wider mood fluctuations among adolescents than adults) (cited in Scott & Steinberg, *supra* note 156 n.70).

181. Scott & Steinberg, *supra* note 156 (citing Ronald Dahl, *Affect Regulation, Brain Development, and Behavioral/Emotional Health in Adolescence*, 6 CNS SPECTRUMS 60 (2001)).

182. Spear, *supra* note 179; *see also* Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 861-63 (1999); Judith L. Rapoport et al., *Progressive Cortical Change During Adolescence in Childhood-Onset Schizophrenia. A Longitudinal Magnetic Resonance Imaging Study*, 56 ARCHIVES OF GEN. PSYCHIATRY 649, 652-54 (1999); Paul M. Thompson et al., *Growth Patterns in the Developing Brain Detected by Using Continuum Mechanical Tensor Maps*, 404 NATURE 190-93 (2000); Avshalom Caspi et al., *Role of Genotype in the Cycle of Violence in Maltreated Children*, 297 SCIENCE 851, 851-54 (2002).

fully mature until young adulthood.[183] This study compared magnetic resonance imaging (MRI) scans of young adults, twenty-three to thirty, with those of teens, twelve to sixteen. The researchers looked for signs of myelin, which would imply more mature, efficient neural connections. Areas of the frontal lobe showed the largest differences between young adults and teens. This increased myelination in the adult frontal cortex likely relates to the maturation of cognitive processing and other "executive" functions. Many other areas—those that mediate spatial, sensory, auditory, and language functions—already seemed mature in the teen brain. Instead, the observed late maturation of the frontal lobe is characteristic of impaired "executive" functioning.[184]

Another series of MRI studies suggests that teens may process emotions differently than adults.[185] Researchers at Harvard's McLean Hospital scanned subjects' brain activity while they identified emotions on pictures of faces displayed on a computer screen.[186] Young teens (below fourteen), who characteristically perform poorly on the task, activated the amygdala, a brain center that mediates fear and other "gut" reactions, more than the frontal lobe. As teens grow older, their brain activity during this task tends to shift to the frontal lobe, leading to more reasoned perceptions and improved performance.[187] Similarly, as teens got older, the researchers saw a shift in activation from the temporal lobe to the frontal lobe during a language skills task. The studies were imprecise as to a bright line threshold when frontal lobe activity dominated cognitive and emotional tasks, but the researchers did note significant variability in the age at which these functional thresholds are achieved: some teens reach this stage of "mature" (frontal lobe) functioning at fourteen, while many others have not yet reached it by age twenty or later into young adult years.[188]

Professor Ruben Gur concludes that brain maturation is not complete until about age twenty-one, with large variations in myelination in different regions of the brain, a marker of uneven maturation in areas associated with cognitive and emotional function.[189] Based on a review of experimental studies and both brain imaging and MRI analyses, Professor Gur explicitly links these brain regions to the control of aggression and other impulses, the consideration of alternatives and consequences of actions, impulsivity, judgment, planning for the future, foresight of consequences, and other "mature thought processes" that make people morally

183. Elizabeth R. Sowell et al., *In Vivo Evidence for Post-adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE, 851 (1999).

184. *Id.*

185. National Institute of Mental Health, *Teen Brain: A Work in Progress*, *at* http://www.nimh.nih.gov/publicat/teenbrain.cfm (last visited Sept. 24, 2003).

186. A.A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 32 J. AM. ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY 195 (1999).

187. *Id.*

188. In a recent television broadcast, Dr. Jay Giedd, of the National Institute of Mental Health, stated that "it's sort of unfair to expect [adolescents] to have adult levels of organizational skills or decision making before the brain is finished being built." Frontline, *Inside the Teen Brain*, (Jan. 31, 2002), *at* www.pbs.org/wgbh/pages/frontline/shows/teenbrain/ (last visited Sept. 24, 2003).

189. *See, e.g.*, Pet. for Writ of Cert., *supra* note 9 (claiming that maturation of association cortex is not complete "even by late adolescence" and that, within this cortex, the prefrontal regions are last to mature, and that myelination is usually not complete until ages 20-22).

culpable.[190] Professor Gur concludes that there is no way to state with any scientific reliability that an individual seventeen year old has a fully matured brain, regardless of the precision of other psychosocial assessments at that age.[191]

This is a new and rapidly developing research area, where natural science complements evidence from behavioral science regarding deficits and incompetencies in adolescents that influence judgment, decision making, and emotional regulation. The implication, then, is that there exists uneven development within the adolescent brain regarding various functions, and this irregularity is also subject to significant variation *among* adolescents in the age at which they attain organic brain developmental thresholds that regulate the emotional and cognitive components of decision making and control. This variation suggests that even at later stages of adolescence, and perhaps among some young adults, there is a non-negligible percentage of people who are "immature" not just in their psychosocial functioning but in the organic development that underlies it.

3. Development and Decision Making

The tendency of adolescents to commit crimes in groups is well known,[192] although the mechanisms of group dynamics and peer influence are not well understood.[193] Changes in peer networks over time, and a diminution of the role of peers in both legal and antisocial behavior, also characterize the predictable patterns of desistance from crime that occurs during the transition from adolescence to adulthood.[194] Scott and Steinberg conclude that the research on peer influence, risk preference, impulsivity, and future orientation shows that these factors affect adolescent decision making, in general, and are equally likely to influence decisions to participate in crime.[195]

Research on the social contexts of adolescent interactions shows that these group settings offer strong incentives for conformity and compliance, serving important developmental functions such as the expression of autonomy and the construction of social identity.[196] Opportunities for crime are more abundant in settings where social controls are weak, whether in the everyday world of adolescents or the unique and stressful settings of inner cities where crime rates are highest.[197] Adolescent peer orientation makes youths who live in high-crime neighborhoods

190. *Id.*

191. *Id.*

192. Albert Reiss, Jr. & David Farrington, *Advancing Knowledge about Co-offending: Results from a Prospective Longitudinal Survey of London Males*, 82 J. CRIM. L. & CRIMINOLOGY 360 (1991).

193. *See* PATRICIA ADLER & PETER ADLER, PEER POWER (1999).

194. *See* ROBERT J. SAMPSON & JOHN H. LAUB, CRIME IN THE MAKING (1993); Robert J. Sampson & John H. Laub, *Understanding Desistance from Crime*, 28 CRIM. & JUST. 1, 46-48 (2001); Edward Mulvey & John La Rosa, *Delinquency Cessation and Adolescent Development*, 56 AM. J. ORTHOPSYCHIATRY 212, 231 (1986).

