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Imposing the Death Penalty upon Juvenile Offenders: A Current Application of the Eighth Amendment's Prohibition against Cruel and Unusual Punishment

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IMPOSING THE DEATH PENALTY UPON JUVENILE OFFENDERS: A CURRENT APPLICATION OF THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

I. INTRODUCTION

In 1988, after many years of avoiding the issue, the United States Supreme Court finally addressed the constitutionality of imposing the death penalty upon individuals who were juveniles at the time of their offenses. In *Thompson v. Oklahoma*,[1] the Court reversed the petitioner's death sentence imposed upon petitioner for a brutal murder he committed as a fifteen-year-old.[2] A plurality of the Supreme Court[3] held that Oklahoma's imposition of the death penalty upon an individual who was fifteen years old at the time of this offense[4] violated the eighth amendment's prohibition against "cruel and unusual punishments."[5] The *Thompson* Court relied heavily upon the actions of state legislatures and sentencing juries as important indicia of society's interpretation of "cruel and unusual punishment."[6]

One year after *Thompson*, in two consolidated cases, *Stanford v. Kentucky*[7] and *Wilkins v. Missouri*,[8] a plurality of the Supreme Court[9] affirmed the death sentences imposed for murders committed by the petitioners when they were seventeen and sixteen years old respectively.[10] A plurality nearly mirroring that in *Thompson* held that it is not "cruel and unusual punishment" under the eighth amendment to impose capital punishment on individuals who were sixteen or seventeen at the time of their crime.[11] In support of its opinion, the *Stanford* plurality, like

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1. 487 U.S. 815 (1988).

2. *Id.* at 838.

3. *Id.* at 816. Justice Stevens authored the plurality opinion, joined by Justice Brennan, Justice Marshall, and Justice Blackmun. Justice O'Connor, concurring only in the judgment, filed a separate opinion. Justice Scalia, joined by Chief Justice Rehnquist and Justice White, filed a dissent. Justice Kennedy did not participate in the decision.

4. Thompson was certified to stand trial as an adult under 10 OKLA. STAT. ANN. § 1112(b) (1987).

5. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The eighth amendment's restrictions are applicable to Oklahoma through the fourteenth amendment. *Thompson*, 487 U.S. at 864.

6. *Thompson*, 487 U.S. at 822-23.

7. 492 U.S. 361 (1989).

8. *Id.*

9. *Id.* Justice Scalia, writing for the plurality, was joined by Chief Justice Rehnquist, Justice White, and Justice Kennedy. Justice O'Connor, concurring in part and concurring in the judgment, filed a separate opinion. Justice Brennan, joined by Justice Marshall, Justice Blackmun, and Justice Stevens, filed a dissent. This line-up was a near mirror image of that in *Thompson*. The plurality in *Thompson* formed the dissent in *Stanford*. The dissenters in *Thompson*, joined by Justice Kennedy, who took no part in the consideration or decision in *Thompson*, formed the plurality in *Stanford*. In both cases, Justice O'Connor cast the deciding vote.

10. *Stanford*, 492 U.S. at 361.

11. *Id.*

the plurality in *Thompson*, relied on state statutes and their individual application as "objective indicia" of society's interpretation of "cruel and unusual punishment."[12] The *Stanford* plurality, however, arrived at quite a different result.

This comment explores current death penalty law as applied to juveniles. It begins with a brief examination of the historical evolution of the death penalty as applied to juvenile offenders, including an exploration of the current status of various state death penalty statutes. Next, it reviews the three recent United States Supreme Court cases which challenged the constitutionality of imposing a death sentence upon individuals who were minors at the time of their crimes. Finally, this comment analyzes the implications of *Thompson*, *Stanford*, and *Wilkins* on the Court's future review of juvenile death penalty cases.

II. HISTORICAL PERSPECTIVE

To analyze effectively the Court's holdings in *Thompson*, *Stanford*, and *Wilkins*, a brief examination of the evolution of the death penalty in general, as well as an examination of the evolution of the death penalty as applied to juveniles, is necessary.

