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Thompson v. Oklahoma: The Mitigating Circumstance of Youthful Capital Offenders

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NOTES AND COMMENTS

THOMPSON v. OKLAHOMA: THE MITIGATING CIRCUMSTANCE OF YOUTHFUL CAPITAL OFFENDERS

I. INTRODUCTION

The uniqueness of the death penalty as a punishment can only be justified by the incomparability of murder as a crime. According to opinion polls, a significant percentage of Americans still believe that capital punishment is society's appropriate response to murder.¹ However, with fourteen states having completely outlawed capital punishment, whether the states impose it is strictly a matter of legislative enactment.²

The United States Constitution, mandating that the states rationally administer the death penalty in a way that is neither arbitrary nor capricious, has provided the primary restraints.³ These restraints are most notably embodied in the eighth amendment outlawing cruel and unusual punishment⁴ and the fourteenth amendment affording every criminal defendant due process of law.⁵

In abiding by these constitutional mandates, those states retaining capital punishment should endeavor, through their courts and legislatures, to insure there is always a valid penological objective served in

1. Petitioner's Brief at 29 n.8, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86-6169). See also Gersten, *The Constitutionality of Executing Juvenile Offenders: Thompson v. Oklahoma*, 24 CRIM. L. BULL. 91, 114-15 (1988). Gersten mentions that a 1965 Gallup poll indicated 45% of respondents favored capital punishment for murder. *Id.*

2. See *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2694 n.25 (1988) (Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, West Virginia, and Wisconsin do not have valid death penalty statutes). *Id.*

3. *Furman v. Georgia*, 408 U.S. 238, 256-57 (Douglas, J., concurring), *reh'g denied*, 409 U.S. 902 (1979). In *Furman*, the Court struck down a death penalty which was imposed in an arbitrary and capricious manner as a violation of the eighth and fourteenth amendments. For further discussion, see *infra* notes 155-68 and accompanying text.

4. U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

5. U.S. CONST. amend. XIV, § 1. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

selecting those few criminals who are to be executed.⁶ However, unfortunately some states have failed to legislate adequate procedures adjusting the legal system to account for youth, with its vulnerability and needs, as a sufficiently mitigating circumstance.⁷

The Supreme Court has traditionally maintained that substantial deference to the state legislatures and courts is, in a general sense, proper with respect to the death penalty.⁸ In *Thompson v. Oklahoma*,⁹ decided in 1988, the Court came close to discarding this principle and specifying a national minimum age of sixteen at the time of the crime, under which the death penalty could not be imposed. Since *Thompson*, the Court in *Stanford v. Kentucky*,¹⁰ has clarified a position in concluding that imposition of capital punishment on an offender for a crime committed at sixteen or seventeen years of age does not constitute cruel and unusual punishment under the eighth amendment.¹¹ A majority of the Court agreed that the primary objective indicator, that is, a national consensus favoring a minimum age, was missing.¹² Therefore, in *Thompson*, the plurality, which was bent on establishing a national bright line age minimum, has been checked in its attempt to set the minimum above sixteen years of age.

Notwithstanding *Stanford*, the Supreme Court will again become embroiled in the central issue of *Thompson*, namely the desirability of stipulating a national minimum age for imposition of the death penalty, whatever that age might be. Objective indicators, argued both ways in

6. *Spaziano v. Florida*, 468 U.S. 447, 460 (1984). "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Id.* *Accord* *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2700 (1988) (Stevens, J., plurality); *Zant v. Stephens*, 462 U.S. 862, 876-77 (1983); *Enmund v. Florida*, 458 U.S. 782, 788-89 (1982).

7. Only three states, Delaware, Oklahoma, and South Dakota have neither a minimum age nor a requirement for age as a mitigating factor.

8. *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983).

9. 108 S. Ct. 2687 (1988).

10. 109 S. Ct. 2969 (1989). This case represented the consolidation of two actions. The first petitioner, Stanford, was 17 years and four months old at the time he committed murder in Kentucky. During a robbery, Stanford and an accomplice repeatedly raped and sodomized a female gas station attendant. Stanford shot her point-blank in the face, and then in the back of the head. At trial, the sentencing jury was instructed that petitioner's age and the possibility of rehabilitation were mitigating factors. The second petitioner, Wilkins, was 16 years and six months old at the time he committed murder in Missouri. Wilkins, during a robbery, repeatedly stabbed a convenience store owner in the chest as she begged for her life, and then sliced her carotid artery and left her to die. The opinion did not indicate if the trial court considered youth as a mitigating circumstance. The Missouri statute requires such consideration so it can only be presumed that it was given.

11. *Id.* at 2976-77.

12. *Id.* at 2981 (O'Connor, J., concurring).

Thompson and further analyzed here, support handling the juvenile death penalty issue at the state level.¹³ Given (1) the lack of any discernable pattern of state laws showing a settled consensus against executing young offenders,¹⁴ (2) the fact that the predominant scientific theory of adolescent maturation does not identify precise transitional periods,¹⁵ and (3) the existence of a significant minority of states rejecting such a bright line,¹⁶ the Court has adhered to its deference policy on the bright line issue. Nevertheless, states refusing to enact legislation directing criminal courts to treat youth as a highly relevant mitigating factor¹⁷ in the death penalty sentencing process are now apparently under charge to do so. According to the Court, such treatment is in keeping with “evolving standards of decency that mark the progress of [contemporary society].”¹⁸

13. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2698 (1988) (Stevens, J., plurality) (citing *Edgings v. Oklahoma*, 455 U.S. 104, 115-16 (1982); *Bellotti v. Baird*, 443 U.S. 622, 635, *reh'g denied*, 444 U.S. 887 (1979)).

14. See *infra* notes 155-85 and accompanying text.

15. See *infra* notes 136-47 and accompanying text.

16. A total of nineteen states have authorized capital punishment but have not expressed a minimum age of sixteen in either their juvenile court waiver statutes or death penalty statutes. The nineteen states and their specific statutory provisions are: ALA. CODE §§ 13A-5-39 to 13A-5-59 and 13A-6-2 (1982 & Supp. 1987) (14 year-old waiver in § 12-15-34(a)); ARIZ. REV. STAT. ANN. §§ 13-703 to 13-706 and 13-1105 (1978 & Supp. 1987) (youth listed as mitigating factor in § 13-703(G)(5)); ARK. STAT. ANN. §§ 5-4-104(b) and 5-4-601 to 5-4-617 and 5-10-101 and 5-51-201 (1987) (14 year-old minimum established through concurrent jurisdiction under § 5-4-617(1)(2)); DEL. CODE ANN. tit. 11, §§ 636 and 4209 (1979 & Supp. 1986) (no minimum age and no requirement for age as a mitigating factor); FLA. STAT. §§ 775.02 and 782.04(1) and 921.141 (1986 & Supp. 1987) (youth listed as mitigating factor in § 921.141(6)(g)); IDAHO CODE §§ 18-4001 to 18-4004 and 19-2515 (1987 & Supp. 1989) (14 year-old minimum established through concurrent jurisdiction under § 16-1806A(1)); LA. REV. STAT. ANN. §§ 14:30 and 14:113 (West 1986) (15 year-old minimum established through concurrent jurisdiction under § 13:1570(A)(5)); MISS. CODE ANN. §§ 97-3-21, 97-7-67 and 99-19-101 to 99-19-107 (1987) (13 year-old waiver in § 43-21-151); MO. REV. STAT. §§ 565.020 and 565.030 to 565.040 (1987) (14 year-old waiver in § 211.071)); MONT. CODE ANN. §§ 45-5-102 and 46-18-301 to 46-18-310 (1987) (12 year-old waiver in § 41-5-206); OKLA. STAT. tit. 21, §§ 701.10-701.15 (1981 & Supp. 1988) (no minimum age or requirement for youth as a mitigating factor); 18 PA. CONS. STAT. § 1102(a) and 42 PA. CONS. STAT. § 9711 (1982 & Supp. 1987) (14 year-old minimum established through exclusive jurisdiction under 42 PA. CONS. STAT. § 6355(a)(1),(e) (1985)); S.C. CODE ANN. §§ 16-3-10 and 16-3-20 (Law. Co-op. 1985 & Supp. 1986) (youth listed as mitigating factor in § 16-3-20(c)(b)(7)); S.D. CODIFIED LAWS ANN. §§ 22-16-4 and 22-16-12 to 23A-27A-41 (1979 & Supp. 1987) (no minimum age and no requirement for youth as a mitigating factor); UTAH CODE ANN. §§ 76-3-206 and 76-3-207 (1978 & Supp. 1987) (14 year-old waiver in § 78-3(a)-25(1)); VT. STAT. ANN. tit. 13, §§ 2303 and 2403, and 7101 to 7107 (1974 & Supp. 1987); VA. CODE ANN. §§ 18.2-31 and 19.2-264.2 to 19.2-264.5 (1983 & Supp. 1987) (15 year-old waiver in § 16.1-269(a)); WASH. REV. CODE §§ 10.95.010 and 10.95.900 (1987) (youth listed as a mitigating circumstance in § 10.95.070); WYO. STAT. §§ 6-2-101 to 6-2-103 (1983) (youth listed as a mitigating circumstance in § 6-2102(j)(vii)).

