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Juveniles and the Death Penalty - A Square Peg in a Round Hole - Thompson v. Oklahoma

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JUVENILES AND THE DEATH PENALTY— A SQUARE PEG IN A ROUND HOLE

Thompson v. Oklahoma, 487 U.S. 815 (1988)

I. INTRODUCTION

On January 23, 1983, fifteen-year-old William Wayne Thompson brutally murdered his former brother-in-law, Charles Keene. From the evidence presented, it appeared that the act was motivated by Keene's physical abuse of Thompson's sister. Keene's body was found in the Washita River chained to a concrete block. He had been shot twice, once in the head and once in the chest, and his throat, chest, and abdomen had been slashed.[1] Although three others assisted with the murder, it was Thompson who slashed Keene's body and pulled the trigger on the gun that inflicted the head wound.[2]

Pursuant to Oklahoma law,[3] Thompson was certified to stand trial as an adult in Grady County District Court[4] where he was convicted of first degree murder and sentenced to death. The Court of Criminal Appeals of Oklahoma considered the circumstances of his crime to be heinous, atrocious, and cruel.[5]

Thompson's conviction was affirmed by the Court of Criminal Appeals of Oklahoma.[6] Thompson based his appeal on the argument that the execution of a juvenile who was fifteen at the time of the offense would constitute cruel and unusual punishment.[7] The court noted that the same argument had been made in *Eddings v. State*,[8] and that the *Eddings* court had unanimously rejected it.[9] The *Thompson* court held that "[u]pon reconsideration of the issue, we reaffirm our previous holding that once a minor is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult."[10]

On November 9, 1987, counsel for Thompson argued before the United States Supreme Court that it was "cruel and unusual" punishment for a state to execute a person who was a juvenile at the time he committed his crime. On June 29, 1988, a plurality of the Supreme Court agreed with Thompson, holding that the "cruel and unusual punishment" laws of the eighth amendment, applicable to the states

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1. Thompson v. Oklahoma, 487 U.S. 815, 860-61 (1988) (Scalia, J., dissenting).
2. *Id.*
3. OKLA. STAT. ANN. tit. 10, § 1112(b) (West 1987).
4. Thompson v. Oklahoma, 724 P.2d 780, 782 (Okla. Crim. App. 1986), *vacated*, 487 U.S. 815 (1988).
5. *Id.* at 785.
6. *Id.* at 786.
7. *Id.* at 784.
8. 616 P.2d 1159 (Okla. Crim. App. 1980).
9. *Id.* at 1166-67. The Court based its decision on the fact that the death penalty is neither cruel nor unusual when applied to minors who are certified to stand trial as adults. *Thompson*, 724 P.2d at 784.
10. *Thompson*, 724 P.2d at 784 (citing *Eddings*, 616 P.2d 1159).

through the fourteenth amendment, "prohibit the execution of a person who was under 16 years of age at the time of his or her offense."[11]

II. Cruel and Unusual Punishment: The Supreme Court's Struggle with the Interpretation of the Eighth Amendment

When the drafters of the Constitution included the "cruel and unusual punishment" clause in the eighth amendment, they did not attempt to define its precise boundaries.[12] There is little evidence of the Framers' intent in placing the "cruel and unusual punishment" clause among the restraints enumerated in the Bill of Rights.[13] From the evidence that is available, it appears that the eighth amendment was intended to be a limitation upon legislative power. It was to serve as a "constitutional check" which would restrain the otherwise uncontrolled legislative power.[14] Nevertheless, as stated by Justice Brennan in *Furman v. Georgia*, "we cannot now know exactly what the Framers thought 'cruel and unusual punishments' were."[15]

This uncertainty was evidenced in the decisions of the Supreme Court prior to *Weems v. United States*.[16] Some of these early decisions compare the punishments in question to punishments that were considered "cruel and unusual" at the time of the adoption of the Bill of Rights.[17]

When *Weems* was decided in 1910, the Court rejected the "historical" interpretation of the eighth amendment "cruel and unusual punishment" clause.[18] The Court not only recognized the clause as an exercise of restraint on the legislature,[19] but also recognized that it was the Court's responsibility to make certain the protections guaranteed by the eighth amendment were enforced.[20]

Forty-eight years after *Weems*, the Court addressed the issue once again in *Trop v. Dulles*.[21] In *Trop*, stating that the eighth amendment would be interpreted by the "evolving standards of decency that mark the progress of a maturing society,"[22] the Supreme Court established that it would interpret the "cruel and unusual" clause of the eighth amendment; however, the Court did not develop any specific guidelines for interpreting the clause.

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11. *Thompson*, 487 U.S. at 838 (Stevens, J., plurality opinion).

12. Weems v. United States, 217 U.S. 349, 368-69 (1910).

13. Furman v. Georgia, 408 U.S. 238, 258 (1972) (Brennan, J., concurring).

14. *Id.* at 260-61 (Brennan, J., concurring).

15. *Id.* at 263 (Brennan, J., concurring).

16. *See, e.g.*, *In re* Kemmler, 136 U.S. 436, 447 (1890); Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878); Pervear v. Commonwealth, 72 U.S. (5 Wall.) 475 (1867).

17. Weems v. United States, 217 U.S. 349, 369-70 (1910).

18. Furman v. Georgia, 408 U.S. 238, 266 (1972) (Brennan, J., concurring).

19. *Id.* at 267 (Brennan, J., concurring).

20. *Id.*

21. 356 U.S. 86 (1958).

22. *Id.* at 101.