A. An Early Perspective on the Death Penalty

Before the Enlightenment, society did not question whether the state had the right to kill its offenders. Rather, society contemplated what would be the most effective (most ingenious and cruel) method of execution.[13] Death alone was not considered sufficient punishment unless it was preceded by terror, torture, and public humiliation.[14] Boiling, burning, beheading, dismembering, impaling, crucifying, stoning, strangling, and burying alive were methods implemented to achieve these goals.[15] Besides addressing murder and treason, England's response to crime included the imposition of the death penalty for more than 200 separate offenses, including pick-pocketing, associating with gypsies, and stealing turnips.[16]

The execution of Damiens, for the attempted assassination of King Louis XV of France in 1757, was perhaps history's most gruesome:

> His flesh was torn with red-hot pincers, his right hand was burned with sulfur, his wounds were drenched with molten lead, his body was drawn and quartered by four horses, his parts were set afire, and his ashes were scattered to the winds.[17]

This most spectacular execution was accomplished before a large crowd.[18]

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12. *Id.*
13. *Revenge is the Mother of Invention*, TIME, Jan. 24, 1983, at 36.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*

B. *Evolution of the Death Penalty as Applied to Juvenile Offenders*

Criminal jurisprudence in the United States today originated in England and other parts of Europe. Although the eighth amendment categorically prohibits the imposition of "cruel and unusual punishments," the framers never intended to prevent the capital punishment of all individuals who were minors at the time of their crimes.[19] Blackstone's *Commentaries on the Laws of England*, widely accepted at the time the eighth amendment was adopted, described the common law's view of age and its effect upon the imposition of capital punishment.[20]

Then, as now, a fundamental principle of criminal law was that children under seven years of age were incapable of forming the criminal intent necessary for the imposition of criminal liability.[21] In the eighteenth century, however, this presumption of absolute incapacity was rebuttable for individuals from ages seven to fourteen. If the requisite criminal intent was proven, a seven-year-old was subject to punishment as an adult, including, theoretically, a sentence of death.[22] For children older than fourteen years, the rebuttable presumption of incapacity to commit a capital offense disappeared, and a fifteen-year-old was subject to adult punishment.[23]

Historically, juveniles as a class were neither categorically immune from conviction for capital offenses, nor immune from the imposition of capital punishment.[24] However, although some children in England were sentenced to death and executed, a dichotomy between death sentencing and actual execution existed. In London, between 1801 and 1836, not one of the 103 children under the age of fourteen sentenced to death was executed.[25]

Throughout the history of the United States, 16,000 offenders have been executed.[26] Of these 16,000 executed, 282 were under the age of eighteen at the time of their offenses.[27] As of September 1989, approximately 2,200 individuals were on death row.[28] Of these 2,200, twenty-eight were under the age of eighteen at the time of their offenses.[29]

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19. *Thompson*, 487 U.S. at 863-64.

20. *Id.*

21. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613, 614-15 (1983). Victor L. Streib is a legal scholar and is recognized as a leading authority on the issue of the death penalty as it applies to juvenile offenders. He has written over 100 papers, articles, and books on the subject. Currently, Professor Streib is a Professor of Law at Cleveland State University. He has served as a juvenile court prosecutor and has represented juvenile defendants in courts from the local trial level to the United States Supreme Court. He was co-counsel for the petitioner in *Thompson v. Oklahoma.*

22. *Id.*

23. *Id.*

24. *Thompson*, 487 U.S. at 864.

25. Streib, *supra* note 21, at 615.

26. Streib, *Testimony: Legislative Criteria Concerning the Death Penalty for Juveniles* 4 (Sept. 27, 1989) (submitted to the Constitution Subcommittee of the United States Senate).

27. *Id.*

28. *Id.* at 5.

29. *Id.* Of these twenty-eight who were under eighteen at the time of their capital offense, one was fifteen, four were sixteen, and twenty-three were seventeen. *Id.*

C. *Theories of Punishment Underlying the Death Penalty*

Legal scholars cite various reasons for the imposition of legal punishment.[30] The goals of retribution, deterrence, and incapacitation are the social purposes which the United States Supreme Court permits when affirming a sentence of death.[31]

When laws were enacted that eliminated the ancient notion of "*lex talionis*,"[32] the government became responsible for retaliating on behalf of the victim. The purposeful infliction of retributive punishment causes the offender to suffer to an extent commensurate with his offense.[33] The United States Supreme Court has opined that the severity and finality of capital punishment is appropriate to the seriousness and finality of murder.[34] Capital punishment ends the existence of the capital offender forever, and it is this irrevocability that fuels the controversy.

The concept of deterrence is a theory under which the threat of future punishment either specifically discourages the offender from future criminal conduct, or discourages other potential offenders from similar acts.[35] There is, however, no conclusive statistical evidence that the death penalty is a better deterrent than alternative forms of punishment.[36] There is no scientific method available for gathering statistics reflecting the number of potential offenders who choose not to commit a crime because of the fear of execution.

Incapacitation contemplates the separation of the offender from those he may harm. Protection of society through incapacitation may be achieved either by incarceration or execution. Although execution ensures that the individual executed will never harm again, incarceration cannot guarantee this end. The vast majority of convicted individuals are ultimately returned to society,[37] and the minority who do spend the remainder of their lives in prison continue to pose a threat to their fellow inmates and prison employees.