195. *See* Scott & Steinberg, *supra* note 156.

196. *See, e.g.*, Jeffrey Fagan & Deanna Wilkinson, *The Social Contexts and Developmental Functions of Adolescent Violence*, *in* VIOLENCE IN AMERICAN SCHOOLS 89 (B. Hamburg et al. eds., 1998).

197. *See, e.g.*, ROBERT J. BURSIK, JR., & HAROLD G. GRASMICK, NEIGHBORHOODS AND CRIME: THE DIMENSIONS OF EFFECTIVE COMMUNITY CONTROL (1993); Philip J. Cook & John H. Laub, *The Unprecedented Epidemic in Youth Violence*, *in* YOUTH VIOLENCE (Michael H. Tonry & Mark Harrison Moore eds., 1998); Robert J. Sampson & Janet Lauritsen, *Individual and Community Factors in Violent Offending and Victimization*, *in* 3 UNDERSTANDING AND PREVENTING VIOLENCE (A. Reiss & J. Roth eds., 1994).

susceptible to powerful pressures to join in criminal activity, and compliance may be both typical and perceived as necessary to avoid threats to an adolescent's personal safety.[198]

In my studies on inner city violence in New York, I showed how social norms within urban adolescent male subcultures prescribe a set of attitudes and behaviors that often lead to violent crime.[199] Avoiding confrontation when challenged by a rival results in a loss of social status and ostracism by peer affiliates, which itself can create vulnerability to physical attack. Ordinary youths in poor urban neighborhoods face coercive peer pressure and sometimes tangible threats that both propel them to get involved in crime and make extrication difficult. Their limited ability to see beyond their immediate social and physical world to the norms and institutions of the dominant society reflects not only their attenuated psychosocial development and decision-making skills, but the influence of their social context as well.[200]

For most adolescents, these characteristic developmental influences on decision making will change in predictable ways as they mature. During the maturational journey to adulthood, adolescents become better decision makers as they grow out of their natural susceptibility to peer influence, their risk perception improves, their computation of risk becomes more balanced and longer in temporal perspective, and self-regulation evolves.[201] These changes lead to changes in the calculus, and competency, of decision making.[202] "The adolescent becomes an adult who is likely to make different choices from his youthful self, choices that reflect more mature judgment."[203] Imagine, then, the mentally retarded person who cannot mature in this fashion and develop these competencies, and the basis for extending the logic of *Atkins* to adolescents becomes transparent.

E. Development and the Jurisprudence of Culpability for Adolescents

The principle of penal proportionality leads to a determination of punishment that combines the degree of harm of the act and the blameworthiness of the actor.[204] Determining blameworthiness, whether in absolute or relative terms, is a process that draws strength not just from normative or moral views, but from more complex and nuanced judgments about exogenous factors that bear on culpability—both

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198. Fagan, *supra* note 156, at 535-38; Jeffrey Fagan & Deanna Wilkinson, *Guns, Youth Violence and Social Identity*, *in* YOUTH VIOLENCE 105 (Michael H. Tonry & Mark Harrison Moore eds., 1998). This study described the way in which the peer social context coerces youths to follow set "scripts" that can lead to violent confrontation. Conformity to these social norms is enforced with severe sanctions. Similar studies of the everyday lives of inner city adolescents in neighborhoods with high rates of violence include ELIJAH ANDERSON, CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY (1999); GEOFFREY CANADA, FIST, STICK, KNIFE, GUN (1997), SUDHIR VENKATESH, AMERICAN PROJECT (2000).

199. *See generally* Fagan & Wilkinson, *supra* note 198.

200. Deanna L. Wilkinson & Jeffrey Fagan, *A Theory of Violent Events*, *in* THE PROCESS AND STRUCTURE OF CRIME 169, 183 (Robert Meier & Leslie Kennedy eds., 2001).

201. Scott & Steinberg, *supra* note 156; Steinberg & Cauffman, *supra* note 157; Scott & Grisso, *supra* note 162.

202. Scott & Steinberg, *supra* note 156, at 836.

203. *Id.*

204. *See generally* ROBERT NOZIK, PHILOSOPHICAL EXPLANATIONS (1981); GEORGE FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT (1996).

contextual factors that bear on the incident itself or the circumstances in which the actor is situated, and developmental factors related to emotional, cognitive, and other psychosocial functions residing within individuals.[205] Some models of culpability are based on rationality and volition, embracing assumptions about the capacity to make rational choices.[206] Actors whose decisions are impaired are less culpable than those who are fully functional, as are those whose choices are severely constrained by either circumstances or individual (functional) limitations.[207] Judgments about the degree of these limitations will determine if the person is judged less culpable and deserving of a lesser punishment compared to the fully functional defendant. These persons may be fully responsible but perhaps less than fully culpable.

The existence of a separate system of juvenile justice, with its own language and jurisprudence, expresses the normative view that adolescents are generally less blameworthy than adults.[208] Scott and Steinberg distinguish between the culpability of adolescent offenders—which is mitigated by their developmental deficits—and their responsibility for their behavior choices.[209] In other words, adolescence as a developmental status is mitigating but not exculpatory.[210] The developmental deficits discussed earlier are not the deficits of an atypical adolescent but are "normal" developmental processes common to all adolescents. To the degree that there is variation among adolescents, whether offenders or not, these differences are predictable and subject to a variety of contextual, circumstantial, and intra-individual factors. In this jurisprudence, the crimes of adolescents are a function of immaturity, compared to the crimes of adults, which are the acts of morally responsible, yet possibly cognitively and emotionally deficient, actors.

This is not necessarily a question of the capacity of teenagers to understand the harms they do and the consequences of their acts. Most developmental psychologists agree that they do. Among adults, that type of incapacity might better describe mentally disordered persons or some mentally retarded persons. Rather, this question considers that it is immature and otherwise defective judgment that

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205. *See generally* Fagan, *supra* note 156.

206. *See generally* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 152 (1968); Sanford H. Kadish, *The Decline of Innocence*, *in* BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW 65 (1987); Joshua Dressler, *Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code*, 19 RUTGERS L.J. 671, 701-02 (1988); Stephen J. Morse, *Culpability and Control*, 142 PENN. L. REV. 1587 (1994). There are notable exceptions. *See* FRANKLIN E. ZIMRING, *Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 271 (Thomas Grisso & Robert G. Schwartz eds., 2000) (arguing that under principles of penal proportionality, immaturity mitigates the blameworthiness of juvenile offenders).