In 1972 the Court decided *Furman v. Georgia*,[23] in which it gave extensive treatment to the issue of capital punishment while nonetheless leaving many questions unanswered. The Court ruled that the death penalty was unconstitutional as applied to the particular cases then being considered but did not determine that the death penalty was unconstitutional for all crimes or all circumstances.[24] Even with the numerous opinions contained in the *Furman* decision, the main theme of each opinion was the arbitrary, random, and discriminately selective manner in which the death penalty was applied. The *Furman* decision focused on the unlimited and uncontrolled discretion that juries had in imposing the death penalty and held that the death penalty was not to be imposed in an arbitrary and capricious manner.[25] This theme provided the basis for guiding the United States Supreme Court in deciding post-*Furman* capital punishment cases.[26]

The next Supreme Court case analyzing the constitutionality of the death penalty was *Gregg v. Georgia*,[27] decided in 1976. In *Gregg*, a plurality of the Court held that the death penalty is not a per se violation of the eighth amendment.[28] The Georgia legislature had amended its death penalty statute in order to comply with the *Furman* decision.[29] Noting that the statute provided a bifurcated system that allowed careful consideration of the circumstances of the crime and of the character of the offender, the Court held that the carefully drafted statute adequately dealt with the concerns of *Furman*.[30]

In 1978, a plurality of the Court in *Lockett v. Ohio*[31] held that the defendant must be afforded individualized consideration of any mitigating factors concerning his crime before he can be sentenced to death. The plurality held that the eighth

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23. 408 U.S. 238 (1972). Prior to *Furman*, the Supreme Court in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), declared that the eighth amendment's "cruel and unusual punishment" clause was applicable and binding on the states through the fourteenth amendment. *Id.* at 463.

24. *Furman*, 408 U.S. at 239-40. Justice Brennan, in his concurring opinion, recognized principles that established guidelines for the Court to follow in determining whether a challenged penalty is unconstitutional. *Id.* at 270 (Brennan, J., concurring). "The primary principle is that punishment must not be so severe as to be degrading to the dignity of human beings." *Id.* at 271. The second is "that the State must not arbitrarily inflict a severe punishment." *Id.* at 274. The third "is that a severe punishment must not be unacceptable to contemporary society." *Id.* at 277. The last principle is that "unusually severe and degrading punishment may not be excessive in view of the purposes for which it is inflicted." *Id.* at 300.

25. *Id.* at 248 n.11 (Douglas, J., concurring); *id.* at 295 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 314 (White, J., concurring); *see id.* at 365 (Marshall, J., concurring).

26. *But cf.* McGautha v. California, 402 U.S. 183 (1971), *vacated sub nom.* Crampton v. Ohio, 408 U.S. 941 (1972), where the Court, writing only one year before *Furman*, upheld two statutes as constitutional in applying the death penalty. The first statute allowed a jury to apply the death penalty without the use of any standard guidelines. The Court held that the absence of standards did not violate due process. *McGautha*, 402 U.S. at 196. The second was Ohio's single verdict procedure for determining guilt and punishment. *Id.* at 208-09.

27. 428 U.S. 153 (1976).

28. *Id.* at 169 (Stewart, Powell, Stevens, JJ., plurality opinion).

29. *Id.* at 162 (Stewart, Powell, Stevens, JJ., plurality opinion). The Legislature set up a bifurcated system with a trial at one stage and determination of the penalty during the second. *Id.* at 162-63 (Stewart, Powell, Stevens, JJ., plurality opinion). At least one of ten aggravating circumstances listed in the statute must be found before the death penalty may be imposed. *Id.* at 165-66 n.9 (Stewart, Powell, Stevens, JJ., plurality opinion) (citing GA. CODE ANN. § 26-3102 (Supp. 1975)); *see also* GA. CODE ANN. § 17-10-30 (1990).

30. *Gregg*, 428 U.S. at 206-07; *see id.* at 222 (White, J., concurring).

31. 438 U.S. 586 (1978).

and fourteenth amendments require that in all capital cases the sentencer must not be prevented from hearing any mitigating factors, such as characteristics of the defendant or circumstances of the offense. The statute involved in *Lockett* limited the types of mitigating circumstances allowed to be considered at sentencing and was therefore held unconstitutional.[32]

In *Eddings v. Oklahoma*,[33] the Supreme Court first considered the specific issue of the constitutionality of the imposition of the death penalty upon a minor who was under the age of sixteen when he committed his crime. The petitioner in *Eddings* was sixteen years old at the time of his offense but was tried as an adult. The trial court convicted Eddings of first-degree murder and sentenced him to death for killing a police officer.[34] The Supreme Court reversed the decision on the ground that the "sentence was imposed without the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases."[35]

The interesting twist in *Eddings* is the Court's decision of an issue entirely different from the one upon which certiorari was granted.[36] The petitioner's claim was not presented to the Oklahoma courts and, furthermore, was raised for the first time in the petitioner's brief to the United States Supreme Court.[37] The decision in *Eddings* allowed the Supreme Court to avoid deciding the specific issue of the constitutionality of the death penalty as applied to a minor under sixteen years of age at the time of the commission of his crime. Until its decision in *Thompson*, the Court considered the age of the petitioner as a mitigating factor rather than establishing an age below which no juvenile could be sentenced to death.

The United States Supreme Court has yet to give a definite and concrete definition of the "cruel and unusual punishment" clause, but it has recognized principles to guide the determination of the constitutionality of a punishment when challenged as a violation of the clause.[38] The Court utilized several of these principles in deciding *Thompson*.

III. WILLIAM WAYNE THOMPSON: THE EXCEPTION BECOMES THE RULE

On June 29, 1988, the Court held that age would no longer be only a mitigating factor which could relieve a minor under sixteen of a death sentence.[39] Instead, the

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32. *Id.* at 608; *see also* Bell v. Ohio, 438 U.S. 637, 642 (1978) (Ohio statute prohibited any mitigating factors other than those specifically listed).

33. 455 U.S. 104 (1982).

34. *Id.* at 109.

35. *Id.* at 105 (quoting Lockett v. Ohio, 438 U.S. 586, 606 (1978) (Burger, C.J., concurring)).

36. *Id.* at 120 (Burger, C.J., dissenting) (The Court "took care to limit [its] consideration to whether the Eighth and Fourteenth Amendments prohibit the imposition of a death sentence on an offender because he was 16 years old in 1977 at the time he committed the offense . . . ." *Id.*).

37. *Id.*

38. Streib, *The Eighth Amendment and Capital Punishment of Juveniles*, 34 CLEV. ST. L. REV. 363 (1986) [hereinafter Streib, *The Eighth Amendment and Capital Punishment of Juveniles*]; *see also* Enmund v. Florida, 458 U.S. 782 (1982); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972); Trop v. Dulles, 356 U.S. 86 (1958).