D. *Current Status of Death Penalty Statutes*

As of September 1989, thirty-six states plus the federal government had death penalty statutes on their books.[38] Of these thirty-seven ju-

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30. *See, e.g.*, W. LAFAVE & A. SCOTT, CRIMINAL LAW 22-26 (2d ed. 1986). *See generally* J. WILSON & R. HERRNSTEIN, CRIME AND HUMAN NATURE 489-507 (1985). Typically addressed are theories of retribution, deterrence, incapacitation, and rehabilitation. At various times, society's focus centers on one theory or another. As society's thoughts on human nature have evolved, so has the theoretical basis for punishment.

31. Gregg v. Georgia, 428 U.S. 153, 183 (1976). The *Gregg* Court concluded that "[retribution] as an expression of society's moral outrage at particularly offensive conduct [is not] inconsistent with our respect for the dignity of men." *Id.*

32. *Exodus* 21:24 (King James). "Eye for eye, tooth for tooth, hand for hand, foot for foot." *Id.*

33. J. WILSON & R. HERRNSTEIN, *supra* note 30, at 496.

34. Just, *Executing Youthful Offenders: The Unanswered Questions in Eddings v. Oklahoma*, 13 FORDHAM URBAN L.J. 471, 482 (1984-85) (citing Weems v. United States, 217 U.S. 349 (1910)).

35. *See generally* W. LAFAVE & A. SCOTT, *supra* note 30, at 24-25.

36. Comment, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1665 (1986).

37. W. LAFAVE & A. SCOTT, *supra* note 30, at 24.

38. Streib, *supra* note 26, at 5.

risdictions which provided for capital punishment, nineteen had set a statutory minimum age for the imposition of a sentence of death.[39] Nine other jurisdictions set no minimum age within the death penalty statute itself but indirectly established a minimum age through statutes which provided for juvenile transfer to adult court.[40] The remaining nine jurisdictions had no minimum age restrictions in either their death penalty statutes or their juvenile transfer statutes.[41]

III. RECENT CHALLENGES TO THE CONSTITUTIONALITY OF STATUTES WHICH IMPOSE THE DEATH PENALTY UPON MINORS

The United States Constitution sets no minimum age for imposition of the death penalty. Because the eighth amendment proscribes the infliction of "cruel and unusual punishments," and because members of the judiciary are appointed to interpret the Constitution, the United States Supreme Court is necessarily called upon to make a final determination of whether a particular sentence of death is "cruel and unusual." Although the constitutionality of the death penalty as applied to the juvenile offender first came before the Court in 1981, the Court in *Eddings v. Oklahoma*[42] avoided the constitutional question by deciding that case on other grounds.

In 1987, however, the Supreme Court granted certiorari in a case involving a convicted juvenile murderer to consider the constitutional issues surrounding the juvenile death penalty.[43] Indeed, within a twelve month period, the Court was called upon three times to determine whether the infliction of the death penalty upon a juvenile fit within the contours of "cruel and unusual punishment." For a clearer understanding of the types of offenses which led to the Court's holdings in these cases, the facts and circumstances of each case are set forth below.

A. Thompson v. Oklahoma

On January 22, 1983, fifteen-year-old William Wayne Thompson,[44]

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39. *Id.* Jurisdictions with a minimum age of eighteen are California, Colorado, Connecticut, Illinois, Maryland, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Oregon, Tennessee, and the Federal Government. Jurisdictions with a minimum age of seventeen are Georgia, North Carolina, and Texas. Jurisdictions with a minimum age of sixteen are Indiana, Kentucky, and Nevada. *Id.* at 6.

40. *Id.* Jurisdictions with a minimum transfer age of fifteen are Louisiana and Virginia. Jurisdictions with a minimum transfer age of fourteen are Alabama, Arkansas, Idaho, Missouri, and Utah. One jurisdiction, Mississippi, has a minimum transfer age of thirteen. Montana has a minimum transfer age of twelve. *Id.*

41. *Id.* These remaining nine jurisdictions are Arizona, Delaware, Florida, Oklahoma, Pennsylvania, South Carolina, South Dakota, Washington, and Wyoming. *Id.*

42. 455 U.S. 104 (1982).