207. *See, e.g.*, WAYNE LAFAVE & AUSTIN SCOTT, CRIMINAL LAW 373 (1972). Duress is an excuse, in the conventional view, in which the actor is placed under such a threat that "a person of reasonable fairness would be unable to resist the pressure." Model Penal Code § 3.04. It does not imply that the balance of interests is sufficient to outweigh the harm of the offense. But this is further complicated by a variety of factors irrelevant to this distinction: duress usually is a response to a human actor, compared to a "choice of evils" claim that worse things would result if a defensive action were not taken. There are other justifications and excuses in the MPC, including, for example, mistakes, legal authority, and parental discipline. *See also* Fagan, *supra* note 156.

208. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909); MURRAY LEVINE & ADELINE LEVINE, A SOCIAL HISTORY OF HELPING SERVICES: CLINIC, COURT, SCHOOL, AND COMMUNITY 155-58 (1970); Zimring, *supra* note 110; SCHOLSSMAN, *supra* note 107.

209. Scott & Steinberg, *supra* note 156, at 828-29.

210. *Id.* at 829.

contributes to decisions by adolescents, along with their inability to make judgments with the same skills and capacities as adults, which reduces their culpability and blameworthiness.

> Due to these developmental influences, youths are likely to act more impulsively and to weigh the consequences of their options differently from adults, discounting risks and future consequences, and overvaluing (by adult standards) peer approval, immediate consequences, and the excitement of risk taking. These influences are predictable, systematic, and developmental in nature (rather than an expression of personal values), and they undermine decision-making capacity in ways that are generally accepted as mitigating of culpability.[211]

F. Development and Competence: The Danger of False Confessions

In *Atkins*, the Court noted, "The risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty, is enhanced...by the possibility of false confessions."[212] The same risks are evident in several recent cases where juveniles falsely confessed to homicides during interrogations by police.[213] Juvenile suspects have long been considered a population that is particularly vulnerable to coercion and false confessions. Because of their underdeveloped thought processes and immaturity, they are less likely to understand their rights.[214] The U.S. Supreme Court has also long recognized this particular

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211. *Id.* at 830.

212. *Atkins*, 536 U.S. at 318 n.24 (citing Everington & Fulero, *Competence to Confess: Measuring Understanding and Suggestibility of Defendants with Mental Retardation*, 37 MENTAL RETARDATION 212, 212-13, 535 (1999)). In note 25, the Court then went on to cite two instances of mentally retarded inmates whose death sentences were overturned and they were exonerated:

> As two recent high-profile cases demonstrate, these exonerations include mentally retarded persons who unwittingly confessed to crimes that they did not commit. See Baker, Death-Row Inmate Gets Clemency; Agreement Ends Days of Suspense, Washington Post, Jan. 15, 1994, p. A1; Holt & McRoberts, Porter Fully Savors First Taste of Freedom; Judge Releases Man Once Set for Execution, Chicago Tribune, Feb. 6, 1999, p. N1.

Atkins, 536 U.S. at 321 n.25.

213. Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998). *See also* Tanenhaus & Drizin, *supra* note 129, at 671-89 (discussing cases of false confessions by very young offenders in homicide cases). *But see* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of False Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 (1999) (suggesting that many defendants who were described as innocent following false confessions may have been guilty despite the miscarriage of justice produced by aggressive police interrogations, and that these cases are concentrated among the mentally retarded). For a recent review of false confessions in capital cases, see Welch S. White, *Confessions in Capital Cases*, 2003 ILL. L. REV. 979 (forthcoming).

214. *See generally* Thomas Grisso, *Juveniles' Capacity to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980). By this reasoning, one might conclude that the development deficits that render adolescents less culpable might also suggest that they lack sufficient adjudicative competence—by virtue of their immaturity—to stand trial. Although there are dimensions of "immaturity" that may make an adolescent defendant less competent to stand trial, these are only a subset of the broader range of factors that make him or her less culpable under death penalty jurisprudence. There is empirical evidence that younger adolescents perform more poorly than adults (and on a level similar to that of mentally retarded adults) on tests of adjudicative competence, suggesting that their immaturity may indeed indicate that they are less competent to participate in a legal proceeding. These differences are likely to have been understated in this research, where tasks were performed in an artificial laboratory setting rather than in the more arousing and threatening atmosphere of an actual court proceeding. *See* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003). Nevertheless, an adolescent

vulnerability of juvenile offenders and has mandated safeguards in the form of procedural due process for juveniles in police custody.[215] Given the emotional and intellectual immaturity of minors, harsh police interrogation may seriously jeopardize the reliability of a confession.

Experimental evidence from controlled studies and case autopsies shows that adolescents may be vulnerable to false confessions owing to their immaturity and its concomitant factors: their suggestibility and their proneness to coercion.[216] Juveniles generally are more susceptible to suggestion, thus making them more likely to implicate themselves in a crime or implicate themselves in a crime they did

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defendant can be competent but sufficiently immature to warrant a discount on punishment. Both law and social science have consistently noted that the skills required to participate effectively in one's own defense (for example, the ability to reason, to identify information of value to counsel, and to understand the proceedings, the roles of those participating, and the consequences of strategy decisions) would not necessarily indicate sufficient maturity to warrant full responsibility for one's actions. *See* Zimring, *supra* note 155, at 267.

Until recently, immaturity was a secondary factor in juvenile competency standards. *See, e.g.*, Dusky v. United States, 362 U.S. 402 (1960) (holding that the competence of a juvenile defendant depended on an assessment of "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has rational as well as factual understanding of proceeding against him" and it was not enough that he was "oriented to time and place and ha[d] some recollection of events"). However, recent statutes now include the term "immaturity" in setting a competency standard for adolescents. *See, e.g.*, ARK. CODE ANN. § 9-27-502(C) (1999).

> The report shall include...(x)(a) An opinion as to whether at the time the juvenile engaged in the conduct charged, as a result of immaturity or mental disease or defect, the juvenile lacked capacity to: (1) Possess the necessary mental state required for the offense charged; (2) Conform his or her conduct to the requirements of the law; and (3) Appreciate the criminality of his or her conduct.

Id.