39. *See* Thompson v. Oklahoma, 487 U.S. 815 (1988) (Stevens, J., plurality opinion).

Court prohibited execution of a minor who was under sixteen at the time of the commission of the crime.[40]

The issue of capital punishment has sparked a vigorous and heated debate in our nation, and, as long as juries are armed with the possible imposition of the death penalty, the debate is not likely to subside. The issue of capital punishment has separated legal scholars, religious leaders, politicians, judges, lawyers, and the American public. The Supreme Court Justices who decided *Thompson* were no exception. Of the eight Justices who took part in the decision, only four joined the plurality opinion.[41]

A. Plurality Opinion

The plurality acknowledged that the drafters of the eighth amendment made no attempt to explicitly define "cruel and unusual punishment," and that it was up to the Court to make such a determination.[42] The plurality turned to the "evolving standards of decency that mark the progress of a maturing society,"[43] and, in determining this "standard of decency," the plurality chose to review legislative enactments and jury determinations.[44] The plurality stated that it would "explain why these indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty."[45]

Not surprisingly, the plurality focused first on the difference between the legal rights and duties of children and those of adults. It noted various statutes which treat children differently from adults; for example, "a minor is not eligible to vote, to sit on a jury, to marry without parental consent, or to purchase alcohol or cigarettes."[46] The plurality did recognize that a sixteen- or seventeen-year-old could, under special circumstances, stand trial as an adult in Oklahoma;[47] however, the plurality found no other Oklahoma statutes that treat a minor under sixteen "as anything but a 'child.' "[48] The plurality placed great emphasis on the fact that no state having legislation that addresses the maximum age of juvenile court jurisdiction has allowed that age to fall below sixteen.[49]

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40. *Id.* at 838 (Stevens, J., plurality opinion).

41. *Id.* at 817. Justice Stevens delivered the opinion. Justices Brennan, Marshall, and Blackmun joined in the opinion. The one Justice who took no part in the decision was Justice Kennedy. He has been labeled a conservative who approves the death penalty. If the issue was to go before the Court again, his vote could change the outcome.

42. *Id.* at 821 (Stevens, J., plurality opinion).

43. *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (Warren, C.J., plurality opinion)).

44. *Id.* at 821-22 (Stevens, J., plurality opinion).

45. *Id.* at 823 (Stevens, J., plurality opinion); *see also* Coker v. Georgia, 433 U.S. 584 (1977) (White, J., plurality opinion) (Where a plurality of the Court stated that "[t]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Id.* at 597.).

46. *Thompson*, 487 U.S. at 823 (Stevens, J., plurality opinion); *see also id.* app. at 839-48.

47. *Id.* at 824 (Stevens, J., plurality opinion); *see* OKLA. STAT. ANN. tit. 10, § 1112(b) (West 1987).

48. *Thompson*, 487 U.S. at 824 (Stevens, J., plurality opinion).

49. *Id.*

The plurality reviewed various states' statutes authorizing capital punishment and found that nineteen states approve of the death penalty but have set no minimum age;[50] eighteen states have established a minimum age,[51] and fourteen states do not allow capital punishment at all.[52] Looking at this data, the plurality emphasized the fact that all eighteen states which have established a minimum age for the imposition of the death penalty require the individual to have reached at least sixteen when the offense was committed.[53] The plurality also noted that professional organizations such as the American Bar Association and the American Law Institute are opposed to executing juveniles.[54] The plurality recognized as well the large number of European countries that have either abolished the death penalty altogether or prohibited its application to juveniles.[55]

The plurality also looked to the behavior of juries, first noting that the fear of an arbitrary and infrequent method of issuing the sentence of death was the underlying basis which evoked the declaration in *Furman* that the administration of the death penalty without proper guidelines was unconstitutional.[56] Relying on information compiled by a scholar,[57] the plurality noted that apparently between eighteen and twenty executions of juveniles under age sixteen have taken place in this country, the last of these occurring in 1948.[58] Considering this decline in the execution of minors, along with the thousands of murder cases that are tried each year, the plurality concluded that the penalty as applied to "a 15-year-old offender is now generally abhorrent to the conscience of the community."[59]

Department of Justice statistics show that from 1982 through 1986, 82,094 people were arrested for willful criminal homicide.[60] Out of this group, 1,393 were sentenced to death, but only five were younger than sixteen at the time of the commission of the offense.[61] The plurality admitted that these statistics can be in-

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50. *Id.* at 826-28 (Stevens, J., plurality opinion) (statutory references contained therein). The states which approve the death penalty with no minimum age are: Alabama, Arizona, Arkansas, Delaware, Florida, Idaho, Louisiana, Mississippi, Missouri, Montana, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, and Wyoming. *Id.* at 828 n.26

51. *Id.* at 829-30 n.30 (Stevens, J., plurality opinion) (statutory references contained therein). Those states establishing a minimum age are: California (age 18), Colorado (age 18), Connecticut (age 18), Georgia (age 17), Illinois (age 18), Indiana (age 16), Kentucky (age 16), Maryland (age 18), Nebraska (age 18), Nevada (age 16), New Hampshire (indicating 18 – the age of majority), New Jersey (age 18), New Mexico (age 18), North Carolina (age 17), Ohio (age 18), Oregon (age 18), Tennessee (age 18), and Texas (age 17). *Id.*

52. *Id.* at 826-28 n.25 (Stevens, J., plurality opinion) (statutory references contained therein). The states not allowing capital punishment are: Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, West Virginia, and Wisconsin. *Id.*

53. *Id.* at 829 (Stevens, J., plurality opinion).

54. *Id.* at 830 (Stevens, J., plurality opinion).

55. *Id.* at 830-31 (Stevens, J., plurality opinion). The United Kingdom and New Zealand do not allow execution of juveniles; West Germany, France, Portugal, the Netherlands, and the Scandinavian countries have totally abolished the death penalty; Canada, Italy, Spain, and Switzerland only allow the death penalty for exceptional crimes, such as treason; juvenile executions are also not permitted in the Soviet Union. *Id.*

56. *Id.* at 831 (Stevens, J., plurality opinion).