43. Thompson v. Oklahoma, 724 P.2d 780 (Okla. Crim. App. 1986).

44. The son of a truck driver and one of eight children, Thompson had numerous prior arrests for shoplifting and assault. Just prior to the murder, Thompson dropped out of the tenth grade. Seligson, *Are They Too Young to Die?*, PARADE MAGAZINE, Oct. 19, 1986, at 5.

along with his brother and two friends,[45] left his mother's home stating, "We're going to kill Charles."[46] Shortly thereafter, Charles Keene was abducted from his home and murdered.[47]

On February 18, 1983, Keene's body was recovered from the Washita River.[48] Evidence at trial was overwhelming and proved that Thompson and his companions premeditated Keene's abduction and brutal murder.[49] Before weighting the body with chains and a concrete block and throwing it into the river, Thompson slashed Keene's abdomen and chest "so that fish could eat his body."[50]

Thompson was tried as an adult, convicted by a jury of first degree murder, and sentenced to death.[51] The Court of Criminal Appeals of Oklahoma, relying on its decision in *Eddings v. Oklahoma*,[52] held that the execution of a minor certified as an adult and convicted of murder is not cruel or unusual punishment.[53] As a result, the appellate court affirmed the judgment of the trial court and the sentence of death.[54]

The United States Supreme Court granted certiorari to consider two issues, but the principal question was whether a death sentence imposed upon a convicted murderer who was fifteen at the time of the crime constituted cruel and unusual punishment in violation of the eighth amendment.[55] The Supreme Court reversed the Court of Criminal Appeals, and a plurality of the Court held that the execution of such an individual was unconstitutional.[56] Limiting the scope of the opinion to juvenile offenders who had not reached their sixteenth birthday, the *Thompson* plurality declined to confront directly the constitutionality of executing juveniles as a class.

B. Stanford v. Kentucky

On January 7, 1981, seventeen-year-old Kevin Stanford,[57] along with an accomplice,[58] repeatedly raped and sodomized Baerbel Poore during

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45. Thompson's brother Anthony James Mann and their friends, Bobby Glass and Richard Jones, were tried separately. Each was convicted of first-degree murder and each received a sentence of death. *Thompson*, 724 P.2d at 782.

46. *Thompson*, 487 U.S. at 860. Charles Keene was the former brother-in-law of Thompson and Mann.

47. *Thompson*, 724 P.2d at 786. Like many juveniles on death row, Thompson grew up witnessing violence firsthand, much of it committed within his family by the brother-in-law he killed. Seligson, *supra* note 44, at 5.

48. *Thompson*, 487 U.S. at 861.

49. *Id.* Keene had been beaten, had his leg broken, had his throat cut, was kicked in the head, and was shot in the head twice. *Id.*

50. *Id.*

51. *Thompson*, 724 P.2d at 782.

52. *Id.* at 784. In *Eddings*, the Court held that once a minor is certified to stand trial as an adult, he may be punished as an adult without violation of the eighth amendment. *Id.*

53. *Id.*

54. *Id.* at 786.

55. The court of criminal appeals deemed photographic evidence which was admitted at the guilt phase of the trial harmless error. It did not consider whether such evidence constituted reversible error when admitted during the penalty phase. Because of the Supreme Court's disposition of the principal question, it did not consider this second question presented. *Thompson*, 487 U.S. at 838.

56. *Id.*

57. Stanford v. Commonwealth, 734 S.W.2d 781 (Ky. 1987). On the date of the murder, Stanford

and after the robbery of the gasoline station where she was employed.[59] The victim was then driven to an isolated area where Stanford shot her twice, fatally, in the head.[60]

Stanford was arrested on January 13, 1981.[61] In October 1981, a Kentucky juvenile court, like the Oklahoma court in *Thompson*, certified Stanford for trial as an adult.[62] In August 1982, Stanford was tried by a jury and convicted of first-degree murder, first-degree sodomy, first-degree robbery, and receiving stolen property.[63] Under a state statute which set the minimum age for execution at sixteen, the court sentenced Stanford to death plus forty-five years of incarceration.[64] The Kentucky Supreme Court affirmed the death sentence and held that the imposition of the death penalty was neither excessive nor disproportionate.[65]

The United States Supreme Court granted certiorari to consider whether the imposition of capital punishment on an individual for a crime he committed at the age of seventeen constituted cruel and unusual punishment under the eighth amendment.[66] The Supreme Court affirmed the Kentucky Supreme Court, and a plurality held that the execution of an individual who was seventeen at the time of the crime was constitutional.[67]

C. *Missouri v. Wilkins*

Typical of many juveniles facing the death penalty, Heath Wilkins was in and out of juvenile facilities from the age of eight.[68] Among

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was seventeen years and four months old. Since the age of ten, Stanford was in and out of juvenile court for numerous offenses, including theft, burglary, arson, assault, and sexual abuse, among others. On a repeated basis, but to no avail, Stanford received treatment available to youthful offenders in Kentucky. *Id.* at 792.

58. *Stanford*, 492 U.S. at 365. David Buchanan confessed to rape, sodomy and robbery. He implicated Stanford as the triggerman. He further identified a third juvenile, Troy Johnson, as the driver of the getaway vehicle and as the individual who supplied the gun used by Stanford. *Stanford*, 734 S.W.2d at 784.