17. See *supra* note 7 and accompanying text.

18. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

II. BACKGROUND AND DEVELOPMENT

A. *Juvenile Justice*

Along with the individual freedoms that Americans enjoy sometimes comes a price. Those so inclined may engage in violent crime and often escape apprehension, much less a punishment commensurate with the pain and suffering which their victims must endure. This is the primary reason why punishment, especially as applied to youth, will never effectively deter such violence.¹⁹

The family was and still is normally thought to have the primary responsibility for a child's welfare.²⁰ Only after the family has totally failed does the state assume that responsibility.²¹ Out of a spirit of paternalism and with a hope toward rehabilitating such children,²² the states first began to establish juvenile court systems in 1899.²³ The courts' philosophy was premised on the twin goals of protecting children from themselves, where society had failed them, and isolating them from the harsh criminal sanctions imposed by the adult courts.²⁴ However, one unfortunate result of paternalism was that children, unlike their adult counterparts, were unable to challenge effectively the state's authority over them.²⁵ For example, the arresting officer was normally called upon to present the state's evidence against the child.²⁶ Finally, the Supreme Court constitutionalized this socialized system in 1967 by returning to juvenile offenders the criminal court procedural protections which the juvenile court system had once denied them.²⁷

Notwithstanding that children were and still are considered to hold a "special place" in society,²⁸ most states have largely rejected the idea of rehabilitating juveniles who have committed more serious or heinous crimes.²⁹ These states have seen fit to forego benevolent treatment when

19. V. STREIB, DEATH PENALTY FOR JUVENILES 189 (1987).

20. See generally Gersten, *supra* note 1, at 93-94 n.18. Gersten disagrees with the *parens patriae* doctrine of the English Court of Chancery which maintains that when a child is at risk, the appropriate authority to decide what is in the child's best interest is the state.

21. Gersten, *supra* note 1, at 93-94 n. 18.

22. V. STREIB, *supra* note 19, at 3-4.

23. Gersten, *supra* note 1, at 94.

24. Gersten, *supra* note 1, at 95.

25. V. STREIB, *supra* note 19, at 5.

26. V. STREIB, *supra* note 19, at 5.

27. V. STREIB, *supra* note 19, at 5 (citing *In re Gault* 387 U.S. 1 (1967), which marked the beginning of the constitutionalized era).

28. *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). See also *In re Gault*, 387 U.S. at 14-15 (1967).

29. Note, *Executing Youthful Offenders: The Unanswered Question in Eddings v. Oklahoma*, 13 FORDHAM URB. L.J. 471, 479-81 (1985).

a juvenile offender has committed murder, rape, robbery, or other serious crimes.³⁰ Because the juvenile justice system must release the offender when he or she reaches the age of majority, the system allows little time for the extended and intensive rehabilitation programs required for serious youthful offenders.³¹ Understandably, the states have been unwilling to expedite release of these probable repeat felons back into society. The adult criminal courts will typically administer the full range of adult criminal sentences to young offenders, with the qualified exception of capital punishment.³² Most recently, the Supreme Court has tasked the states to weigh youth as a “highly relevant” mitigating factor to be considered during the young murderer’s sentencing process.³³

B. *Cruel and Unusual*

The eighth amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”³⁴ The Supreme Court has therefore interpreted cruel and unusual punishment in a flexible and dynamic manner in “light of contemporary human knowledge.”³⁵ The founding fathers viewed the amendment as prohibiting “tortures” and “barbarous” methods of punishment; moreover, the earlier Supreme Court decisions appear to support that view.³⁶ Today, the eighth amendment generally limits certain types of punishment and prohibits punishment grossly disproportionate to the severity of the crime.³⁷

More recently, the Court’s exemption of rape as a crime punishable by death set one parameter on capital punishment as cruel and unusual.³⁸

30. V. STREIB, *supra* note 19, at 9.

31. Gasper & Katkin, *A Rationale for the Abolition of the Juvenile Court’s Power to Waive Jurisdiction*, 7 PEPPERDINE L. REV. 937, 938 (1980).

32. V. STREIB, *supra* note 19, at 9.

33. *Eddings v. Oklahoma*, 455 U.S. 104, 116-17 (1982). Although the Court reversed the case due to the sentencing court’s failure to consider the youth’s background and mental and emotional development, the Court nevertheless emphasized that “age of a minor is itself a relevant mitigating factor of great weight.”*Id.*

34. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

35. *Robinson v. California*, 370 U.S. 660, 666 (1962).

36. *Gregg v. Georgia*, 428 U.S. 153, 169-71, *reh’g denied*, 429 U.S. 875 (1976). The conclusion that the framers were primarily concerned with tortures can be gleaned from the debates in the state conventions called to ratify the Constitution. *Id.* at 170 n.17.

37. *See Furman v. Georgia*, 408 U.S. 238, 392-93, *reh’g denied*, 409 U.S. 902 (1972) (eighth amendment prohibits unnecessary and wanton infliction of pain); *Weems v. United States*, 217 U.S. 349, 367 (1910) (punishment must be relative to the severity of the crime).

38. *Coker v. Georgia*, 433 U.S. 584 (1977) (nationwide jury sentencing and legislative attitudes strongly rejected death as a disproportionate punishment for rape, Georgia having been the only state with a death penalty statute for rape).

The Court concluded that death was “grossly disproportionate and excessive punishment for the crime of rape.”³⁹ However, setting parameters based on types of crime is a far simpler task than selecting classes of persons who might qualify for special treatment based on reduced culpability. Given the widely varying maturity levels of adolescents,⁴⁰ those states having drawn a bright line based on the chronological age of young murderers have overly simplified the sentencing process. The Supreme Court, in *Gregg v. Georgia*,⁴¹ reaffirmed another eighth amendment parameter by declaring murder a crime deserving of the death penalty. This landmark decision specified the aggravating circumstance that a murder must be “outrageously or wantonly vile, horrible or inhuman in that it involved . . . [the] depravity of [the] mind” of the defendant, to be deserving of the death penalty.⁴²

With respect to capital punishment for youthful offenders, the Supreme Court has primarily looked to “history and precedent, legislative attitudes, and the response of juries” to best gauge the evolving standard.⁴³ There is well settled precedent under both American and English law for executing young murderers.⁴⁴ Even though minors have been increasingly involved in violent crime,⁴⁵ and should somehow be held legally responsible, the Supreme Court has generally perceived the harshness of the death penalty as often inappropriate.⁴⁶ Furthermore, the extreme infrequency of juvenile executions indicates a strong national disfavor toward them.⁴⁷

III. THOMPSON V. OKLAHOMA

A. *Leading Up To Thompson v. Oklahoma*

Even though capital punishment was widely accepted at the time,

39. *Id.* at 592.

40. *See infra* notes 145-47 and accompanying text.

41. 428 U.S. 153 (1976).

42. *Id.* at 201.

43. *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

44. *See Comment, Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. CRIM. L. & CRIMINOLOGY, 1471, 1475 (1983). *See also* 4 W. BLACKSTONE, COMMENTARIES 23-24 (1850).

45. *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982).

46. *See e.g., Id.* at 116; *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (youth was mentioned as a mitigating circumstance); *Jurek v. Texas*, 428 U.S. 262, 273 (1976) (a sentencing jury “could further look to the age of the defendant”).

47. *See infra* notes 171-78 and accompanying text.

abolitionists won a partial victory in the 1972 *Furman v. Georgia* ruling.⁴⁸ Although Georgia's death penalty statutes were struck down by the Court as imposing capital punishment in an arbitrary and capricious manner, *Furman* came short of declaring capital punishment unconstitutional.⁴⁹ Nevertheless, the states declared an unofficial moratorium on its imposition until 1976.⁵⁰

Shortly thereafter and to the abolitionists' dismay, the Court held, in *Gregg v. Georgia*,⁵¹ that capital punishment was not a per se violation of the eighth amendment.⁵² The Court still found a national consensus regarding the death penalty as "an appropriate and necessary criminal sanction."⁵³ However, before a judge or jury may impose a death sentence, there has to be a finding beyond a reasonable doubt of at least one of ten aggravating circumstances specified in Georgia's death penalty statute.⁵⁴ This was also the first time the Court mentioned youth as a relevant mitigating factor to be considered during sentencing.⁵⁵

In *Lockett v. Ohio*,⁵⁶ the Court had more to say about the relevance of youth. The Ohio death penalty statute only permitted consideration of three mitigating factors, none of which was youth.⁵⁷ This landmark decision held that not only must the circumstances of the crime be taken into account, but the character and propensities of the offender as well.⁵⁸ The Ohio statute was therefore ruled unconstitutional because it precluded

48. 408 U.S. 238, *reh'g denied*, 409 U.S. 902 (1972).