57. *See* V. STREIB, DEATH PENALTY FOR JUVENILES, 190-208 (1987).

58. *Thompson*, 487 U.S. at 832 (Stevens, J., plurality opinion).

59. *Id.*

60. *Id.*

61. *Id.* at 832-33 (Stevens, J., plurality opinion).

terpreted differently, "but they do suggest that these five young offenders have received sentences that are 'cruel and unusual in the same way that being struck by lightning is cruel and unusual.' "[62] This statement reflects the plurality's view that the statistics show that the death penalty is being applied to juveniles in an arbitrary and infrequent manner.

The plurality acknowledged that all the factors previously mentioned are important considerations as to whether the punishment is unconstitutional and also declared that the issue of unconstitutionality is for the Court to ultimately decide. In making that final determination, the plurality stated two factors to consider: (1) "whether [a] juvenile's culpability should be measured by the same standard as that of an adult"[63] and (2) whether the death penalty as applied to juveniles " 'measurably contributes' to the social purposes that are served by the death penalty."[64]

Justice Stevens stressed the difference between juvenile and adult culpability, concluding that juveniles are less mature and responsible than adults.[65] The basis for this conclusion, as stated by the plurality, is that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."[66]

Relying on *Gregg v. Georgia*,[67] the plurality recognized two principal social purposes that the death penalty serves: retribution and deterrence.[68] Considering the lesser culpability, the capacity for growth, and society's fiduciary obligations to minors, the plurality then stated that execution of a fifteen-year-old was "inapplicable" to the principle of retribution.[69] The plurality concluded that the deterrence rationale was also "inapplicable" to such young offenders.[70] The plurality also noted that ninety-eight percent of the arrests for willful homicide involved offenders over sixteen years of age and that removing those under sixteen from the possibility of receiving the death penalty would have no diminishing effect on the potential class of offenders.[71] Accordingly, those under sixteen would not be deterred because it is very unlikely that a minor under sixteen would make the "cost-benefit" analysis necessary to the operation of the deterrence principle.[72] Therefore, according to the plurality, the execution of minors who were under the age of sixteen at the time of the commission of the crime is " 'nothing more than

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62. *Id.* at 833 (Stevens, J., plurality opinion) (quoting Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring)).

63. *Id.* at 833 (Stevens, J., plurality opinion).

64. *Id.*

65. *Id.* at 835 (Stevens, J., plurality opinion); *see also* Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982); Bellotti v. Baird, 443 U.S. 622, 635 (1979).

66. *Thompson*, 487 U.S. at 835 (Stevens, J., plurality opinion).

67. 428 U.S. 153 (1976).

68. *Thompson*, 487 U.S. at 836 (Stevens, J., plurality opinion) (quoting *Gregg*, 428 U.S. at 183 (Stewart, Powell, Stevens, JJ., plurality opinion)).

69. *Id.* at 836-37 (Stevens, J., plurality opinion).

70. *Id.* at 837.

71. *Id.* at 837 (Stevens, J., plurality opinion).

72. *Id.*

the purposeless and needless imposition of pain and suffering . . . .' "[73] It is, therefore, unconstitutional.

B. Concurring Opinion

In her concurring opinion, Justice O'Connor agreed that there is some age below which a juvenile cannot be punished by death in accordance with the Constitution. She also agreed that the Court is required to determine this age "in light of the 'evolving standards of decency that mark the progress of a maturing society.' "[74] However, she contended that since there is insufficient evidence to establish a "relevant social consensus," the Court should be "reluctant to adopt this conclusion as a matter of constitutional law . . . ."[75]

Justice O'Connor's disagreement with the plurality arises from the ambiguous inferences that can be drawn from the data of the nineteen states that have authorized the death penalty without setting an age limit for its application. If the conclusion could be reached that the nineteen states had deliberately chosen to authorize the death penalty for minors under sixteen, a national consensus rejecting the death penalty would not exist. According to Justice O'Connor, this conclusion cannot be reached without speculation.[76] She stated that the legislatures of those nineteen states may have authorized a juvenile's being tried as an adult for other reasons and that the legislatures possibly had not even considered that the juveniles might be punished by death.[77] In light of these considerations it does not follow that the nineteen states deliberately authorized the death penalty for minors under age sixteen.[78]

Justice O'Connor discussed some of the reasons that juveniles may be transferred into the adult criminal system. One such reason is the length of confinement available in the juvenile justice system.[79] Considering that most states lose jurisdiction of juveniles between the ages of sixteen through eighteen, the juvenile system might be inappropriate for serious offenders. In addition, state legislatures may not want to confine serious offenders of any age in the same institutions that house their more vulnerable minor offenders.[80] O'Connor pointed out that these reasons suggest nothing about the legislature's consideration of the appropriateness of the death penalty for minors under sixteen.[81] Nevertheless, the fact that nineteen states and the federal government have legislation that appears to have

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73. *Id.* at 838 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977) (White, J., plurality opinion)).

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

75. *Id.* at 848-49 (O'Connor, J., concurring). Justice O'Connor concedes that there is strong evidence toward a national consensus rejecting execution of juveniles who were under sixteen when the crime was committed, but contends that it is difficult to comprehend that a national consensus exists with only two-thirds of the states opposed to capital punishment of such juveniles. *Id.*

76. *Id.* at 850 (O'Connor, J., concurring).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

the legal effect of authorizing the death penalty as applied to juveniles is "a real obstacle in the way of concluding that a national consensus forbids this practice."[82]

Justice O'Connor argued that the execution and sentencing statistics lack important data, such as how many times juries have been asked to impose the death penalty on a defendant under sixteen years of age and how often these decisions have been the result of prosecutorial discretion.[83] Without this data, it is difficult to deduce anything except that juries are reluctant to impose the ultimate penalty of death upon a juvenile.[84]

According to Justice O'Connor, the plurality did not demonstrate that those under age sixteen are "inherently incapable" of being deterred by the threat of the possible imposition of the death penalty.[85] The plurality noted that deterrence is not effective in this situation since ninety-eight percent of those arrested for willful homicide are over sixteen years of age.[86] Accordingly, excluding the young offender from the class that is eligible for the death penalty will not diminish the deterrence value for the ninety-eight percent of offenders over sixteen years of age.[87] This reasoning does not support a conclusion that capital punishment has no deterrence value for offenders fifteen years of age; it only supports the proposition that excluding those under sixteen will not diminish the deterrence value for the ninety-eight percent over the age of sixteen.