A recent thread of cases also illustrates the increasing emphasis on immaturity in determinations of a juvenile's competence to stand trial. *See In re* J.M., 769 A.2d 656, 662 (Vt. 2001) (requiring that the "evaluations of a particular juvenile's competency are to be made with regard to juvenile [developmental] norms"); Golden v. Arkansas, 21 S.W.3d 801, 803 (Ark. 2000) (stating that competency evaluations should apply an "'age-appropriate' capacity standard to juveniles, which is different from adults"); *In re* Charles B., 978 P.2d 659, 660 (Ariz. 1998) ("although the Juvenile...has no mental disorder or disability, he fits the description of 'incompetent'...because he lacks a present ability to consult with his attorney with a reasonable degree of rational understanding, and he does not have a rational and factual understanding of the proceeding against him").

Also, the weight accorded to various dimensions of culpability is influenced by the type of proceeding. The factors that reduce an adolescent's responsibility at trial—susceptibility to peer pressure, impulsivity, and poor emotional self-regulation, consistent with the reasoning of *Atkins*—may be less important in determining whether one is competent to stand trial because, presumably, counsel is provided to ensure that legal decisions and strategies are not pursued impulsively and that the defendant is not unduly pressured into a plea bargain or into self-incriminating testimony. By the same token, however, these culpability-reducing factors *are* likely to influence behavior during interrogation (when a suspect who is impulsive or susceptible to peer pressure might be tempted, for example, to make a false confession) when counsel is not present. Such factors are thus important when determining whether an individual is competent to waive procedural rights and, thus, are part of the "special risk" of false confession mentioned by the *Atkins* Court. *See Atkins*, 536 U.S. at 321.

215. *See* Gallegos v. Colorado, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1948). In *Gallegos*, the Court recognized the limited ability of a minor to comprehend constitutional concepts:

> [A] 14 year old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

Gallegos, 370 U.S. at 54. In *Haley*, the Court made nearly identical statements about a male suspect who was 15 years of age. *Haley*, 332 U.S. at 599-600.

216. Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOLOGIST 221 (1997); Gerald Robin, *Juvenile Interrogation and Confessions*, 10 J. POLICE SCI. & ADMIN. 224 (1982).

not commit. This often results as a reaction to what a child would perceive as a threat from an authority figure. Suggestibility is inversely related to intelligence,[217] increasing their risk of susceptibility to giving false confessions.[218] In laboratory studies, adolescents with low intelligence were much more susceptible to leading questions, confabulate more, and are more acquiescent with interrogators.[219] The more suggestible subjects are, the less accurate they are in recalling details, and the more erroneous information is produced during interrogation.[220] Low IQ subjects are more likely to believe that falsely confessing will have little or no consequences because of their knowledge of the truth of the matter and belief that truth always wins out. This naiveté renders low functioning subjects at higher risk for falsely confessing than normally functioning subjects. Combined with susceptibility to acquiescence, suggestibility, compliance with authority, and the proclivity to confabulate put low IQ subjects at significantly higher risk for false confession in the context of a police interrogation.[221] The case autopsies by Professors Tanenhaus and Drizin[222] show that aggressive police tactics during interrogations of adolescents often produce confessions that later are proved false.

The recent well-publicized reversals of the convictions of five New York City teenagers, ages fifteen to seventeen at the time of the attack, accused of brutally raping a female jogger in Central Park illustrates the vulnerability of adolescents to giving false confessions. More than a decade after their convictions and after some had served long prison sentences, the real attacker came forward and confessed to the crime.[223] DNA tests of Mr. Reyes' semen and other materials confirmed his presence at the crime scene. The absence of DNA evidence from any of the five teens at the crime scene motivated their exoneration, in addition to inconsistencies in the details they provided on the victim's clothing and the attack itself.

The persistence of false confession cases involving both the young defendants described by Professors Tanenhaus and Drizin and the older teenagers in the Central Park jogger case, coupled with laboratory evidence of adolescents' susceptibility to suggestion and vulnerability to coercion, places adolescents at elevated risk of making false confessions to both capital and other serious crimes. In experiments and other laboratory studies, the spread in susceptibility scores in these experiments suggests that many defendants older than sixteen would be prone to false confessions.[224] And, while these experimental studies involve adolescents below age

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217. G.H. Gudjonsson, *Suggestibility and Compliance among Alleged False Confessors and Resisters in Criminal Trials*, 31 MED., SCI. & L. 147, 149 (1991).

218. S.J. Ceci et al., *Suggestibility of Children's Memory: Psycholegal Implications*, 116 J. EXPERIMENTAL PSYCHOL. 38 (1987).

219. Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation*, 7 PSYCHOL. SCI. 125, 129 (1996).

220. Saul M. Kassin & H. Sukel, *Coerced Confessions and the Jury: An Experimental Test of the "Harmless Error" Rule*, 21 LAW & HUM. BEHAV. 27, 42 (1997).

221. Gudjonsson, *supra* note 217.

222. Tanenhaus & Drizin, *supra* note 129, at 671-89 (discussing cases of false confessions by very young offenders in homicide cases).

223. Jim Dwyer & Kevin Flynn, *New Light on Jogger's Rape Calls Evidence into Question*, N.Y. TIMES, Dec. 1, 2002, at A1.

224. *See infra* section IV and note 246.

sixteen, most of the Central Park defendants were above sixteen and death-eligible had theirs been a capital case.

The Supreme Court in both *Gallegos*[225] and *Haley*[226] has been concerned with two primary problems in the interrogation of minors. The first inquiry is whether or not a juvenile has the capacity to comprehend his or her Fifth Amendment rights against self-incrimination. Although the standard *Miranda* warning is given, there are arguments that the vocabulary contained in the *Miranda* warning is too advanced for a teenager's comprehension or that the warning is not given to children until after a confession has already been attained. The second question revolves around the reliability of "voluntary" confessions of juveniles in police custody. Given the emotional and intellectual immaturity of minors, both the condition and process of interrogation may seriously jeopardize the reliability of a confession and place them at risk for a death sentence and the specter of wrongful execution.