49. *Id.* Only Justices Brennan and Marshall concurred that the death penalty was per se cruel and unusual punishment.

50. The first state to break the moratorium was North Carolina in *Woodson v. North Carolina*, 428 U.S. 280 (1976). There, the death penalty had been imposed for first degree murder committed during a bank robbery. A statute made the death sentence mandatory for all first degree murders. The Supreme Court held that aspects of the character of the offender and circumstances of the crime are always to be considered in the sentencing process. Thus, the mandatory death penalty statute was ruled unconstitutional.

51. 428 U.S. 153, *reh'g denied*, 429 U.S. 875 (1976).

52. *Id.* at 169.

53. *Id.* at 179.

54. *Id.* at 164-66. Examples of some of these aggravating circumstances included "murder, rape, armed robbery, or kidnapping [that] was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Id.* at 165-66 n.9. This was the aggravating circumstance under which Thompson was sentenced.

55. *Id.* at 197.

56. 438 U.S. 586 (1978).

57. *Id.* at 608. The Ohio statute precluding consideration of any mitigating factors when certain specified aggravating factors were present was held to be in violation of the eighth and fourteenth amendments.

58. *Id.*

consideration of a defendant's minor role, *or age*, as affecting the sentencing decision.⁵⁹ In the companion case to *Lockett*, *Bell v. Ohio*,⁶⁰ the murderer was sixteen at the time of the crime. The Court avoided addressing the youth issue and simply reversed the death sentence because Bell had been convicted under the same unconstitutional Ohio statute.⁶¹

Oklahoma's juvenile death penalty sentencing procedures have come to the attention of the United States Supreme Court on two recent occasions.⁶² In both instances, the youth of the offender was at issue. In 1982, the Court granted certiorari on the issue of age in *Eddings v. Oklahoma*.⁶³ At the age of sixteen, Monty Lee Eddings had killed a police officer. He was subsequently charged and plead *nolo contendere*.⁶⁴ At the sentencing hearing, the judge gave much consideration to Eddings' youth, but failed to consider his troubled past, severe mental and psychological impairments, and his violent and unhappy background.⁶⁵ The judge sentenced Eddings to death.

The anticipation was that the Court would consider whether the execution of juvenile murderers is cruel and unusual punishment, but instead the Court reversed the death sentence because the sentencer did not consider all the mitigating evidence as required by *Lockett*.⁶⁶ Some commentators view the decision as exhibiting almost complete irresolve on the constitutional issue.⁶⁷ They imply that only an age-based constitutional bar could adequately address the issue. More realistically, the *Eddings* Court would have been hard-pressed to draw that bright line for two reasons: (1) the Court lacked any convincing empirical evidence and

59. *Id.*

60. 438 U.S. 637 (1978).

61. *Id.* at 642-43.

62. The Supreme Court found Oklahoma's capital punishment sentencing procedures in violation of the eighth and fourteenth amendments in both *Thompson* and *Eddings*.

63. 455 U.S. 104 (1982).

64. *Id.*

65. *Id.* at 108-09.

66. *Id.* at 117.

67. *Lockett v. Ohio*, 438 U.S. 586 (1978). In *Lockett*, the Court reversed the death sentence. The Ohio statute included only three mitigating factors whereas the Court ruled that sentencers must consider any relevant mitigating factor or personal characteristic as a possible basis for a sentence less than death. *Id.* at 604. The Court did later address youth:

But youth 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. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.

Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635, *reh'g denied*, 444 U.S. 887 (1979)) (footnote omitted).

data required to decide the issue; and (2) there was a lack of Supreme Court dicta and precedent on the issue.⁶⁸

B. *The Facts*

At the time of Charles Keene's death, Wayne Thompson was only fifteen years old, the youngest member of four co-defendants, and the only minor.⁶⁹ On the night of the murder, Thompson had told his girlfriend that he was leaving with his brother to kill his former brother-in-law Charles.⁷⁰ Keene had been repeatedly beating Thompson's sister Vicki.⁷¹ Upon returning home, Thompson related that he had killed Charles Keene and that Vicki did not have to worry about him anymore.⁷²

Keene was beaten in a neighbor's front yard while he shouted frantically to be let into the house.⁷³ He was ultimately shot in the head and chest, and his chest, throat, and stomach had been cut.⁷⁴ The four co-defendants then chained the body to a concrete block and threw it in the river.⁷⁵ All four co-defendants were tried separately and each received the death penalty.⁷⁶ The Oklahoma Court of Criminal Appeals affirmed Thompson's sentence,⁷⁷ and the United States Supreme Court later took the case on a writ of certiorari.⁷⁸

C. *Three Opinions*

The plurality of Justices Stevens, Brennan, Marshall, and Blackmun indicated that they granted certiorari to consider whether (1) the death sentence was cruel and unusual punishment for a crime committed by a boy of fifteen, and whether (2) erroneously admitted photographs of the

68. In cases prior to *Eddings*, the Supreme Court said very little about the juvenile death penalty, in dicta or otherwise, indicating the Court's general avoidance of the youth issue regarding imposition of the death penalty. Thus, there is little precedent upon which to decree a minimum age for imposing the death penalty.

69. Thompson v. State, 724 P.2d 780, 784 (Okla. Crim. App. 1986), *vacated*, 108 S. Ct. 2687 (1988).

70. *Id.* at 783.

71. Thompson v. Oklahoma, 108 S. Ct. 2687, 2712 (1988) (Scalia, J., dissenting).

72. Thompson v. State, 724 P.2d 780, 783 (Okla. Crim. App. 1986), *vacated*, 108 S. Ct. 2687 (1988).

73. Thompson v. Oklahoma, 108 S. Ct. 2687, 2712 (1988) (Scalia, J., dissenting).

74. *Id.* at 2712-13.

75. *Id.* at 2712.

76. Thompson v. State, 724 P.2d 780, 782 (Okla. Crim. App. 1986), *vacated*, 108 S. Ct. 2687 (1988).

77. *Id.* at 786.

78. Thompson v. Oklahoma, 108 S. Ct. 2687 (1988).

victim were prejudicial at the penalty stage.⁷⁹

In confronting the first question, the plurality stated that nationally, legislative enactments indicated an intolerance toward juvenile executions.⁸⁰ It further alluded to prohibitions in other western nations and the abolitionist stands taken by various professional organizations.⁸¹ Furthermore, with only 0.3% of those under sixteen who were arrested for willful criminal homicide receiving the death penalty,⁸² the plurality suggested that these freakish judicial determinations were cruel and unusual.⁸³ The plurality could not find sufficient culpability in the criminal behavior of a fifteen-year-old whom it deemed to lack the capacity to control his or her conduct.⁸⁴ Finally, the plurality concluded that juvenile executions do not contribute to the social purposes of capital punishment, namely retribution and deterrence.⁸⁵ The plurality then drew the

79. In a split decision, a plurality of three justices concluded that the eighth and fourteenth amendments prohibited execution of a person who was under 16 years of age at the time of the offense and that the photographs taken of the dead body were inflammatory, constituting error. Three justices dissented to both conclusions. One justice concurred in the judgment to vacate judgment and remand the case.

80. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2692-96 (1988). The plurality buttressed its argument by pointing out the fact that all states have enacted various status laws which differentiate according to age. Its opinion included five pages of appendices listing voting, jury service, driving, marriage, pornographic material purchase, and legalized gambling statutes and constitutional provisions. The idea is if the states differentiate by age in these areas, why not differentiate by age on the life or death issue of capital punishment. *See infra* notes 148-54 and accompanying text for a critique of this line of reasoning. The Court also listed the 31 states which statutorily prohibit the imposition of the death penalty for murders committed while under the age of 16. These prohibitions are derived from either absolute prohibitions on capital punishment or are reflected in minimum age statutes. *See infra* notes 155-60 and accompanying text for further discussion.

81. *Id.* at 2696. The plurality referred to several previous rulings where it had recognized the views of the international community. *See infra* notes 179-85 and accompanying text. The plurality also noted that the American Bar Association and the American Law Institute oppose the death penalty for juveniles. Actually, eight amicus curiae briefs were filed with the Court in support of the petition.

82. *Id.* at 2697 n.39.

83. *Id.* at 2697-98. In quoting *Furman*, the Court actually characterized the sentences as "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* (citing *Furman v. Georgia*, 408 U.S. 238, 309 (Stewart, J., concurring), *reh'g denied*, 409 U.S. 902 (1972)).

84. *Id.* at 2698. The plurality referred to a passage from the 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders from which Justice Powell had quoted in the *Eddings v. Oklahoma* decision:

Adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.