Justice O'Connor emphasized that Oklahoma has a statute authorizing the death penalty without establishing any minimum age.[88] In addition, Oklahoma has a statute authorizing the transfer of fifteen-year-old murder defendants to adult criminal proceedings in some circumstances.[89] This, according to Justice O'Connor, poses the risks either that Oklahoma did not realize that fifteen-year-olds would be subjected to death or that Oklahoma did not give this question serious consideration before authorizing the death penalty.[90] If it was clear that there exists no national consensus against imposing the death penalty upon minors, Oklahoma's statute would not be problematic.[91] Here, however, Oklahoma has established a statutory system, and "they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty."[92]

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82. *Id.* at 852 (O'Connor, J., concurring).
83. *Id.* at 853 (O'Connor, J., concurring).
84. *Id.*
85. *Id.*
86. *Id.* at 837.
87. *Id.* at 837 (Stevens, J., plurality opinion).
88. *Id.* at 857.
89. *Id.* at 857 (O'Connor, J., concurring).
90. *Id.*
91. *Id.*
92. *Id.*

Relying on the familiar principal that the Court should avoid unnecessarily broad constitutional adjudication,[93] Justice O'Connor concluded "that petitioner and others who were below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution."[94] Her decision would leave the broader eighth amendment issue to those best suited to address it: "the people's elected representatives."[95]

C. Dissenting Opinion

Dissenting, Justice Scalia found no "plausible basis" for concluding that "no criminal so much as one day under 16, after individuated consideration of his circumstances, including the overcoming of a presumption that he should not be tried as an adult, can possibly be deemed mature and responsible enough to be punished with death for any crime."[96] According to Justice Scalia, Thompson was not a juvenile who unknowingly slipped through the system and found himself confronted with the sentence of death.[97] Rather, Thompson was given, not one, but two opportunities of individualized consideration before receiving the death penalty. The first occurred before he was transferred from the juvenile system; the second came at his trial when the jury considered his young age before imposing the death penalty.[98]

Justice Scalia noted that the plurality rested its conclusion on the theory that executing a minor under sixteen is "contrary to the evolving standards of decency that mark the progress of a maturing society."[99] Justice Scalia looked to legislative enactments as the "most reliable" objective indicators of how a society views a punishment. He first looked to federal legislation, specifically the Comprehensive Crime Control Act of 1984.[100] Congress lowered from sixteen to fifteen the age at which a juvenile can be transferred from juvenile court to federal district court.[101] As Justice Scalia noted, the fact that Congress had not specifically addressed the

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93. *Id.* at 858 (O'Connor, J., concurring); *see* Ashwander v. TVA, 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring).

94. *Thompson*, 487 U.S. at 857-58 (O'Connor, J., concurring).

95. *Id.* at 858-59 (O'Connor, J., concurring).

96. *Id.* at 859 (Scalia, J., dissenting).

97. *Id.* at 863.

98. *Id.* at 863 (Scalia, J., dissenting). Scalia effectively restated the appalling circumstances and facts of the crime along with Thompson's previous background. Scalia also noted that the age of executing juveniles had been discussed in *Blackstone's Commentaries on the Laws of England. See* 4 W. BLACKSTONE, COMMENTARIES 22-24; 1 M. HALE, PLEAS OF THE CROWN 25-28 (1682); Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613 (1983) [hereinafter Streib, *Death Penalty for Children*] (children under age seven were conclusively presumed to be incapable of criminal intent; from age seven to fourteen there was a rebuttable presumption of inability of criminal intent; over age fourteen there was no presumption. *Id.* at 614-15.).

99. *Thompson*, 487 U.S. at 864-65 (Scalia, J., dissenting) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (Warren, C.J., plurality opinion)).

100. Comprehensive Crime Control Act of 1984, 18 U.S.C. § 5032 (1982 & Supp. IV 1986).

101. *Thompson*, 487 U.S. at 865 (Scalia, J., dissenting).

penalty of death for these juveniles does not change what the law on its face now permits.[102]

The dissenters considered state legislation and noted a trend toward lowering the age at which juveniles can be transferred to the adult system.[103] According to Justice Scalia, the majority of the thirty-seven states that allow capital punishment have not set an age limit, but instead allow the age at which a juvenile can receive the death penalty to be the same as the age at which the juvenile can be transferred to the adult system.[104] Therefore, considering the federal legislation and the nineteen states that allow those under sixteen to receive the death penalty, there can be no societal consensus against those under sixteen receiving the death penalty.

Justice Scalia addressed the plurality's reliance on "the behavior of juries."[105] According to the plurality, there has been a drastic decline in executions of juveniles in this century.[106] The dissenters stated that there are many reasons, other than societal consensus against the execution of minors, which explain the decline in executions. Among these reasons are reduction of public support for the death penalty and the now mandatory individualized sentencing determinations,[107] rather than automatic death sentences. Therefore, a society that is generally less willing to impose the death penalty, coupled with the required individualized considerations, will rarely execute a minor. Accordingly, Justice Scalia said these statistics show only that society feels that executing a minor under sixteen should be rare.[108] The statistics do not, however, provide a rational basis for concluding that a societal consensus demands that execution of a juvenile should never occur.[109]

Justice Scalia discussed the imposition of capital punishment in other classes, such as women and offenders seventeen and eighteen years of age.[110] He noted a similar decline and rarity of death sentences for these offenders.[111] Accordingly, if the reasoning adopted by the plurality is plausible, the same judgment should be extended to women and those seventeen or eighteen years of age.[112] Justice Scalia criticized the plurality for acting in accordance with its own views. He criticized the plurality's rationale for concluding that there is a national consensus and stated that "there is no clear line here, which suggests that the plurality is inappropriately acting in a legislative rather than a judicial capacity."[113]

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102. *Id.* at 866.