G. Converting Mitigation to a Categorical Exception of Juveniles from Capital Punishment

The convergence of scientific evidence on immaturity from developmental psychology with the nascent biological evidence raises the question of a *categorical* exception to criminal punishment generally for juveniles. That is not at issue in this article,[227] although a variety of rationales have been advanced for a categorical reduction in sentence severity for adolescents.[228] Here, for proportionality considerations, and precisely because death is different, a general exception should apply to the most severe form of punishment.[229] The *Thompson* Court stated, in effect, that immaturity was *categorically* a mitigator of culpability in capital cases, but that case-by-case determinations might not adequately protect all juveniles so exposed.[230] In other words, the "narrowing jurisprudence" of adult death penalty cases—emphasizing the avoidance of unwarranted death sentences via procedural rules—would not work for juveniles. Moreover, the recent high rates of jurisdictional waiver or transfer of adolescent offenders to adult court suggests that the boundary between the juvenile court—where the mitigating status of adolescence is internalized into the court's jurisprudence[231]—and the criminal court that ignores

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225. Gallegos v. Colorado, 370 U.S. 49 (1962).

226. Haley v. Ohio, 332 U.S. 596 (1948).

227. From the outset of the juvenile court, its founders recognized that some youths would necessarily be expelled and be subject to adult punishment. *See* Tanenhaus, *supra* note 110. Juvenile offenders often commit crimes whose seriousness commands harsh punishment. *See* Zimring, *supra* note 110. There is a vigorous debate as to which juveniles should be subject to punishment as adults, how they should be identified, the legal arrangements and procedural mechanisms that regulate the flow of cases that are relocated from the juvenile court to the criminal court, and how they should be punished once transferred. *See* Francis Allen, *Foreword, in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT ix (Jeffrey Fagan & Franklin E. Zimring eds., 2000). *See also* Jeffrey Fagan, *This Will Hurt Me More Than It Hurts You: Social and Legal Consequences of Jurisdictional Transfer*, 16 NOTRE DAME J. L., ETHICS AND PUB. POL'Y 101 (2002).

228. *See, e.g.*, BARRY C. FELD, BAD KIDS (1996) (discussing a "youth discount" in the context of a unified criminal court that eliminates separate jurisdiction and jurisprudence for adolescents).

229. *See* Steiker & Steiker, *supra* note 135, for objections to the use of proportionality as a rationale to categorically exempt juveniles from capital punishment.

230. Scott & Steinberg, *supra* note 156 (raising much the same argument).

231. Andrew Walkover, *The Infancy Defense in New Juvenile Court*, 31 UCLA L. REV. 503, 510-12 (1984); *see also* Scott, *supra* note 85.

it, has been severely breached.[232] The mitigation doctrine loses its case-by-case force where there is a flood of "waived" juveniles facing long and harsh terms of criminal punishments for crimes far less serious than murder.

If adolescent murderers are less culpable than their adult counterparts because of developmental deficits and are particularly vulnerable to false confessions and other limitations in adjudicative competence, then this immaturity places them well below the threshold of culpability articulated in the U.S. Supreme Court's "death-is-different" jurisprudence. This applies to adolescents as a group that differs in its culpability for its offenses, not simply as a subgroup of criminal offenders. Accordingly, the presumption of immaturity can be applied to most individuals in the age group, based on predictable trajectories of adolescent development. Alternately, individualized assessments leave triers of fact at the mercy of imperfect diagnostic assessments to determine which adolescents are "mature" and which are not.

Moreover, categorical exemptions reduce the likelihood of racial or regional variation in the determination of who is death-worthy and who is not.[233] This determination is even more complicated for juveniles than adults given the externalities that arise when juveniles commit well-publicized homicides.[234] Recent data show, for example, that there is an unavoidable conflation of race and homicide, raising further tensions in the search for justice.[235] Indeed, the conflation of race and blameworthiness is a disturbing specter that unfortunately has a long and painful history in criminal justice.[236] In capital cases, such determinations about culpability seem to fall more heavily on African Americans and other ethnic minorities[237] and are complicated by the structural circumstances that obstruct assignment of competent and experienced capital defense counsel.[238] It also insulates against the limitations of scientific instruments to accurately distinguish who is mature of judgment and who is not.[239]

In *Atkins*, the Court created a categorical exception for the mentally retarded because, like adolescents, their culpability is seriously diminished and the risk of false confession is high. Why, then, is there not a similar exception for adolescents? How can the law recognize and express the recognition of diminished responsibility

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232. *See generally* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

233. Glen L. Pierce & Michael L. Radelet, *Race, Region and Death Sentencing in Illinois, 1988–97, in* ILLINOIS COMMISSION ON CAPITAL PUNISHMENT (2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/techinical_appendix/reasearch_report.html) (last visited Sept. 24, 2003).

234. *See, e.g.*, Michael Browning et al., *The Case of Lionel Tate. Boy, 14, Gets Life in TV Wrestling Death: Killing of 6-Yr.-Old Playmate Wasn't Just Horseplay, Florida Judge Says*, CHI. SUN-TIMES, Mar. 10, 2001, at 1 (noting that the death occurred while Tate was "allegedly demonstrating wrestling techniques on her"); Dana Canedy, *At 14, a Life Sentence: Boy Killed Girl in "Wrestling" Murder*, DALLAS MORNING NEWS, Mar. 10, 2001, at 1.

235. *See* FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE (2000); FELD, *supra* note 111.

236. *See, e.g.*, SAMUEL WALKER ET AL., THE COLOR OF JUSTICE (2001).

237. Pierce & Radelet, *supra* note 233.

238. Incompetent defense counsel is the major source of serious trial error in capital cases, producing a corrosively high rate of sentencing and trial errors. *See* James S. Liebman et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*, Columbia University School of Law, 2002, *at* http://www.law.columbia.edu/brokensystem2/ (last visited Sept. 24, 2003).

239. *See generally* Scott & Steinberg, *supra* note 156.

among the less culpable mentally retarded who commit murder, but not of the less culpable juveniles who do the same?

IV. *ATKINS* AND THE MATURITY HEURISTIC OF THE DEATH PENALTY FOR JUVENILES

The categorical exception to capital punishment granted in *Atkins* should be applied to juveniles who commit murder. The competencies required for a juvenile to make decisions to engage in crime occupy common psychological ground with decisions made by those whose capacities are impaired by emotional disturbance or mental illness: susceptibility to or domination by peers, inability to control impulses, and the inability to grasp the consequences of their acts. Just as there is controversy, however, over measurement of mental retardation and determinations of the thresholds that apply, the components of "immaturity" among juveniles invite similar complications both in terms of measurement and of clinical interpretation.