59. *Stanford*, 734 S.W.2d at 783. Baerbel Poore was a young mother of an eleven-month-old child at the time of her murder. *Id.* at 790. The robbery netted a small amount of cash, two gallons of gasoline, and 300 cartons of cigarettes. *Id.* at 783.

60. *Id.*

61. *Id.*

62. *Stanford*, 492 U.S. at 365. KY. REV. STAT. § 208.170 (Michie 1982) provides for waiver of juvenile court jurisdiction when the offender is charged with a class A felony or capital crime or is over sixteen at the time of a felony offense. *Id.*

63. *Stanford*, 492 U.S. at 366. Motions for separate trials were denied, and Buchanan and Stanford were tried together. The state sought the death penalty for both juveniles, but it did not object when Buchanan moved to exclude the death penalty as to him. Buchanan received a life sentence. *Stanford*, 734 S.W.2d at 784.

64. *Stanford*, 492 U.S. at 366.

65. *Stanford*, 734 S.W.2d at 793.

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

67. *Id.* at 380.

68. *Id.* at 367.

numerous other offenses, Wilkins attempted to murder his own mother by putting insecticide into Tylenol capsules.[69]

On July 27, 1985, at the age of sixteen years and seven months, Wilkins, along with four friends, executed a plan conceived by Wilkins two weeks earlier.[70] At approximately 10:30 p.m., two of the four juveniles entered Linda's Liquors and Deli.[71] According to the plan, Wilkins rushed around the counter and stabbed 26-year-old Nancy Allen in the back.[72] When Wilkins and his accomplice were unable to open the cash register, their victim assisted them.[73] Wilkins then thrust his knife into Nancy Allen's chest three times, piercing her heart.[74] As Allen begged for her life, Wilkins stabbed her four more times in the throat, opening her carotid artery.[75]

Like Thompson and Stanford, Wilkins was certified for trial as an adult under a state statute which permitted juvenile felons between the ages of fourteen and seventeen to be tried as adults.[76] Wilkins entered guilty pleas to charges of first-degree murder, armed criminal action, and carrying a concealed weapon.[77] Both the state and Wilkins himself sought the death penalty.[78]

Finding that the murder involved "depravity of mind and that as a result thereof, it was outrageously or wantonly vile, horrible or inhuman," the trial court found the death penalty appropriate.[79] Missouri's death penalty statute set no minimum age for its imposition.[80] On a mandatory review, the Supreme Court of Missouri affirmed the lower court, rejecting the "cruel and unusual" argument.[81] As in *Stan-*

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69. *Id.* Wilkins had committed various acts of burglary, theft, arson, and killing of neighborhood animals. Psychiatric testimony indicated that although Wilkins knew right from wrong, heavy drug use affected his cognitive functioning. Wilkins had used marijuana since age five and had abused inhalants, stimulants and depressants since age six. Wilkins estimated that he had inhaled gasoline fumes on 500 occasions, and he admitted that he had used LSD, his favorite drug, since age ten. *Missouri v. Wilkins*, 736 S.W.2d 409, 422 n.13 (Mo. 1987) (*en banc*).

70. *Wilkins*, 736 S.W.2d at 411. Juveniles Patrick Stevens, Ray Thompson, and Marjorie Filipiak were part of Wilkins' plan to rob the liquor store and to kill whoever was on duty. During the two weeks prior to the murder, Wilkins worked on sharpening his butterfly knife.

71. *Id.* The four met at the North Kansas City Hospital. Wilkins and Stevens headed to the liquor store through the woods. They waited until no customers were present, cleaned their shoes to avoid identifying mudprints and entered the store. As planned, Wilkins ordered a sandwich while Stevens used the restroom behind the counter. As Stevens rushed out of the restroom to grab Nancy Allen, Wilkins came around the counter with his sharpened knife. After the murder and robbery, Wilkins and Stevens returned to the hospital where, as planned, Thompson and Filipiak were waiting with taxis. *Id.* at 411-12.

72. *Id.* Attempting to inflict what he considered a fatal wound, Wilkins aimed at his victim's kidneys. *Id.* Nancy Allen, a married mother of two, owned and operated the convenience store in which she was murdered. *Stanford*, 492 U.S. at 366.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*; MO. REV. STAT. § 211.071 (1986).

77. *Stanford*, 492 U.S. at 367.

78. *Id.*

79. *Id.*

80. *Thompson*, 487 U.S. 827-28.