Id. (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

85. *Id.* at 2699.

line at sixteen years of age at the time of the offense,⁸⁶ and having resolved the first question found it unnecessary to address the second.⁸⁷

The dissent consisted of Justices Scalia, White, and Chief Justice Rehnquist. The dissent rejected even the suggestion of a bright line as an implausible interpretation of the Constitution.⁸⁸ It warned that the risk of assessing evolving standards, as the plurality managed to do, is that such assessments often culminate in one's own views.⁸⁹ The dissent considered international opinion irrelevant to this constitutional issue.⁹⁰ Its remedy was to defer to the legislature as the objective sign of modern society's consensus.⁹¹ Whereas the plurality emphasized the thirty-one states having either outlawed capital punishment altogether or having instituted age limitation statutes, the dissent emphasized that the remaining nineteen states without such a statute negate a consensus.⁹² The dissent also perceived the drastic reduction in executions of persons committing crimes while under the age of sixteen as a reflection of a general reduction in public support for capital punishment and the exercise of executive clemency.⁹³ Finally, the dissent attacked the plurality for its abiding conviction that none of the death penalty rationales apply to juvenile offenders.⁹⁴

Justice O'Connor partly concurred and partly dissented. She agreed

86. *Id.* at 2700.

87. *Id.* at 2700 n.48.

88. *Id.* at 2714 (dissenting opinion). The dissent denounced the plurality's conclusion that it is "a fundamental principle of our society that no one who is as little as one day short of his 16th birthday can have sufficient maturity and moral responsibility to be subjected to capital punishment for any crime," this being a "sociological and moral conclusion that is implausible; and it is doubly implausible as an interpretation of the United States Constitution." *Id.*

89. *Id.* at 2715.

90. *Id.* at 2716 n.4. See *infra* notes 179-85 and accompanying text for expanded discussion of international opinion.

91. *Id.* at 2715-16. The dissent identified legislative enactments as one objective sign of how society views a particular punishment.

92. *Id.* at 2716. See *infra* notes 155-68 and accompanying text for expanded discussion of legislative enactments regarding capital offenses.

93. *Id.* at 2717. The dissent contested the plurality's contention that all of the eighteen to twenty pre-1948 executions of offenders who were below the age of sixteen when they committed crimes is persuasive evidence of an enlightened social attitude. The dissent succinctly claimed it is a mistake to discern such a consensus by referring to an earlier analogous situation:

[I]n 1927 when, despite a level of total executions almost five times higher than that of the post-1950 period, there had been no execution for crime committed by juveniles under the age of 16 for almost 17 years. That that did not reflect a new societal absolute was demonstrated by the fact that in approximately the next 17 years there were 10 such executions.

Id. (citing V. STREIB, DEATH PENALTY FOR JUVENILES 191-208 (1987)).

94. *Id.* at 2719. The dissent attacked the plurality's "abiding conviction" that "the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children" abrogated application of the death penalty rationales. The judgment as to

with the plurality that there is a clear national legislative consensus outlawing capital punishment for fifteen-year-olds.⁹⁵ However, this perception alone did not persuade her that the Court must draw a bright line. She dismissed the plurality's raw execution and sentencing statistics as inadequate to establish a consensus.⁹⁶ Most importantly, she remained unconvinced that all fifteen-year-olds are incapable of the moral culpability that might justify execution.⁹⁷

Both the plurality and dissenting opinions repeat, for the most part, the opposing arguments presented in the numerous briefs filed with the Court. However, except for the judgment to vacate and remand, Justice O'Connor's concurring opinion sided largely with the dissent. Most notably, she asserted that: (1) the plurality never adduced any evidence demonstrating that fifteen-year-olds as a class are inherently incapable of being deterred from major crimes by the prospect of the death penalty;⁹⁸ (2) in the absence of such evidence, it would be incorrect to substitute the Supreme Court's "inevitably subjective judgment" as to the best age to draw a line;⁹⁹ (3) if a best-age decision were made based on a mistaken premise, it would be "frozen into constitutional law" making it difficult later to refute or reject;¹⁰⁰ and (4) there was no indication that any state legislature had *considered* executing juveniles for murder committed while under the age of sixteen.¹⁰¹

what the eighth amendment permits, according to the dissent, should not be dictated by the "personal consciences" of the Court. Rather, the dissent argued that its parameters are dictated by either the "original understanding of 'cruel and unusual' . . . or because they come within current understanding of what is 'cruel and unusual,' because of the 'evolving standards of decency' . . ." The Court is appointed to "discern rather than decree" these standards. *Id.*

95. *Id.* at 2706 (O'Connor, J. concurring).

96. *Id.* at 2708. Justice O'Connor stated that variables such as how many times juries have been asked to impose the death penalty on juveniles and or how many times prosecutors have exercised discretion in refraining from seeking the death penalty make sentencing statistics suspect. *Id.*

97. *Id.* at 2708.

98. *Id.* at 2708-09.

99. *Id.* at 2709.

100. *Id.*

101. *Id.* at 2708. This last observation strongly suggests that legislatures having seriously considered the issue have consensually drawn bright lines ranging from fifteen to eighteen years of age. There are only three state legislatures that have not seriously considered the issue, the rest having either completely outlawed capital punishment, stipulated a minimum age, or established procedural safeguards which have thus far immunized all offenders having committed crimes while under the age of fifteen. Justice O'Connor objected to the plurality's attempt at "[p]lacing restraints upon the manner in which the States make their laws, in order to give 15-year-old criminals special protection against capital punishment" as "not . . . an idea [that] is ours to impose." *Id.* at 2721 (dissenting opinion).

III. SHEDDING LIGHT ON THE BRIGHT LINE ISSUE

The reality of any crime, including juvenile crime, is that there are innocent victims involved. The murderer perpetrates significant pain and suffering on the collective victim: the actual victim, family, friends, and society in general. In determining just what "the evolving standards of decency that mark the progress of a maturing society" are, the *Thompson* plurality failed to address this collective victim. The plurality, in subscribing to the evolutionary process theory,¹⁰² addressed only the criminal as a possible beneficiary of any measure of "decency" which the criminal justice system might extend.¹⁰³ However, because a retributive element is still left in the death sentence, the system must be flexible enough to afford the collective victim the assurance that a culpable murderer is adequately punished,¹⁰⁴ even if this means execution.

This discourse is not to say that the proper test is "an eye for an eye, a tooth for a tooth." Instead, the sentencer must properly balance the rights of the collective victim against the offender's rights to humane treatment under the law. The sentencer should weigh the young offender's culpability and amenability to treatment and rehabilitation against the needs to placate the collective victim and deter further crime. Furthermore, the Supreme Court has occasionally engaged in "proportionality analysis" which examines whether there is a disproportion between the offender's punishment and his or her culpability, and whether penological objectives are met.¹⁰⁵ In *Stanford v. Kentucky*, a plurality stated that state laws and jury determinations must first evidence a societal consensus against the death penalty before proportionality analysis can be applied.¹⁰⁶ However, because five justices rejected this rule, the

102. *Id.* at 2691 n.4 (plurality opinion). Here, the plurality characterized the "cruel and unusual" clause as "progressive" and acquiring its "meaning as public opinion becomes enlightened by a humane justice". *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 373-74, 378 (1910)). However, it is an anomaly to support this view, as the plurality did, with Judge Bork's statement that it is a judge's task to "discern how the framers' values, defined in the context of the world they knew, apply to the world we know . . . in which unchanging values find their application." *Id.* (citing *Ollman v. Evans*, 750 F.2d 970, 995-996 (D.C. Cir. 1984) (en banc) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985)). Judge Bork is saying, rather, that there is no modern age enlightenment, but only a changing world context where unchanging values must be applied.

103. *Id.*

104. *Coker v. Georgia*, 433 U.S. 584, 616 (1977) (White, J., plurality opinion). The Court stated that, "[a]lthough human lives are in the balance, it must be remembered that failure to allow flexibility may also jeopardize human lives—those of the victims of undeterred criminal conduct." *Id.* If courts disregard victims in their assessment of the "evolving standards of decency," then the logical terminus of this line of thought precludes all attempts to punish or deter criminal conduct.

105. *Stanford v. Kentucky*, 109 S. Ct. 2969, 2981 (1989) (O'Connor, J., concurring).

106. *Id.* Justice O'Connor dissented on this point, leaving a plurality of four justices. She stated

future of proportionality analysis as applied to juvenile murderers is uncertain. To determine the current standard of decency regarding the death penalty for juveniles, the Supreme Court has looked at previous sentencing decisions, sociological data and findings, current legislation and legislative attitudes, jury verdicts, and judicial attitudes.¹⁰⁷

A. *A Policy of Deference*

Justice Powell once warned that the Court should not become the ultimate arbiter on eighth amendment issues, but this was rather a legislative responsibility.¹⁰⁸ In *Coker v. Georgia*,¹⁰⁹ the Court even refused to look solely at what legislatures, bewildered as to the Court's unclear holdings on cruel and unusual punishment, had refrained from doing. In other words, the states' inaction since the *Gregg* decision, only one year earlier, was still not cause for formulating sweeping constitutional interpretations. The *Coker* Court embraced a federalist scheme, upholding the policy of allowing state legislatures to experiment with both criminal and civil laws within constitutional limitations. However, in *Thompson*, a plurality did conjecture a minimum age of sixteen for imposition of the death penalty based on indicators which were indefinite as to any "right" age.¹¹⁰ Even though forty-seven state legislatures had, by various means, arrived at a consensus of age fifteen or above for imposition of the death penalty, the plurality was no longer content with deferring to the

that the Court was constitutionally obligated to engage in proportionality analysis regardless of their assessment of the specific enactments of American legislatures. *Id.* at 2981.