Drawing these boundaries poses both normative and scientific challenges. The difficulties and statistical error rates in measuring immaturity for juveniles invite complexity in the consistent application of the law.[240] The emerging jurisprudence of mental retardation may well create the same tensions and dilemmas.[241] The choice of a fixed boundary either for immature adolescents or mentally retarded adults brings with it another set of problems—the unacceptable risks of trial and sentencing errors that could lead to executions of those whose culpability fails to reach constitutional thresholds,[242] or whose false confessions may lead to tragic and unthinkable miscarriages of justice.

The execution of an adolescent who is less than fully mature—whose capacity for choice is impaired by immaturity in the dimensions of cognitive and emotional development that adults have achieved—meets this definition of error. There is considerable variability in adolescent development, both between individuals for specific components of maturity[243] and within individuals for these same components. This variability in adolescent development means that by ages seventeen, eighteen, or perhaps even age twenty, many will not reach the developmental thresholds of maturity on the markers of culpability established by *Atkins*, the same markers that have been validated and confirmed by social and

240. *See* Steinberg & Cauffman, *supra* note 157. Adolescents are less competent decision makers than adults, largely because their capacities for autonomous choice, self-management, risk perception, responsibility, temperance, long-term perspective, and calculation of future consequences are deficient compared to adults, and these traits influence decision making in ways that can lead to risky conduct. *Id.* at 801.

241. James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, *at* http://www.deathpenaltyinfo.org/MREllisLeg.pdf (last visited Sept. 24, 2003); John Blume & Sheri Lynn Johnson, *Killing the Non-Willing: Atkins, the Volitionally Incapacitated, and the Death Penalty*, CORNELL L. REV. (forthcoming 2003).

242. In *Gardner v. Florida*, 430 U.S. 349 (1977), the U.S. Supreme Court once again emphasized the notion that "death is different." In *Gardner*, the Court describes this difference: "From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action." *Gardner*, 430 U.S. at 357-58. A death sentence and execution of a defendant whose culpability does not rise to this threshold is a sentencing error, which appellate courts are obligated to reverse. *See* Liebman et al., *supra* note 238.

243. Steinberg & Cauffman, *supra* note 157 (discussing social science evidence that age-linked differences in maturity of judgment account for differences in decision making).

emerging biological science of adolescent development as reliable predictors of full capacity for competent and mature behavioral choices.

Consider one developmental dimension—consequential judgment. Because the development of consequential judgment is a normal function, we have no reason to assume that the distribution of this or any other developmental competence is exceptional for youths engaged in criminal conduct. Indeed, we can assume a "normal" distribution of development. Typically, social science shows that the attainment of any feature of development follows a "normal" distribution,[244] where most persons reach a threshold by a certain age—for example, sixteen years, but some reach this threshold well before this age and others reach it well after this age. This type of distribution is known as a "bell-shaped curve" and is characteristic of the distribution across populations of many features of social, psychological, and physical development.[245]

Let us assume that on this measure, then, empirical studies show that most teenagers reach the test score threshold of maturity (*i.e.*, the generally accepted threshold of maturity for this dimension) at sixteen years of age. That is, given a normal distribution, most teenagers—about two in three—have reached this threshold of maturity at that age. Accordingly, a considerable percentage—perhaps a third—of all adolescents has not fully matured on this dimension by age sixteen. Let us assume, also, that the standard deviation for this measure[246]—the spread in the distribution of ages at which adolescents reach the threshold of maturity for this specific dimension—is equivalent to approximately one year of age. That means that by age seventeen, perhaps one in six still is immature in this dimension of maturity. By age eighteen, perhaps one in fifteen still lacks this specific capacity for choice and maturity of judgment.

But the heuristic of maturity becomes more complex when we recognize that several dimensions of adolescent development comprise maturity.[247] Now, consider that these several dimensions of psychosocial maturity are less than perfectly correlated and cannot be substituted for one another.[248] The determination of maturity then would require independent assessments over several dimensions. We

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244. On a "normal" or universal developmental measure, where the norms have been estimated from many studies under a variety of sampling and measurement conditions, we have no reason to assume that there will be large sample differences.

245. A bell-shaped curve represents the normal distribution of population values. *See, e.g.*, SCHUYLER W. HUCK & WILLIAM H. CORMIER, READING STATISTICS & RESEARCH (2d ed. 1996). In a normal distribution, a few scores are at either end of the distribution, and most are in the middle grouped around the average (or mean) score. If one knows the mean and standard deviation (or variability) of a score or measure of developmental competency of persons at various ages, one can predict what percentage of the population is likely to have obtained that threshold by a specific age. The empirical rule for any normal distribution is (1) 68% of the values fall within one standard deviation of the mean, (2) 95% of the values fall within two standard deviations of the mean, and (3) 99.7% of the values fall within three standard deviations of the mean. *See* David H. Kaye & David A. Freeman, *Reference Guide on Statistics*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (1994).

246. Standard deviation is a measure of the dispersion of a distribution of a test score or any measure around a mean. We assume that the distribution is "normal," where the spread around the mean is equal on either side and the test scores are concentrated near the average. In a normal distribution, 68 percent of the cases lie within one standard deviation of the mean; approximately 16 percent lie one standard deviation or more below the mean. *See, e.g.*, FRANK HAGAN, RESEARCH METHODS IN CRIMINAL JUSTICE AND CRIMINOLOGY 347-48 (4th ed. 1997).

247. Steinberg & Cauffman, *supra* note 157; Scott & Grisso, *supra* note 162.

248. Steinberg & Cauffman, *supra* note 157; Scott & Grisso, *supra* note 162.

can reasonably expect that the probability of reaching a threshold of maturity along several of these dimensions will require a complex calculation, where the joint or conditional probability of an adolescent reaching the accepted threshold of maturity along more than one dimension compounds and becomes increasingly small. Under current death penalty jurisprudence, each dimension of immaturity is a potential mitigator.[249] The cumulative probability that a minor may be immature grows incrementally as a defendant falls farther and farther below the high threshold of culpability for a capital offense, increasing the risk of sentencing error under the U.S. Supreme Court's death penalty jurisprudence. The risk grows larger when we compound this calculus across several dimensions of maturity and culpability.