81. *Stanford*, 492 U.S. at 368.

ford, the United States Supreme Court granted certiorari to consider the eighth amendment argument[82] and affirmed the Supreme Court of Missouri.[83]

IV. DISCUSSION AND ANALYSIS

A. The Decision in Thompson

In reaching its holding in *Thompson*, a plurality of the Court determined that executing a person who was less than sixteen years old at the time of his offense offended the "evolving standards of decency that mark the progress of a maturing society" and, therefore, violated the proscription of the eighth amendment.[84] Because the drafters of the eighth amendment did not precisely define "cruel and unusual," the *Thompson* plurality relied upon its own interpretation of the moral conscience of modern American society.[85] In its search for these "evolving standards of decency," the Court considered relevant state statutes and jury determinations to be objective signs of the moral conscience of American society and used these sources to confirm the Court's own judgment.[86] In addition, the Court reviewed the social purposes served by the death penalty.[87]

1. Legislative Enactments

Speaking through Justice Stevens, the *Thompson* plurality noted that although the delineation between childhood and adulthood varied from state to state, all states defined an individual under sixteen years of age as a minor for most legal purposes.[88] With regard to the death penalty, nineteen states had set no statutory minimum age for the penalty's imposition.[89] Because the plurality accepted the premise that a minimum age for imposition of the death penalty does exist, it ignored these nineteen states. The plurality expressed uncertainty that these states' legislatures had focused on and deliberately decided the issue[90] because their statutes did not set a minimum age for the death penalty.

The *Thompson* plurality then confined its analysis to the eighteen states which had established a statutory minimum age for death sentences.[91]

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82. *Id.*
83. *Id.* at 380.
84. *Thompson*, 487 U.S. at 821 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
85. *Id.* at 822-23.
86. *Id.* (citing Furman v. Georgia, 408 U.S. 238, 277-79 (1972)). The Court recognized its long history of similar analysis.
87. *Id.* at 836.
88. *Id.* at 824.
89. *Id.* at 826-27. Oklahoma has not expressed a statutory minimum age in its death penalty statute. *Id.* at 827-28.
90. *Id* at 827. In furtherance of its eighth amendment inquiry, the plurality stressed that fourteen states were without a death penalty statute of any sort. *Id.* at 826.
91. *Id.* at 828-29. In New Mexico, a defendant convicted of a capital felony may be sentenced to life imprisonment or death. If, however, the defendant has not reached the age of eighteen at the time of the commission of the capital felony, he must be sentenced to life imprisonment. N.M. STAT. ANN. § 31-18-14 (1978).

All eighteen states required the offender to have reached the age of sixteen at the time of the offense.[92] Justice Stevens concluded that the legislative enactments of these eighteen states were indicators of contemporary standards of decency and that the plurality's conclusion comported with the views of several of this nation's professional organizations and the emerging international standard among countries that allow the death penalty.[93]

Justice O'Connor's narrow concurrence and deciding vote in *Thompson* established a two-part standard for determining when a state may impose a sentence of death upon a juvenile. A state may impose the death penalty upon a juvenile only when: (1) its legislature has seriously considered the issue of age and has clearly expressed its judgment through a statutory minimum age requirement; or (2) absent such statutory specificity, it is clear that no national consensus forbids the practice.[94] Because Oklahoma's death penalty statute failed to set a minimum age for imposition of a sentence of death,[95] and because every state legislature that had set a minimum age for capital punishment set the age at sixteen or above,[96] Justice O'Connor concluded that there was a national consensus against executing juveniles under the age of sixteen and that Thompson's death sentence should be vacated.[97]

Justice O'Connor agreed with the plurality that adolescents as a class are generally less blameworthy than adults.[98] She declined, however, to adopt the plurality's conclusion that as a matter of constitutional law no fifteen-year-old is capable of the moral culpability required for the imposition of the death penalty.[99] Justice O'Connor concurred only with the judgment of the plurality. She left for the state legislatures to decide the broader question of whether any person younger than sixteen at the time of his crime can constitutionally be executed.[100]

2. Jury Determinations

Because jury sentencing patterns reflect public opinion, the plurality concluded that the execution of a person fifteen years old or younger at the time of his crime is "generally abhorrent to the conscience of the

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92. *Thompson*, 487 U.S. at 829.

93. *Id.* at 830. The American Bar Association and the American Law Institute oppose the death penalty for juveniles. Amnesty International opposes capital punishment for anyone, but it defines eighteen as the standard minimum age among countries where the death penalty is imposed. *Id.*

94. *Id.* at 857-58. Thompson became death eligible through a combination of two Oklahoma statutes: Oklahoma's death penalty statute, which does not specify a minimum age, and a statute that establishes the circumstances under which a juvenile may be certified to stand trial as an adult. Although Justice O'Connor agreed that under this statutory scheme Oklahoma could not execute an offender who was less than sixteen at the time of his capital offense, she declined to hold that no state could constitutionally do so.

95. *Id.* at 857.