107. In addressing the juvenile death penalty issue, the Court has addressed these areas in recent decisions. However, in the most recent decision, *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989), the dissenting justices in *Thompson* along with Justice Kennedy, who did not sit on that case, joined in a plurality opinion which refused to rest constitutional law upon opinion polls, views of special interest groups, and positions adopted by various professional associations. Such indicia are generally tainted with bias. The plurality continued in its assault on the use of these indicia:

To say, as the dissent says, that 'it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty,' *post*, at 2986 (emphasis added), quoting *Enmund v. Florida*, 458 U.S. 782, 797 (1982) — and to mean the as the dissent means it, i.e., that it is for us to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society through its democratic processes now overwhelmingly disapproves, but on the basis of what we think 'proportionate' and 'measurably contributory to acceptable goals of punishment' — to say and mean that, is to replace judges of the law with a committee of philosopher-kings.

Id. at 2980.

108. *Gregg v. Georgia*, 428 U.S. 153, 176, *reh'g denied*, 429 U.S. 875 (1976) ("The concerns expressed in *Furman* that the death penalty not be imposed arbitrarily or capriciously can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. . . .") *Id.* at 155.

109. 433 U.S. 584 (1977).

110. Section III primarily addresses these objective yet indefinite indicators.

states on the age issue.¹¹¹

As the state legislatures and judiciaries address the juvenile death penalty issue, they must establish a sentencing process where the character and moral guilt of the accused are consistently considered regardless of the nature and brutality of the crime.¹¹² In this context, the Supreme Court stated in *Eddings* that “[j]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.”¹¹³ It then follows that mandatory removal of youth as a relevant mitigating factor after the accused has attained a certain age necessitates a presumption of “adulthood” and precludes the sentencer from considering these concomitant characteristics of youth.

The Supreme Court, in *Bellotti v. Baird*,¹¹⁴ has already recognized that state courts can competently ascertain the maturity level of a minor to make the decision to abort.¹¹⁵ The Court stated that

[E]very minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent.”¹¹⁶

Bellotti recognizes that there are individual differences in juveniles’ maturity levels and age is not the sole determinant of one’s maturity. The process of determining the maturity requisite to allowing a minor to choose abortion will undoubtedly vary from that requisite to determining criminal culpability. Nevertheless, to establish a minimum age for imposing capital punishment runs counter to the ad hoc treatment which *Bellotti* affords minors.

The Supreme Court enunciated as a general rule in *Lockett v. Ohio*

111. This figure includes all the states but the three that have no minimum age statutes or requirements for youth as a mitigating factor.

112. See *Lockett v. Ohio*, 438 U.S. 586 (1978). The rule in *Lockett* recognizes that the circumstances of the offense together with the character and propensities of the offender must be taken into account.

113. *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982).

114. 443 U.S. 622, *reh’g denied*, 444 U.S. 887 (1979).

115. *Id.* at 643-44.

116. *Id.* at 647. The Supreme Court chose not to designate an age for the requirement of parental consent to have an abortion because it considered judges quite adept at determining if a girl is mature enough to make the abortion decision on her own. It follows then, that the close relationship between an adolescent’s maturity level and culpability in crime should also lend itself to a judicial rather than a chronological determination.

that "a consistency produced by ignoring individual differences is a false consistency."¹¹⁷ On the juvenile death penalty issue as on the abortion consent issue, the Court has recognized that juveniles possess varying levels of maturity, not necessarily related to chronological age.¹¹⁸ On a case-by-case basis, the chronological bright line ignores individual differences and thus creates that false consistency which the Court cautions against. If there is a danger of an arbitrary and capricious death penalty, the Court's solution is offered in *Gregg*, namely, "a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance."¹¹⁹ Such a statute must be drafted to insure that the severity of the sentence is directly related to the culpability of the youthful offender and not merely a reflection of the sentencer's emotional or sympathetic response.¹²⁰

B. Retribution and Deterrence

The notion that it is wrong to kill someone to solve a problem is a postulate incompatible with man's survival instinct.¹²¹ Killing is sometimes necessary to preserve innocence and deter greater harms, whether it be in the context of war, police work, self-defense, capital punishment, *ad infinitum*.

Justice Black once stated "[r]etribution is no longer the dominant objective of the criminal law."¹²² However, executions essential though unappealing, are still required to appease society.¹²³ The Supreme Court in *Furman v. Georgia*, expressed this belief in stating, "[if] organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy. . . ."¹²⁴ But retribution must also be tempered in accord with "the dignity of

117. *Eddings*, 455 U.S. at 112.

118. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). In *Eddings*, the Court stated that "youth 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." *Id.* (emphasis added).

119. *Gregg v. Georgia*, 428 U.S. 153, 195, *reh'g denied*, 429 U.S. 875 (1976).

120. *California v. Brown*, 479 U.S. 538, 540 (1987).

121. See V. STREIB, *supra* note 19, at 188. Streib makes the statement: "[It is] wrong to kill someone to solve a problem." *Id.* One need only witness our sometimes cruel and violent human condition to justify numerous exceptions to the rule.

122. *Williams v. New York*, 337 U.S. 241, 248 (1949).

123. *Gregg v. Georgia*, 428 U.S. 153, 183, *reh'g denied*, 429 U.S. 875 (1976). The Court remarked that, "the actions of juries in many States since *Furman* are fully compatible with the legislative judgments, reflected in the new statutes, as to the continued utility and necessity of capital punishment in appropriate cases." *Id.* at 182.

124. 408 U.S. 238, 308 (Stewart, J., concurring), *reh'g denied*, 409 U.S. 902 (1972).

man.”¹²⁵ This means that punishment should not be excessive and should not unnecessarily and wantonly inflict pain,¹²⁶ or be grossly out of proportion to the severity of the crime.¹²⁷

The talisman of the retribution rationale is that the criminal sentence must be related to the culpability of the offender.¹²⁸ Because the juvenile offender is “more vulnerable, more impulsive, and less self-disciplined than [an] adult,” his ability to form an intent to kill is flawed.¹²⁹ Therefore, it follows that juveniles, like other irresponsible actors, *e.g.*, retarded adults and the insane, do not deserve “harsh punishment in the same way that mature adults might.”¹³⁰ While the adult has had some time to develop socially redeeming qualities, the youthful offender’s lack of time essentially denies potentially lifesaving evidence to the juvenile.¹³¹

Studies are inconclusive as to the general deterrent value of the death penalty for adults.¹³² Furthermore, juvenile murderers have so seldomly been executed that it would be next to impossible to determine a deterrent value here.¹³³ Thus, the argument is that long-term imprisonment is more than sufficient retribution, and in lieu of death, gives juveniles the opportunity to become productive adults.¹³⁴ Juvenile murderers tend in fact to be model prisoners and have a very low rate of

125. *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (Warren, C.J., plurality opinion).

126. *Furman*, 408 U.S. at 392-93 (Burger, C.J., dissenting).

127. *Trop*, 356 U.S. at 100.

128. Respondent’s Brief at 68-69, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86-6169) (citing *Tison v. Arizona*, 107 S. Ct. 1676, 1683 (1987)).

129. *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982) (citing TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, *CONFRONTING YOUTH CRIME* 7 (1978)).

130. See generally V. STREIB, *supra* note 19, at 35.

131. Ellison, *State Execution of Juveniles: Defining ‘Youth’ as a Mitigating Factor for Imposing a Sentence of Less Than Death*, 11 *LAW & PSYCHOLOGY REV.* 21, 33 (1987). Ellison presents a review of the juvenile offender’s impaired thought processes.

132. *Gregg v. Georgia*, 428 U.S. 153, 184-86, *reh’g denied*, 429 U.S. 875 (1976). The Supreme Court takes note of several studies which indicate that “each execution would save ‘x’ number of lives.” F. CARRINGTON, *NEITHER CRUEL NOR UNUSUAL* 182 (1984). The Court further concludes:

Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent.

Gregg, 428 U.S. at 185-86.

133. See generally V. STREIB, *supra* note 19, at 190-208. Streib indicates that approximately eighteen to twenty persons have been executed during the 20th century for crimes committed while under the age of sixteen.