103. *Id.* at 867 (Scalia, J., dissenting).

104. *See id.* at 868 (Scalia, J., dissenting).

105. *Id.* at 869 (Scalia, J., dissenting).

106. *See id.* at 869 (Scalia, J., dissenting).

107. *See* Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (making it a constitutional requirement that individualized consideration be given the capital offender at his sentencing hearing, including all relevant circumstances of the crime and characteristics of the offender, offered to mitigate the punishment to a lesser penalty than death).

108. *Thompson*, 487 U.S. at 870. (Scalia, J., dissenting).

109. *Id.*

110. *Id.* at 871 (Scalia, J., dissenting).

111. *Id.* at 872 (Scalia, J., dissenting).

112. *Id.* at 871-72 (Scalia, J. dissenting).

113. *Id.* at 872 (Scalia, J., dissenting).

IV. SUPPORTING THE PLURALITY'S DECISION

A. Drawing the Line: A National Consensus

To begin the discussion of the Court's judicial power to draw the line at age sixteen, it seems appropriate to quote language directly from the case:

> Thus, in confronting the question whether the youth of the defendant – more specifically, the fact that he was less than 16 years old at the time of his offense – is a sufficient reason for denying the State the power to sentence him to death, we first review relevant legislative enactments, then refer to jury determinations, and finally explain why these indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty.[114]

Considering this language, it seems reasonable to conclude that the plurality based its conclusion on the lesser culpability of a juvenile rather than on any "national consensus." The plurality did not claim that there was a national consensus among the states against executing a minor under sixteen. By placing so much emphasis on the lack of a "national consensus," both Justice O'Connor and Justice Scalia failed to recognize that the plurality used legislative statistics as a guiding factor rather than as the basis for its decision.

It has been recognized that the Court will be the final authority on the acceptability of the death penalty.[115] Although legislative enactments weigh heavily in the determination, the Court is the ultimate decision maker.[116] In *Gregg*, Justices Stewart, Powell, and Stevens noted that "it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power."[117] In *Thompson*, the plurality stated that it still had to make the final decision and, in doing so, placed emphasis upon the juvenile's culpability and whether the death penalty as applied to minors " 'measurably contributes' to the social purposes that are served by the death penalty."[118]

In other words, the plurality's determination was not limited necessarily to finding a national consensus; the plurality used recognized principles in interpreting the eighth amendment challenge before it. Furthermore, although the concurring opinion in *Gregg* recognized that judges have a limited role to play in interpreting the eighth amendment,[119] it further stated that "[t]his does not mean

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114. *Id.* at 822-23 (Stevens, J., plurality opinion) (footnotes omitted).

115. Enmund v. Florida, 458 U.S. 782, 797 (1982); Coker v. Georgia, 433 U.S. 584, 597 (1977) (White, J., plurality opinion).

116. *Enmund*, 458 U.S. at 797; Gregg v. Georgia, 428 U.S. 153, 175 (1976) (Stewart, Powell, Stevens, JJ., plurality opinion).

117. *Gregg*, 428 U.S. at 174 n.19 (Stewart, Powell, Stevens, JJ., plurality opinion).

118. *Thompson*, 487 U.S. at 833 (Stevens, J., plurality opinion) (citing *Enmund*, 458 U.S. at 798).

119. *Gregg*, 428 U.S. at 174-76 (Stewart, Powell, Stevens, JJ., plurality opinion).

that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power."[120]

It would be implausible to suggest that the Court, after declaring a particular punishment unconstitutional and acting fully within recognized principles for determining the validity of a punishment under the eighth amendment, would have to depend upon the legislature to enact the proper statutes in order to give legal meaning to the Court's decision. The eighth amendment is recognized as a limitation upon the legislatures, and in this delicate situation the Court must be the interpreter of the Constitution.[121] The Court, in interpreting, must be able to draw impermeable boundary lines in order to keep the legislature from infringing upon constitutionally-protected rights.

The basis for the criticisms of the Court's acting in a legislative manner stems from the case of *Ashwander v. TVA*.[122] In *Ashwander,* Justice Brandeis set out in his concurring opinion the rules the Court has developed to avoid deciding many of the constitutional questions brought before the Court.[123] The emerging principle is that the Court will narrow its decision of a constitutional issue as much as the facts allow and will avoid a constitutional question altogether if another independent basis for the decision is available.

Another consideration in the analysis of judicial line-drawing is the deference given to the legislature. In *Ashwander* it was noted that, because of the respect accorded to the legislature by the Court, any statutes or laws that are passed carry a presumption of constitutional validity.[124] In *Weems v. United States,*[125] the Court noted that great respect and deference would be given to the legislature to define crimes and their punishment. The Court refused to assert judgment against the legislature "unless that power encounters in its exercise a constitutional prohibition."[126] The Court further stated that the legislature has no limitations, except constitutional ones, and it is the role of the judiciary to decide constitutional limitations.[127]

With respect to the instant case, Oklahoma has a statute that allows juveniles to be transferred and tried as adults for certain crimes—such as murder—thereby subjecting those juveniles to the possibility of punishment by death. If punishment by death of a person under sixteen is determined to be unconstitutional, the Court is justified in striking down legislation that allows this constitutionally prohibited punishment.

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120. *Id.* at 174 (Stewart, Powell, Stevens, JJ., plurality opinion).

121. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

122. 297 U.S. 288 (1936).

123. *Id.* at 346-48 (Brandeis, J., concurring).

124. *Ashwander,* 297 U.S. at 355 (Brandeis, J., concurring) (quoting Ogden v. Saunders, 25 U.S. (12 Wheat) 213, 270 (1827) (Washington, J., dissenting)); *see also* Union Pac. R.R. v. United States, 99 U.S. 700, 718 (1878).

125. 217 U.S. 349 (1910).

126. *Id.* at 378.

127. *Id.* at 379.

Justices O'Connor and Scalia have criticized the plurality for acting in a legislative rather than a judicial capacity, but both have failed to realize that the Court was acting pursuant to its interpretation of the eighth amendment in drawing the line at age sixteen. It is up to the Court to determine what constitutes "cruel and unusual punishment."[128] It would be implausible to contend that because the Court's interpretation of the "cruel and unusual punishment" analysis involved a statute it would have to defer to legislative action.