96. *Id.* at 849.

97. *Id.* at 857-59.

98. *Id.* at 853.

99. *Id.*

100. *Id.* at 857-59.

community."[101] The plurality turned to statistical evidence as the rationale for its unambiguous conclusion.

In this century, between eighteen and twenty persons have been executed for crimes committed when they were under the age of sixteen, the last in 1948.[102] Despite the fact that 82,094 people were arrested for homicide during the years 1982 through 1986, only 1,393 received a death sentence,[103] and of these, only five were less than sixteen at the time of their offense.[104] In its interpretation of these statistics, the *Thompson* plurality found the imposition of the death sentence upon these five juveniles to be "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[105]

3. Social Purposes Served by Imposition of the Death Penalty

"Given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children,"[106] the *Thompson* plurality reasoned that the social purposes underlying penalty, deterrence, and retribution are not fulfilled by the execution of a fifteen-year-old.[107] The plurality dismissed the deterrent value of the juvenile death penalty, citing its conviction that a teenage offender is unable to make the cost-benefit analysis required.[108] Notwithstanding the Court's recognition in *Gregg* of the retributive function of capital punishment, the *Thompson* plurality concluded that juvenile offenders, because of their lesser culpability, do not deserve the full "expression of society's moral outrage."[109] In dictum, the plurality concluded that retribution was "simply inapplicable" to the execution of a fifteen-year-old.[110]

Although the Justices who formed the plurality in *Thompson* would have drawn a constitutional line prohibiting the execution of all individuals under the age of eighteen at the time of their offense,[111] the court was unable to do so,[112] narrowing the scope of its decision to those under sixteen.[113] Following *Thompson*, questions concerning the constitutionality of executing sixteen or seventeen-year-olds remained.

B. Stanford and Wilkins Decisions

Because the dissenting Justices in *Thompson* formed the plurality in *Stanford*, it comes as no surprise that the opinion in *Stanford* was a

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101. *Id.* at 832.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 831 (citing Furman v. Georgia, 408 U.S. 238, 309 (1972)).
106. *Id.* at 837.
107. *Id.*
108. *Id.*
109. *Id.* at 836-37.
110. *Id.*
111. *Stanford*, 492 U.S. at 382.
112. *Thompson*, 487 U.S. at 838.
113. *Id.*

direct counter to that in *Thompson*. Agreeing with the *Thompson* plurality that an interpretation of "cruel and unusual" punishment should be dictated by "objective indicia" which reflect "evolving standards of decency,"[114] the *Stanford* plurality likewise considered legislative enactments[115] and their application by sentencing juries.[116] Justice Scalia, writing for the *Stanford* plurality, emphatically rejected the position of the *Thompson* plurality that "it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty," positing that to do so would "replace judges of the law with a committee of philosopher-kings."[117] For Scalia, the Court's job is to "identify the 'evolving standards of decency'; to determine, not what they should be, but what they are."[118]

Finding that the majority of states which provided for the death penalty applied it to offenders who committed capital offenses at age sixteen and above,[119] the plurality did not find "the degree of national consensus" required to label this punishment "cruel and unusual."[120] Acknowledging that only two percent of actual executions in the United States had been for crimes committed by individuals under the age of eighteen,[121] the plurality dismissed the conclusion that prosecutors and juries found the ultimate punishment "categorically unacceptable."[122] Rather, the plurality concluded that "the very considerations which induce petitioners and their supporters to believe that death should never be imposed on offenders under 18 cause prosecutors and juries to believe that it should rarely be imposed."[123]

Next, the *Stanford* plurality dismissed as irrelevant those state statutes which set a minimum age of eighteen for individuals to participate in various activities such as consuming alcohol and voting.[124] Justice Scalia noted that the judgment required to "vote intelligently" is obviously greater than that required for a clear understanding that murder is wrong.[125] Further, Justice Scalia distinguished such laws because they do not provide for the constitutionally required "individualized consideration" of laws concerning capital punishment.[126]

Finally, the *Stanford* plurality rejected the views of professional organizations and various interest groups as a basis upon which to rest constitutional law.[127] For the plurality, were the opinions of such groups

114. *Stanford*, 492 U.S. at 369-71.
115. *Id.* at 370.
116. *Id.* at 373.
117. *Id.* at 379.
118. *Id.* at 378.
119. *Id.* at 370-71.
120. *Id.*
121. *Id.* at 373.
122. *Id* at 374.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 375.
127. *Id.* at 377.

as sweeping as suggested, a national consensus against the juvenile death penalty would appear in the enacted laws of the people.[128]

As in *Thompson*, Justice O'Connor provided the deciding vote in *Stanford*.[129] Justice O'Connor applied her two-part standard developed in her *Thompson* concurrence to the separate facts of *Stanford* and *Wilkins*.[130] Because the Kentucky legislature had considered the issue of age in capital murder cases and had set the minimum age for execution at sixteen,[131] and because it was "sufficiently clear that no national consensus forbids the imposition of capital punishment on 16 or 17-year-old capital murderers,"[132] the rationale underlying Justice O'Connor's concurrence in *Thompson* did not apply to *Stanford*.