Although the law is otherwise comfortable with bright lines to legally define competencies for adolescents,[250] the threshold for the attainment of sufficient maturity to attribute culpability *in capital cases* is a far more complex determination. Because what is at stake is death, the boundary cannot be determined simply by examining the average age by which most adolescents attain one or any number of the several indicia of maturity. In addition to these expected age thresholds, variability in the pace at which most adolescents reach that threshold is critical. Variability means that a substantial proportion of adolescents at ages eighteen, seventeen, or sixteen are likely to score well below the threshold for maturity, including many of the constituent elements of retardation identified in *Atkins*.[251] That is, some non-negligible percentage of adolescent murderers will not have achieved the threshold of culpability that capital jurisprudence requires. A death sentence handed down to a defendant who is below eighteen years of age and who is substantially immature in impulse control and emotional regulation, for example, might invite the most serious form of capital sentencing error—the condemnation of a youth whose culpability does not rise to constitutional standards—in perhaps ten percent or more of the cases involving offenders below age eighteen at the time of their crime. When the determination of culpability is compounded across multiple dimensions of immaturity, the denial of the reality of this variability in favor of an absolute threshold of maturity at seventeen or even sixteen years of age invites the prospect of fallibility—error—on at least one or more dimensions of mitigation tied to immaturity.

There is an obvious and important tension between this maturity heuristic and normative views of adulthood and maturity. Normative views might assign maturity for criminal culpability at a specific age, based on broad societal views of what capacities most adolescents have attained by that age. But the empirical reality of a progression of adolescent maturation that occurs variably over several dimensions or indicia of culpability creates a complex calculus of maturity based on multiple dimensions of adolescent development. In fact, there are two normative tensions in this framework, one that reflects concerns over the execution of minors and a second arising from concerns of death penalty advocates for penal proportionality. Tipping in one direction or the other has "legitimacy" costs—for opponents of the

249. Unlike the determination of mental retardation that results in a diagnostic classification, immaturity is not classified using a similar heuristic. *See* Thompson v. Oklahoma, 487 U.S. 815 (1988).

250. Scott, *supra* note 85.

251. *Atkins*, 536 U.S. at 317; *See also* social science evidence cited *supra* note 24.

death penalty, the moral authority of law and legal institutions is threatened when capital punishment is imposed unjustly. For supporters of capital punishment, the moral authority of the criminal law is corroded when punishments do not scale proportionately to the severity of the crime or the culpability of the offender.[252] A maturity heuristic offers a rationalization under current death penalty jurisprudence for withholding executions for offenders as old as twenty-one, when the risk of error due to false claims of maturity declines to near zero.[253] That is not the case now: under *Stanford*, and despite the immaturity of many adolescents at ages sixteen, seventeen, or even at eighteen, execution is permitted, inviting the risk of execution of adolescents whose immaturity renders them not fully culpable for their crimes.

Resolution of this tension may come from the law's comfort with bright lines of maturity that apply to specific competencies. For many legally regulated areas, including those that require the skills associated with maturity, there is a generally accepted upper boundary of eighteen for nearly all behavioral functions of adulthood.[254] Many of these roles require mature judgment (*i.e.*, voting, medical consent); others require behavioral regulation (*i.e.*, drinking, military service). The states assign criminal liability to wrongdoing at no more than age eighteen, although many assign it at even younger ages for specific crimes. For some offenses and offenders, the threshold drops as low as thirteen years of age.[255] However, the elevated arrest rates of adolescents tried as adults may be a sign that the assumption of maturity that informs these legal policies evidently is flawed.[256]

The balancing of tensions among this triad of normative concerns suggests that perhaps the norms of the *Kent*[257] and *Gault*[258] eras of juvenile jurisprudence should apply to the threshold of capital culpability for adolescents. Not long ago, Justice Harry Blackmun noted how the tension between fundamental fairness and individualized judgments haunts the administration of the death penalty. The juvenile death penalty epitomizes this tension. Avoiding false assumptions about maturity that can easily lead to sentencing errors in capital sentences, maintaining popular demand for penal proportionality, and sustaining consistency in the

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252. *See generally* DAVID BEETHAM, THE LEGITIMATION OF POWER (1991); JOHN RAWLS, A THEORY OF JUSTICE (2d ed. 1999); GEORGE FLETCHER, RETHINKING CRIMINAL LAW (1978); Zimring, *supra* note 155.

253. Except in cases of mental retardation or mental illness.

254. Scott, *supra* note 85.

255. Patricia Torbet et al., Office of Juvenile Justice and Delinquency Prevention, National Center for Juvenile Justice, *State Responses to Serious and Violent Juvenile Crime: Research Report* (1996), *at* http://www.ncjrs.org/txtfiles/statresp.txt (last visited Oct. 6, 2003).

256. *See, e.g.*, Fagan, *supra* note 227. Recent studies on the responses of adolescent offenders subjected to criminal punishment show that they are more likely to be rearrested and re-incarcerated compared to similarly situated youths who are retained in the juvenile justice system. *See, e.g.*, Donna Bishop, *Juvenile Offenders in the Adult Criminal Justice System* 27 CRIME & JUSTICE 81 (2000). Many state policies are designed simply to incapacitate youths who they see as dangerous and are agnostic with respect to either their amenability to change or their maturity. Some policies view immaturity as an indicator of continued risk of offending. These arguments are orthogonal to the assessment of culpability in capital cases. The implication of higher recidivism rates is simply the over-prediction of dangerousness based on an equivalence of criminality with dangerousness and maturity, and the toxic reaction of adolescents to harsh, non-therapeutic retributive regimes of correctional intervention. *See* Fagan, *supra* note 227.

257. Kent v. United States, 383 U.S. 541 (1966).

258. *In re* Gault, 385 U.S. 965 (1966).

threshold for attainment of maturity and criminal liability should lead the Court to the conclusion that juveniles should be afforded the same protection by the Court that the mentally retarded were given in *Atkins*.

V. CONCLUSIONS

Juveniles and mentally retarded persons are two groups that face substantial risk of sentencing error when facing the death penalty. Beyond the fact that their disabilities are mitigating factors in assessing criminal conduct, these disabilities place each group at substantial risk for providing false confessions,[259] as well as limiting their ability to competently and, to use the language of *Atkins*, meaningfully assist defense counsel.[260] Because defendants with diminished competence and culpability face an elevated likelihood of reversible sentencing error, principles of proportionality should govern these situations. Accordingly, juvenile defendants, like the mentally retarded, should be exempted from capital punishment.[261]

This is a narrowing argument, not a normative one about the moral status of the law of capital punishment. That is, a categorical exemption for juveniles below the age of eighteen from execution is agnostic about capital punishment for those whose maturity and competence reaches societal norms. The alternative—creating exempted categories such as the immature or the mentally retarded—invites disputes about how to reliably establish membership. Although legislatures and appellate courts can create language that scientifically and reliably expresses the underlying complexity and dimensionality of these categories, there inevitably will be subjective risks of misdiagnosis, testing error, instrument unreliability, or other limits of behavioral science.