In *Solem v. Helm*,[129] the Court discussed the issue of judicial line-drawing, noting that line-drawing is not unique to eighth amendment situations and stating that courts are called upon to draw lines in a variety of other contexts.[130] Referring to *Baldwin v. New York*,[131] the Court pointed to the right to a jury trial as just one example.

In *Baldwin* the Court determined that where the defendant may be imprisoned for more than six months, he has a right to a jury trial.[132] The Court, in drawing this line at six months, relied on the fact that only New York City denied the right to a jury trial for offenses punishable by more than six months.[133] According to Justice White, "[t]his near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn—on the basis of the possible penalty alone—between offenses that are and that are not regarded as 'serious' for purposes of trial by jury."[134] As stated in *Solem*, *Baldwin* established that the Court can distinguish one sentence of imprisonment from another and, more importantly, that "courts properly may look to the practices in other jurisdictions in deciding where lines between sentences should be drawn."[135]

Solem is directly analogous to the analysis the plurality used in *Thompson* in drawing the line of the constitutionality of executing minors at age sixteen. To arrive at the age of sixteen, the *Thompson* plurality compared statutes of all the different states.[136] The Court was asked to extend this line to eighteen but declined to do so, limiting its decision to the facts of the case. By narrowing its decision of the constitutional issue as much as the facts allowed, the Court complied with the principles expressed in *Ashwander*.[137] In drawing the line at sixteen, the plurality was properly exercising judicial authority in interpreting the eighth amendment,

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128. *See* Thompson v. Oklahoma, 487 U.S. 815, 821-22 (1988) (Stevens, J., plurality opinion).

129. 463 U.S. 277 (1983).

130. *Id.* at 294.

131. 399 U.S. 66 (1970).

132. *Id.* at 69 (White, J., plurality opinion).

133. *Id.* at 71-72 (White, J., plurality opinion).

134. *Solem*, 463 U.S. at 295 (quoting *Baldwin*, 399 U.S. at 72-73 (White, J., plurality opinion)).

135. *Id.*

136. 487 U.S. 815 (1988).

137. 297 U.S. 288, 346-48 (Brandeis, J., concurring).

declaring the death penalty unconstitutional as applied to minors, and comparing the practices in various states in determining where to draw the line.[138]

B. Legislative Enactments and Jury Verdicts

Although the *Thompson* Court was not required to find a national consensus, there is a strong indication of a trend toward a consensus favoring exclusion of minors under the age of sixteen from the imposition of the death penalty. The plurality recognized that fourteen states prohibit capital punishment[139] and that eighteen states have established a minimum age below which it is impermissible to execute anyone. Of these eighteen states, only one sets the age at sixteen; none permit the execution of a minor under sixteen, and the remainder have established the age at seventeen or eighteen.[140]

The plurality then recognized that professional organizations such as the American Bar Association and the American Law Institute are opposed to executing juveniles.[141] The Model Penal Code provides additional support: " '[C]ivilized societies will not tolerate the spectacle of execution of children.' "[142] Sharing this opinion are the National Commission on Reform of Federal Criminal Laws, the *Washington Post,* the United Nations, Pope John Paul II, and more than three-fourths of the nations of the world, including all of the European countries,[143] and, specifically, the Soviet Union.[144]

Justice Scalia, in his criticism of the plurality, stated that there was a "common-law understanding that 15-year-olds were not categorically immune from commission of capital crimes."[145] It is well accepted that this country adopted its common law from England. Additionally, it is generally accepted that minors can commit and be convicted of capital crimes, but it does not necessarily follow that they should also receive the death penalty.

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138. *See also* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) ("whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry"); *cf.* Brilmayer, *Carolene, Conflicts, and the Fate of the 'Inside-Outsider,'* 134 U. PA. L. REV. 1291 (1986). *See generally* Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis,* 74 J. CRIM. L. & CRIMINOLOGY 1471, 1504 n.190 (1983) [hereinafter Comment, *Capital Punishment for Minors*] (citing Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam)) ("Age is not a suspect classification" in fourteenth amendment equal protection issues; therefore, punishing minors and adults differently poses no fourteenth amendment problems.). Accordingly, "different treatment based on age will not violate the Equal Protection Clause if there is a rational basis for the distinction. *Murgia,* 427 U.S. at 312, 314." Comment, *Capital Punishment for Minors,* at 1504 n.190. Considering that juveniles are less culpable than adults, there is a rational basis for the distinction. Juveniles may not be adequately protected by the representatives of the people, the legislatures; juveniles have no vote, no power to contract, and are treated differently than adults in many different legal contexts. Therefore, "[i]t seems inconsistent that one be denied the fruits of the tree of the law, yet subjected to all of its thorns." Workman v. Commonwealth, 429 S.W.2d 374, 377 (Ky. 1968).

139. See *supra* note 52 for a list of states prohibiting capital punishment.

140. *See supra* note 51.

141. *See supra* note 54 and accompanying text.

142. Streib, *The Eighth Amendment and Capital Punishment of Juveniles, supra* note 38, at 388 (quoting MODEL PENAL CODE § 210.6 commentary at 133 (Official Draft and Revised Comments 1980)).

143. *Id.* at 388-89.

144. Thompson v. Oklahoma, 487 U.S. 815, 831 (1988) (Stevens, J., plurality opinion).

145. *Id.* at 864 (Scalia, J., dissenting).

According to research that was performed at England's Old Bailey in London, it was "revealed that over 100 youths had been sentenced to death from 1801-1836 but none had actually been executed . . . . While some cases do exist, it appears settled that execution of youths was never common in England, at any time."[146] Furthermore, execution of minors under the age of sixteen at the time they committed their crimes has been prohibited in England since 1908.[147]

Turning to the behavior of juries, both the concurrence and the dissent correctly label the statistics ambiguous. Without more data it is impossible to determine exactly the proper interpretation of the statistics. However, the Court did provide some guidance with its holding in *Furman v. Georgia*[148] that the arbitrary and infrequent method of issuing the death sentence without any guidelines was unconstitutional.