134. V. STREIB, *supra* note 19, at 36-37.

recidivism upon release.¹³⁵ Long term imprisonment also protects society from further serious criminal acts by the offender.¹³⁶

The Supreme Court, in *Roberts v. Louisiana*,¹³⁷ stated that "death finally forecloses the possibility that a prisoner will commit further crimes, whereas life imprisonment does not."¹³⁸ But given the low rate of recidivism following long prison terms, the threat of such a possibility is significantly reduced. The suggestion in *Eddings* was that even though only thirty percent of youths suffering from violent sociopathic and anti-social personalities ever grow out of it, if intensively treated over a period of years, most would no longer pose a threat to society.¹³⁹

The *Thompson* plurality certainly views the juvenile death penalty issue in the aforementioned perspective. However, whether or not long-term imprisonment is an acceptable alternative is not the issue in *Thompson*. The fact is that adolescents may be executed in Oklahoma at this time and the matter of setting an age minimum of sixteen is problematic in that the upper age limit of adolescence varies from person to person.¹⁴⁰

C. "Choosing" to Kill

In *Thompson*, the state's singular focus is on the marked cruelty of the killing which "manifests adultlike maturity and sophistication of an adult mind."¹⁴¹ One critic challenging this reasoning has observed, "[e]ven the toddler can discharge a firearm and kill an intended victim . . . pull the lever in the voting booth . . . or take a sip of beer."¹⁴² After

135. V. STREIB, *supra* note 19, at 36-37. See also Vitello, *Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent v. United States*, 26 DEPAUL L. REV. 23, 32-34 (1976).

136. V. STREIB, *supra* note 19, at 36-37.

137. 428 U.S. 325 (1976).

138. *Id.* at 354 (White, J., dissenting); See also *Furman v. Georgia*, 408 U.S. 238, 311 (White, J., concurring), *reh'g denied*, 409 U.S. 902 (1972).

139. *Eddings v. Oklahoma*, 455 U.S. 104, 107-08 (1982). Besides offering the possibility of rehabilitation, Streib urges that long term imprisonment may very well be more of a deterrent than the death penalty. V. STREIB, *supra* note 19, at 188. This premise dictates that the adolescent's fear of being locked up for a long time would more likely than not enter the calculation to kill. Whereas the adolescent's perceived immortality, an element of adolescent egocentrism, supercedes any fear of being put to death that might enter the calculation to kill.

140. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 602-03 (1978). The plurality opinion quoted *Williams v. New York*, 337 U.S. 241, 247, *reh'g denied*, 337 U.S. 961 (1949) stating that "the sentencing judge's 'possession of the fullest information possible concerning the defendant's life and characteristics' is '[h]ighly relevant - if not essential - [to the] selection of an appropriate sentence,'" age; for imposition of the death penalty forecloses a judge's consideration of youthful characteristics where the offender is one day older than the minimum age. *Id.*

141. Brief of Amici Curiae for Respondent, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86-6169).

142. V. STREIB, *supra* note 19, at 184.

all, these too are adult and sometimes criminal acts. When a sentencer focuses on a heinous or cruel killing to the exclusion of the young offender's typically impaired cognitive ability,¹⁴³ the sentencer will be more inclined to impose the death penalty.

Adult-like maturity and sophistication of thought are the *sine qua non* of the guilty mind and not solely manifestations of the juvenile's criminal act. Therefore, the sentencer must focus on the adolescent's thought process, not as a manifestation of the criminal act, but as a partial cause of it. Oklahoma's emphasis on the cruelty of the act precludes any reasonable consideration of youthful impulse as a mitigating factor.¹⁴⁴

The predominant sociological theory of adolescent cognitive ability postulates that egocentrism often incapacitates the adolescent's thought processes to a significant degree.¹⁴⁵ Adolescent egocentrism manifests itself in a variety of aberrant behaviors. For instance, the adolescent will often boldly defy danger and even death.¹⁴⁶ This false sense of power compounded with youth's lack of experience, perspective, and judgment to avoid fateful choices can have catastrophic consequences for criminally inclined adolescents and their victims. If the death penalty deters murder, then only those who carefully contemplate it prior to their criminal acts will possibly be deterred. But adolescents are generally incapable of contemplating the risk of their own death resulting from their criminal behavior.¹⁴⁷

143. See generally Ellison, *supra* note 131, at 27-31 (1987). This source provides a capsulized version of adolescent egocentrism and how the sentencer should consider it during the sentencing process. Adolescent egocentrism is derived from Piagetian theory and expounded on in Muuss, *Social Cognition: David Elkind's Theory of Adolescent Egocentrism*, 17 *ADOLESCENCE* 249, (1982); Elkind, *Egocentrism in Adolescence*, 38 *CHILD DEVELOPMENT* 1025 (1967). The early adolescent typically enters a period of operational thought which permits him to conceptualize his own thoughts as well as the thoughts of others. Unfortunately, the adolescent is not yet able to differentiate between objects toward which others direct their thoughts. Therefore, adolescent egos assume the world is as obsessed with their behavior as they are. This false perception is better known as the "imaginary audience." *Id.* at 28-29 (citing excerpts from Elkind and Muuss).

144. See generally Petitioner's Brief at 30-34, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86-6169).

145. Ellison, *supra* note 131, at 29-30. One aspect of adolescent egocentrism is the "personal fable" in which adolescents view themselves as special or unique. The destructive component of the personal fable is the adolescent's defiance of danger and death which ensues from a sense of divine omnipotence. Taking life for granted, the adolescent believes that bad things happen only to others. In choosing to engage in crime, the threat of a policeman's bullet or the more remote electric chair prematurely ending one's life never enters the adolescent's calculation.

146. Ellison, *supra* note 131, at 29-30.

147. See *Bellotti v. Baird*, 443 U.S. 622, 635, *reh'g denied*, 444 U.S. 887 (1979). *Cf.* *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (juveniles have a lack of judgment in considering the consequences of their actions); *V. STRIEB*, *supra* note 19, at 37. "[J]uveniles do not commonly engage in any 'cold

As adolescents mature, they decenter off themselves, and their ability to make mature and rational decisions increases.¹⁴⁸ The post-adolescent is then better able to weigh the detrimental consequences of criminal behavior in the calculation to commit or not to commit a crime. But until this time, the effects of egocentrism must be explained in detail to the jury or considered by the judge during the juvenile's sentencing process.¹⁴⁹ Without such consideration, the sentencer, much like Thompson's sentencing jury, is left with only the aggravating circumstances of the murder to dwell upon. The sentencer might even view the juvenile as a greater threat to society and be inclined to punish more harshly.

The abatement of this "cognitive impairment" cannot be chronologically determined with the precision a sentencer requires where life hangs in the balance.¹⁵⁰ Adolescent egocentrism, according to one study, is as

calculus that precedes the decision to act.'" (quoting *Gregg v. Georgia*, 428 U.S. 153 (Stewart, J., plurality), 186, *reh'g denied*, 429 U.S. 875 (1976).

148. Ellison, *supra* note 131, at 30-31.

149. *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982). This footnote is an excerpt from a government-funded study which states:

[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for development of America's youth.

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

150. *Id.* at 116 ("just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing."); *See also* Respondent's Brief at 40-41, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86-6169). The Respondent's Brief cited several arguments against such a chronological determination as follows:

It is recognized that some youths handled by juvenile courts are hardened, dangerous offenders, while some adults older than the arbitrary upper age level are emotionally and sometimes physically immature individuals. . . . No chronological age bracket is uniformly identical or entirely homogenous.

Id. at 40 (citing THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 119-20* (1967)).

An arbitrary age limit below which the death penalty should never be imposed would be almost impossible to determine with certainty. Many persons who have no objection to executing a youth of sixteen would be horrified at the thought of executing a ten-year-old. Further, if the cutoff age were, for example, to be seventeen years, a hardened and sophisticated sixteen-year-old would escape the death penalty while an immature and impulsive seventeen-year-old would not. *Chronological age is an inherently poor criterion by which to determine actual maturity.*

Id. at 40-41 (emphasis original) (citing Hill, *Can the Death Penalty be Imposed on Juveniles: The Unanswered Question in Eddings v. Oklahoma*, 20 CRIM. L. BULL. 5, 26 (1984)). Even a government report opposing the death sentence for juveniles stated "no single age during mid-adolescence should be used as a sharp dividing line for sentencing policies." *Id.* at 41 (citing TWENTIETH

much related to a person's level of formal operations as it is a function of age.¹⁵¹ Furthermore, different school environments, gender, racial heritage and the social context surrounding race, and home environment may each have as much influence on egocentrism as age.¹⁵²

D. *Legislative Enactments*

The dominant tradition that children are not assumed to be responsible for themselves is reflected in our laws.¹⁵³ The status laws discriminating by age include voting, contracting, purchasing liquor, suing or being sued, disposing of property by will, serving as jurors, enlisting in the armed forces, driving vehicles, marrying, and accepting employment.¹⁵⁴ Such laws insure that youngsters receive the "special treatment" they deserve.¹⁵⁵

These legislative enactments have a more practical function as well. Within the general population, aspects of adolescent immaturity often spill over into the early twenties. Likewise, aspects of adult maturity begin to appear in the adolescent years. For example, there are some politically astute sixteen-year-olds in this country who are better informed to vote than most adults, yet are prohibited. Similar analogies can be made regarding the rest of the status laws. Governments, however, are ill-equipped to ascertain the abilities of millions of teenagers to

CENTURY TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS CONFRONTING YOUTH CRIME 5 (1978).