Like Oklahoma, Missouri had not expressed a statutory minimum age in its death penalty statute,[133] but rather operated under an implied minimum age for death sentences based on an express minimum age of fourteen for adult court jurisdiction.[134] Finding, however, that "such specificity is not necessary to avoid constitutional problems if it is clear that no national consensus forbids the imposition of capital punishment for crimes committed at such an age,"[135] Justice O'Connor, joining the plurality, concluded that neither Wilkins' nor Stanford's death sentence should be set aside.[136]

V. FUTURE IMPLICATIONS

Because one-half of the states with death penalty statutes have failed to set a statutory minimum age for imposition of the death penalty, state legislatures will undoubtedly tackle the issue to avoid expensive constitutional challenges. Only if enough states opt for setting the minimum age at fifteen will the national consensus against the execution of fifteen-year-olds disappear. Only then, under the Court's present reasoning, will the death sentence of a fifteen-year-old offender be affirmed. Because, however, "every single American legislature that has expressly set a minimum age for capital punishment has set that age at 16 or above,"[137] this possibility seems unlikely. Considering the opposing viewpoints among the Justices of the current Supreme Court regarding this issue, it is far more likely that the Court will deny certiorari in cases posing the same constitutional challenge, at least in the near future. Thus, the issue will be left for resolution by individual state legislatures.

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128. *Id.*
129. *Id.* at 380.
130. *Id.* at 381.
131. *Id.*
132. *Id.*
133. *Id.*
134. Streib, *supra* note 26, at 6.
135. *Stanford*, 492 U.S. at 380.
136. *Id.* at 381.
137. *Id.*

VI. CONCLUSION

In *Thompson v. Oklahoma*[138] and *Stanford v. Kentucky*,[139] the United States Supreme Court considered whether the execution of an individual who was a minor at the time of his offense constitutes "cruel and unusual punishment" within the meaning of the eighth amendment. In *Thompson*, a four member plurality pronounced that no fifteen-year-old is capable of the maturity and responsibility required for the moral culpability that justifies a sentence of death: to impose such a penalty would be "abhorrent" to the conscience of the community, even when a jury representing that community finds otherwise. Although Supreme Court justices are appointed to interpret the Constitution, the Justices forming the *Thompson* plurality relied on their own interpretation of the moral conscience of modern American society when deciding that case.

One year after *Thompson*, the dissent in *Thompson* formed a new plurality in *Stanford*. It concluded that the execution of sixteen and seventeen-year-olds is neither "cruel and unusual at the time that the Bill of Rights was adopted,"[140] nor is it "contrary to the evolving standards of decency that mark the progress of a maturing society."[141] Analyzing the holdings in *Thompson*, *Stanford*, and *Wilkins*, it appears that the United States Supreme Court has set the age of sixteen as the minimum age for imposition of the death penalty. The failure of a clear majority to coalesce in the decision, however, allows for speculation about what the Court might do in the future.

Without question, the death penalty is the ultimate penalty for a crime. Proponents of capital punishment insist that it is just and useful. Responding abolitionists argue that a sentence of death fails to deter and is morally wrong. While it may be impossible to prove that the death penalty is a better deterrent than alternative forms of punishment, the benefit of executing a guilty individual is sufficient if fear of receiving the death penalty deters only one prospective killer from murdering an innocent victim. The offender, by committing the crime, assumes the risk of the punishment that he could otherwise avoid.[142]

Perhaps the drafters of the Constitution declined to set a minimum age at which a state may impose a sentence of death because there is no magic age at which all individuals achieve competency. The only real question is whether the particular offender is competent.

"Individualized consideration [is] a constitutional requirement" when considering a sentence of death.[143] Sentencing juries and judges deciding this critical issue under the particular facts of each case offer a clearer

138. 487 U.S. 815 (1988).
139. 492 U.S. 361 (1989).
140. *Id.* at 368.
141. *Id.* at 369.
142. Comment, *supra* note 36, at 1668. In his comment, Ernest van den Haag, Professor of Law at Fordham University, thoroughly discusses, and then counters, many arguments often offered against the death penalty.
143. *Stanford*, 492 U.S. at 375.

path to justice than legislators and members of the judiciary selecting an arbitrary number based upon conflicting statistical studies replete with endless, politically influenced, interpretations.

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