In the case of juveniles, the significance of "immaturity" as a mitigating factor in criminal punishment can be reinforced by placing it in the context of its broader role in the legal regulation of adolescence and the law's comfort with bright lines. Here, then, the reconciliation of normative views of deserved and proportional punishment with social science evidence of diminished culpability and variability of adolescents in reaching the thresholds of maturity can reinforce the jurisprudential logic of a ban on executions of youths who commit murder below eighteen years of age.

This exemption would avoid the many errors that characterize the "broken system" of capital punishment that is so riddled with serious, reversible error.[262] The empirical reality of capital sentencing suggests that current procedures and jurisprudence are not reliable in sorting out who is or is not sufficiently culpable.

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259. *Atkins*, 536 U.S. at 320 n.25.

260. *Id.* at 304 ("mentally retarded defendants in the aggregate face a special risk of wrongful execution because of the possibility that they will unwittingly confess to crimes they did not commit, their lesser ability to give their counsel meaningful assistance, and the facts that they are typically poor witnesses and that their demeanor may create an unwarranted impression of lack of remorse for their crimes").

261. *See generally* Steiker & Steiker, *supra* note 135.

262. James S. Liebman et al., *supra* note 238; James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839 (2000) (describing the system of prosecution and sentencing in capital cases as "broken" due to the very high rates of serious, reversible trial error, averaging 68% in all documented state direct appeal, state post-conviction appeal, and federal habeas corpus decisions from 1973–1995).

Even when individualized assessments are conducted using modern scientific and clinical tools, the risks of error due to measurement and diagnostic limitations suggest that it is neither reliable nor efficient for each court to assess the competency of each juvenile individually. The precise conditions of immaturity, incapacity, and incompetency are difficult to consistently and fairly express in a capital sentencing context.[263] Further, cognitive and volitional immaturity might be easily concealed by demeanor or physical appearance and, more importantly, obscured by the gruesome details of a murder and its emotional impact on the victim's family. These limitations invite an attribution of culpability to the seemingly remorseless and competent adolescent whose developmental reality may be exactly the opposite, raising the risk of a death sentence where it is not deserved.[264]

The Court's interest in procedural reliability and fairness calls for action to reduce high risks of sentencing errors. One critical area requiring further attention is the execution of juveniles, where care and caution are needed to reinforce the judicial system's legitimacy. *Atkins* has established a critical path for honoring principles of fairness while retaining the core jurisprudential theories of immaturity, incapacity, and mitigation in capital punishment. Extending the Court's *Atkins* reasoning to sentencing determinations for juveniles not only maintains the integrity of the Court's *Atkins* decision, it more importantly reduces the risk of executing children who are less than fully culpable for their crimes.

The Missouri Supreme Court is the first to extend the logic of *Atkins* to adolescents and ban the execution of persons who commit murder before reaching age eighteen.[265] In reversing the death sentence of Christopher Simmons in *Simmons v. Roper*,[266] the Missouri court located its decision in the intersection of jurisprudential theories that recognize the diminished capacity of adolescents with the multiple theories of the *Atkins* Court. That is, the *Simmons* court cited the broad acceptance of the immaturity of adolescents articulated by the U.S. Supreme Court in *Eddings* and *Thompson* and noted that the risks of false confession attached to juveniles due to the similarity of their cognitive deficits that informed the *Atkins* decision. Again invoking *Atkins*, the *Simmons* court found that such executions violated the U.S. Constitution's prohibition of cruel and unusual punishment. The *Simmons* court noted that many adolescents may lack the moral development and reasoning capacity necessary to satisfy the requirements in capital jurisprudence of sufficient mental capacity to meet the threshold of "deterrence."

The *Simmons* court also addressed the test of the U.S. Supreme Court in *Stanford* that "a national consensus has developed against the execution of juvenile offenders." The *Simmons* court's opinion noted that, since the U.S. Supreme Court's 1989 decision in *Stanford*, no state has lowered the age for execution from eighteen to seventeen or sixteen, five more states have banned the practice of executing juvenile offenders through legislative action, and a sixth has banned it through a

263. Steiker & Steiker, *supra* note 135, at 101.

264. *See, e.g.*, Martha Grace Duncan, *So Young and So Untender: Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1520-22 (2002).

265. *State ex rel.* Simmons v. Roper, 112 S.W.3d 397 (Mo. 2003) (W.R. Price, Jr., J., dissenting).

266. The Missouri court resentenced Simmons to life imprisonment without the possibility of release.

judicial decision. Including the Missouri decision, a total of seventeen states, in addition to federal courts, require a minimum age of eighteen for a death sentence. The court also noted that the infrequency of execution of juveniles—only six states have executed a juvenile since *Stanford*—as further evidence of this emerging national consensus.[267] The *Simmons* court also recognized international standards, rejected fourteen years ago in *Stanford*, citing the Convention on the Rights of the Child in its decision.[268]

Atkins has established a critical path for honoring principles of fairness while retaining the core jurisprudential theories of immaturity, incapacity, and mitigation in capital punishment. Extending the Court's *Atkins* reasoning to sentencing determinations for juveniles not only maintains the integrity of the Court's *Atkins* decision, it more importantly reduces the risk of executing children who are less than fully culpable for their crimes.

267. The *Simmons* court also noted that twelve states and the District of Columbia bar the death penalty entirely.

268. *Simmons*, 112 S.W.3d at 411 (citing Article 37(a) of United Nations Convention on the Rights of the Child). The same article the court cites in its opinion, provides that "[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age." Convention on the Rights of the Child, United Nations, Nov. 20, 1989, art. 37(a), U.N. *at* http://www.unhchr.ch/html/menu2/6/crc/treaties/crc.htm (last visited Oct. 6, 2003). *See also* George J. Annas, *Moral Progress, Mental Retardation, and the Death Penalty*, 347 NEW ENG. J. MED. 1814, 1817 (2002) (predicting that the public will support an extension of the *Atkins* decision to murder defendants ages 16 or 17).