151. Riley, Adams, & Nielsen, *Adolescent Egocentrism: The Association Among Imaginary Audience Behavior, Cognitive Development, and Parental Support and Rejection*, 13 J. YOUTH & ADOLESCENCE 401, 402 (1984).

152. *Id.* at 403. Various studies have indicated adolescent egocentrism to be a function of a number of various environmental factors, any one of which might be a primary determinant of adolescent egocentrism in a young person. The dominance of a single factor or a combination of factors could carry over into young adulthood.

153. See *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults."); *In re Gault*, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone"); *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring) ("Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children.").

154. The Supreme Court has articulated the purposes behind such status laws as follows:

We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

Bellotti v. Baird, 443 U.S. 622, 634, *reh'g denied*, 444 U.S. 887 (1979).

155. Petitioner's Brief at 24, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86-6169).

distinguish those physically, mentally, and emotionally capable of assuming responsibilities as capable and reasonably prudent persons. The statutes, while greatly reducing the government's burden to ascertain maturity levels, sometimes deny privileges to those who deserve them and grant privileges to those who do not.¹⁵⁶

Statutory presumptions based on age are conclusive.¹⁵⁷ But such presumptions must give way where governments endeavor to enforce laws against criminal offenders.¹⁵⁸ An age-based death penalty statute unjustly denies the mitigating factor of youth to less mature offenders who are older than the specified age, even if by one day. It likewise grants the redeeming factor to more mature offenders who are under the specified age. The magnitude of the life-or-death decision compels the sentencer *always* to consider mitigating factors when the evidence presents them.¹⁵⁹ The spillover effect of a status law may present an unacceptable margin of error which runs counter to the exacting standard set forth in *Gregg*.¹⁶⁰

Another possible objective indicator of society's attitude regarding the juvenile death penalty is the juvenile death penalty statutes themselves.¹⁶¹ Legislative attitudes to the death penalty for minors have

156. See *Stanford v. Kentucky*, 109 S. Ct. 2969, 2977 (1989) ("[the age-statutes] do not represent a social judgment that *all* persons under the designated ages are not responsible enough to drive, to drink, or to vote, but at most a judgment that the vast majority are not."). *Id.* (emphasis added).

157. Brief of Amici Curiae for Respondent at 13, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86-6169). Regarding the more practical purpose for these laws, the brief states that "the government could not very well be expected to conduct a trial-type hearing, complete with the opportunity for exhaustive appellate review, every time a twelve-year-old thought he was mature enough to begin voting or driving a car." *Id.*

158. *Id.*

159. V. STREIB, *supra* note 19, at 27.

160. See *Gregg v. Georgia*, 428 U.S. 153, 190, *reh'g denied*, 429 U.S. 875 (1976). The Court stressed that trial judges have accurate information about both defendant and crime, and that "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision." *Id.* See also *Stanford v. Kentucky*, 109 S. Ct. 2969, 2977-78 (1989) ("[The age-statutes do] not conduct individualized maturity tests for each driver, drinker, or voter. The criminal justice system, however, does provide individualized testing). *Id.*

161. *Gregg*, 428 U.S. at 190-92. In *Gregg*, the Court recommends a bifurcated sentencing procedure, such as that employed by Georgia, to better insure that exacting standards of fourteenth amendment due process are maintained. This procedure will preclude the information required for the sentencing procedure from prejudicing the question of guilt. The idea is to abide strictly by the rules until and unless there is a conviction, and only then allow in additional information relevant to sentencing. *Id.* (dictum). Florida has gone one step further in establishing a trifurcated procedure consisting of: (1) determination of guilt or innocence by a jury; (2) an advisory sentence by the jury; (3) an actual sentence imposed by the trial judge; and (4) review of the sentence by the Florida Supreme Court. *Proffitt v. Florida*, 428 U.S. 242, 248-250 (1976). However, in adhering to the deference principle, the Supreme Court has stated, "[w]e are unwilling to say that there is any one way for a State to set up its capital punishment scheme." *Spaziano v. Florida*, 468 U.S. 447, 464

changed since 1962 when there were forty-one death penalty states with ages down to seven.¹⁶² Today, fourteen states have abolished capital punishment altogether.¹⁶³ The eighteen legislatures that have expressly considered the question have set a minimum age for capital punishment at sixteen or above.¹⁶⁴ This leaves nineteen states that authorize capital punishment without setting any statutory minimum age for the death penalty.¹⁶⁵ However, of these, twelve have established minimum ages ranging from ten to fifteen in their waiver statutes.¹⁶⁶ Even considering the states with the minimum criminal court age, this does not alter the fact that nineteen legislatures have authorized capital punishment at either staggered minimums from age fifteen to ten or have enacted no minimum age laws at all.¹⁶⁷

With thirty-nine percent of the states not statutorily committed to a minimum age for capital punishment of sixteen or above, there is an insufficient national legislative consensus for prohibiting capital punishment at any specific age. This is not to say that the lower age waiver statutes are dispositive of legislative intent to allow execution of ten- to fifteen-year-olds. Rather, the legislative intent of these nineteen states cannot be sufficiently determined to confirm the existence of a national consensus on how old a youthful offender need be at the time of murder to be eligible for execution.

The Supreme Court, in *Furman v. Georgia*, erred once before in suggesting there might be a societal consensus rejecting the death penalty.¹⁶⁸

(1984). It is a discouraging commentary on the Oklahoma Legislature that, given the *Gregg* recommendation of a bifurcated sentencing process in 1976, it has failed to establish such a process. *See* OKLA. STAT. tit. 21, §§ 701.10-701.15 (1981 & Supp. 1988). As of January, 1989, there were 97 death row inmates in Oklahoma with the last execution having occurred in the 1960s. *Tulsa World*, Jan. 26, 1989, at A-1, col. 1. These inmates are involved in the lengthy appeals process. At least some of these inmates were caught up in Oklahoma's unitary system which fails to function in a consistent and rational manner. This malfunction is a special problem for young criminals when compounded by the fact that the Oklahoma Legislature has not enacted laws to consider youth as a mitigating circumstance. One need only witness *Thompson*, a virtual repeat of *Eddings* five years earlier, to realize that the Oklahoma Legislature has not yet heeded the Supreme Court's message that the State's death penalty statutes require substantial revision.

162. V. STREIB, *supra* note 19, at 26.

163. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2694 (1988). *See supra* note 2 and accompanying text for listing.

164. *Thompson*, 108 S. Ct. at 2695-96. These states are California, Colorado, Connecticut, Georgia, Illinois, Indiana, Kentucky, Maryland, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Tennessee, Texas. *Id.*

165. *See supra* note 16 and accompanying text for list of statutes.

166. *See supra* note 16 and accompanying text.

167. *See supra* note 16 and accompanying text.

168. *See Furman v. Georgia*, 408 U.S. 238, 249 (Douglas, J., concurring), *reh'g denied*, 409 U.S. 902 (1972). Actually, all concurring opinions inferred a societal consensus as evidenced by the rarity of the death sentence which indicates its arbitrary imposition.

Following the decision, thirty-five state legislatures stampeded to reenact their death penalty statutes.¹⁶⁹ This was a panic response to the threat which *Furman* posed to the constitutionality of the death penalty¹⁷⁰ as well as a marked indication of society's endorsement of the death penalty.¹⁷¹ In the 1950s and 1960s, many states had abolished or radically restricted capital punishment and executions had ceased completely beginning in 1968.¹⁷² Justice O'Connor describes what would have transpired had the Supreme Court actually inferred a societal consensus in this way:

But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.¹⁷³

In the *Furman* era, it was clear that the legislatures, and not the Supreme Court or state judiciaries, had the firmer grasp on societal consensus.¹⁷⁴ And again in *Thompson*, the Court did not have sufficient empirical evidence to support finding a legislative consensus and risk the consequences of ruling on a mistaken premise.¹⁷⁵

E. *Other Objective Indicators Suggest No Consensus*

A 1965 Gallup poll showed that 45% of respondents supported capital punishment but only 23% supported it for persons under twenty-one years of age.¹⁷⁶ This latter figure was about ten percentage points higher

169. Comment, *Thompson v. Oklahoma: A Special Place in Society for Juveniles; Does It Include Death Row?*, 9 CRIM. JUST. J. 371, 385 (1987).

170. *Furman v. Georgia*, 408 U.S. 238, 256-57 (Douglas, J., concurring), *reh'g denied*, 409 U.S. 902 (1972) (In criticizing Ohio's death penalty statutes, Justice Douglas stated that they were "pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments"). *Id.* Six justices held the statutes to be unconstitutional, raising the spectre of a future ruling outlawing capital punishment altogether.

171. See *Gregg v. Georgia*, 428 U.S. 153, 179-81, *reh'g denied*, 429 U.S. 875 (1976) ("The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*"). *Id.*

172. V. STREIB, *supra* note 19, at 25.

173. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2709 (1988) (O'Connor, J., concurring).

174. See *Gregg*, 428 U.S. at 179-81.

175. The lack of empirical evidence is apparent from the fact that *Thompson* only offers a plurality opinion. Justice O'Connor did posit that "[t]he day may come when . . . we shall have to decide the Eighth Amendment issue that divides the plurality and the dissent in this case, and we shall have to evaluate the evidence of societal standards of decency that is available to us at that time." *Thompson*, 108 S. Ct. at 2710 (O'Connor, J., concurring).

176. V. STREIB, *supra* note 19, at 33 (citing Erskine, *The Polls: Capital Punishment*, 34 PUB.

in two recent regional surveys.¹⁷⁷ Although the juvenile death penalty is most certainly opposed by the majority, the surveys suggest there is still a strong minority favoring it. Furthermore, the percentage may well be higher in those locales favoring capital punishment in general. Inferring a “national consensus” in this instance would effectively prescribe one region’s preferences over another’s.

Low death sentencing and execution statistics have been viewed as an objective indicator of societal consensus on the juvenile death penalty issue.¹⁷⁸ Of seventy people executed in the post *Furman* era, only three were under the age of eighteen at the time of trial.¹⁷⁹ Even though the death row population had increased by 42% from December 1983 to March 1987, the juvenile death row population decreased by 16%.¹⁸⁰ The trend since 1982 has been to impose fewer death sentences on juveniles.¹⁸¹ Also, the commutation rate for youth on death row has always been high.¹⁸² These findings, rather than indicating a need for a national age minimum for imposing the death penalty, more properly indicate the states have practically resolved the bright line issue already. In other words, the Supreme Court’s policy of deferring to the states has been largely successful.

Commentators have argued that statistical trends are indicative of society’s consensus on the need for a national minimum age for the imposition of the death sentence.¹⁸³ But the percentage of juvenile executions in the 1980s has actually been higher than at any other period during this century.¹⁸⁴ Also, it is unclear if judges and juries are becoming more reluctant to impose the death sentence as the statistical trends might suggest. Hidden factors such as successful plea-bargaining, executive pardons, procedural and evidentiary error, and decisions not to waiver

OPINION Q. 290 (1970), as cited in Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1250 (1974)).

177. V. STREIB, *supra* note 19, at 34.

178. See e.g., *Thompson*, 108 S. Ct. at 2697 (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 249, *reh’g denied*, 409 U.S. 902 (1972). Brief of Nat’l Legal Aid and Defender Association and Others as amici curiae for Petitioner at 25 n.32, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86-6169).

179. Brief of Nat’l Legal Aid and Defender Association and Others as amici curiae for Petitioner at 23-24; *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86-6169).

180. *Id.* at 24. The downward trend has been as follows: 1982—11, 1983—9, 1984—6, 1985—3, 1986—7. *Id.*

181. Bedau, *Death Sentences in New Jersey: 1907-1960*, 19 RUTGERS L. REV. 1, 25 (1964).

182. Respondent’s Brief at 85, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No.86-6169).

183. See, e.g., V. STREIB, *supra* note 19, at 24-25; Gersten, *supra* note 1, at 113-14.

184. Brief of Petitioner at app. C, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No.86-6169). The percentages range from a low of 0% to a high of 4.5% during the years 1980-87. Only one other decade registers over 3%, 1940-49 at 4.1%.

youthful offenders may affect trends as much as any societal consensus on the issue.¹⁸⁵

The plurality justices in *Thompson* claim international “standards of decency” are highly persuasive on the establishment of a minimum age statute.¹⁸⁶ The plurality opinion goes so far as to suggest that the United States may even be under an obligation to establish a rigid standard.¹⁸⁷ Former President Carter signed the *International Covenant on Civil and Political Rights* in 1977.¹⁸⁸ This document, prohibiting capital punishment for persons who committed crimes while under eighteen, has yet to be ratified by the Senate.¹⁸⁹ This treaty was not made under the authority of the United States and is therefore not binding on its citizens.¹⁹⁰

The fact that other democracies have minimum age laws for imposing the death penalty is mildly persuasive at best.¹⁹¹ The dissenting justices in *Thompson* best stated the principle involved as follows:

But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment

185. See *Stanford v. Kentucky*, 109 S. Ct. 2969, 2977 (1989) (plurality) (“[i]t is not only possible but overwhelmingly probably that the very considerations which induce petitioners and their supporters to believe that the death should *never* be imposed on offenders under 18 cause prosecutors and juries to believe that it should *rarely* be imposed [emphasis in original]”). *Id.*

186. *Thompson*, 108 S. Ct. at 2696.

187. *Id.* at n.34. Three human rights treaties are mentioned as explicitly prohibiting juvenile death penalties. Of these, only one, Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, was ever ratified by the United States. *Id.*

188. Comment, *Thompson v. Oklahoma: A Special Place in Society For Juveniles; Does It Include Death Row?*, 9 CRIM. JUST. J. 371, 378 n.42 (1987).

189. *Id.*

190. See R. STONE, L. SEIDMAN, C. SUNSTEIN, & M. TUSHNET, CONSTITUTIONAL LAW 214 (1986) (citing *Missouri v. Holland*, 252 U.S. 416, 432 (1920)):

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do.

Id. See also *Reid v. Covert*, 354 U.S. 1 (1957) (“It would be manifestly . . . alien to our entire constitutional history and tradition - to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.”).

191. Our Constitution is not only the oldest and most durable in existence today, but was uniquely conceived and has stood as the premier model in drafting the constitutions of western democracies. The United States and British Commonwealth nations also share a very unique common law. To interject what might be one world of legal mandates, such as the death penalty, gun control, or various civil rights law into our statutory scheme may undermine the common law underpinnings of our legal system and prove to be unconstitutional as well.

at all, or have standards of due process quite different from our own.¹⁹²

IV. CONCLUSION

The Court continues to adhere to a process-oriented approach in that it will defer to the states' legislatures and judiciaries which must insure that youth is considered during the young offender's sentencing process. This process-oriented approach will not always keep fifteen-year-old offenders off death row, this being the substantive result which the *Thompson* plurality desires. Conversely, it is a fiction to believe that the more conspicuous fifteen-year-old, as a matter of age, is *always* less culpable than the sixteen, seventeen, and eighteen-year-old offenders alongside him on death row. Thus, the chronological bright line creates a false consistency which achieves a substantive result less likely to shock the abolitionist conscience only because of the certainty that no fifteen-year-old offender will be found on death row. The substantive approach, while precisely equating youthful culpability to commit murder as a function of chronological age, abandons older offenders who may actually be more immature and therefore less culpable. The *Thompson* decision, therefore, rightfully retains a policy of deferring to the states to establish and implement judicial procedures to insure that youth is considered as a mitigating factor in sentencing juvenile murderers. In *Stanford*, the Court reemphasized that, "it is not demonstrable that *no* 16-year-old is 'adequately responsible' or significantly deterred. It is rational, even if mistaken, to think the contrary."¹⁹³

In *Thompson*, the jury was never instructed to consider Wayne Thompson's youth as a factor possibly mitigating his punishment. The Supreme Court justifiably reversed the judgment for this reason. However, due to the extreme polarization between the plurality and dissent on the juvenile death penalty issue, the states were left with no practical guidance as how best to insure that youth is considered as a mitigating factor during the sentencing process. Addressing the adult death penalty in 1976, the Court recommended a bifurcated sentencing process to guard against arbitrary and capricious imposition of the death penalty. However, after twelve years, the Oklahoma Legislature has still not enacted the appropriate statutes to effect such a process and greatly reduce the likelihood that youth or any other mitigating circumstance might not

192. *Thompson*, 108 S. Ct. at 2716-17 n.4 (1988) (dissenting opinion).

193. *Stanford v. Kentucky*, 109 S. Ct. 2969, 2979 (1989) (plurality) (emphasis added).

be considered during the sentencing process. The Supreme Court reversals in *Thompson*, and its predecessor *Eddings*, clearly signal a need for the Oklahoma Legislature to overhaul its death penalty statutes.

Finally, the Supreme Court would do well to establish additional guidelines, beyond bifurcation, to assist states in insuring that youth is treated as a highly relevant mitigating factor in the sentencing process. Nineteen states have clearly rejected a minimum age statute as the means of accounting for youth during the sentencing process. Given guidance, these states might then better establish or refine their juvenile death penalty statutes and sentencing procedures. Such guidance would ultimately curtail the flow of juvenile death penalty cases properly reviewable by the Supreme Court.

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