The *Thompson* Court noted that between 1982 and 1986, 1,393 offenders were sentenced to death, but only five were younger than sixteen at the time of the commission of their crimes.[149] In 1987 alone, 419 juveniles under sixteen were arrested for murder and non-negligent manslaughter,[150] compared to only five sentenced to death in a four-year period, which seems to point to the fact that a juvenile's being condemned to death is a rare event. Although these statistics do not reflect the number of convictions, they do suggest that capital punishment sentences of juveniles are arbitrary.

Another example of this arbitrariness and lack of guidelines is the initial process by which a juvenile is transferred into the adult criminal system. Under most waiver statutes, the court focuses on whether the youth will be responsive to rehabilitation and also on the danger he presents to society.[151] The court bases its decision whether to waive the juvenile to the adult system upon many factors.[152] However, there are no specific guidelines regarding the relative weight to be assigned to any particular factor. Typical waiver statutes have been criticized as "broad strandless grants of discretion."[153] Although juveniles may still have the avenue of appeal available, the subjective decisions and unbridled discretion allowed to the court, again, bring up the same concerns that were addressed in *Furman*.[154]

As Justice O'Connor said in *Thompson*, there are many reasons that legislatures may allow juveniles to be transferred to the adult criminal system,[155] but this does

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146. Streib, *The Eighth Amendment and Capital Punishment of Juveniles*, *supra* note 38, at 379.

147. *Id.*

148. 408 U.S. 238 (1972).

149. *See supra* note 61 and accompanying text.

150. U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 174 (1987).

151. Hill, *Can the Death Penalty Be Imposed on Juveniles: The Unanswered Question in* Eddings v. Oklahoma, 20 CRIM. L. BULL. 5, 28 (1984) [hereinafter Hill, *Can the Death Penalty Be Imposed on Juveniles*].

152. *Id.* at 28-29; *see, e.g.*, Breed v. Jones, 421 U.S. 519 (1975); Kent v. United States, 383 U.S. 541 (1966).

153. Hill, *Can the Death Penalty Be Imposed on Juveniles*, *supra* note 151, at 29.

154. *See supra* note 148 and accompanying text; *see also* Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 IND. L.J. 757, 774 (1986) [hereinafter Note, *The Decency of Capital Punishment for Minors*].

155. Thompson v. Oklahoma, 487 U.S. 815, 850 (1988) (O'Connor, J., concurring).

not mean that they should be fully punished as adults.[156] It very possibly means only that the juvenile system lacks the adequate resources to deal with the particular juvenile. Even granting that the juvenile system is inadequate for the particular juvenile, it does not mean that he is incapable of being treated or that he may never be rehabilitated.[157]

One major criticism of the transfer process is that it allows a juvenile offender to be transferred based solely on the particular crime charged, thus directly conflicting with the philosophy of the juvenile justice system.[158] This also conflicts with *Enmund v. Florida,* which states that "[t]he focus must be on *his* culpability" in committing the crime, not on the particular crime itself.[159] As the mere existence of a separate juvenile system demonstrates, juveniles are less culpable and responsible for their crimes than adults. According to the principles of *Enmund,* juveniles, therefore, should not be subjected to the same penalty as adults. This does not mean that juveniles should not be tried or punished in the adult system; rather, it means that considering the lesser culpability of juveniles, "the death penalty always will be disproportionate punishment for children and adolescents."[160]

C. Culpability

Recognizing the criticisms of the concurrence and the dissent that not all juveniles are incapable of having the requisite culpability, this section will present social and policy reasons for applying a blanket per se rule against imposition of the death penalty upon minors under sixteen years of age.

In the 1800's, social reforms began to establish a separate juvenile justice system, and by 1925, all but two states had established some type of independent and separate justice system for juveniles.[161] The basic reasoning was that juveniles are not totally responsible for their offenses and should not be treated as adults.[162] The system was designed to meet the needs of children and to concentrate on rehabilitation.[163]

There are a number of reasons that minors are less responsible than adults. First, "minors are less mature than adults," a fact that has been recognized by the Supreme Court.[164] Second, "minors . . . are less able to control their conduct and to recognize the consequences of their acts . . . ."[165] This is evidenced by the numerous laws that are enacted treating minors' legal responsibility differently from that of adults.[166] Minors are also still in their developmental stage, and statistics

156. Note, *The Decency of Capital Punishment for Minors, supra* note 154, at 771.

157. Comment, *Capital Punishment for Minors, supra* note 138, at 1478.

158. *Id.* at 1479 n.63; *see also* Workman v. Commonwealth, 429 S.W.2d 374, 377 (Ky. 1968) (imprisonment without parole is cruel and unusual when applied to a juvenile of age fourteen).

159. 458 U.S. 782, 798 (1982).

160. Comment, *Capital Punishment for Minors, supra* note 138, at 1503.

161. *Id.* at 1474-75.

162. Note, *The Decency of Capital Punishment for Minors, supra* note 154, at 770.

163. Comment, *Capital Punishment for Minors, supra* note 138, at 1475.

164. *Id.* at 1493 n.132.

165. *Id.* at 1493.

166. Thompson v. Oklahoma, 487 U.S. 815, app. 839-48 (1988) (Stevens, J., plurality opinion).

show that as they grow older "they commit fewer offenses, whether or not they are apprehended . . . ."[167] Rebellion, risk-taking, peer pressure, and youth subcultures virtually guarantee some type of criminal activity among a large percentage of juveniles.[168]

For those minors who may be so significantly advanced in their level of maturity as to be culpable as adults, there are still reasons for their exclusion from the death penalty. There is an accepted view that "juvenile crime results from environmental factors for which society must share the blame . . . ."[169] As recognized in *Eddings v. Oklahoma*,[170] " '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.' "[171]

It seems to be a well-established belief that children are different from adults and occupy " 'a very special place in life which law should reflect.' "[172] It seems inconsistent with our legal system that a juvenile should be able to be arbitrarily plucked from the protection afforded him by the juvenile system, based solely on his criminal offense, and subjected to the penalty of death. To do so is nothing more than paying lip service to the juvenile justice system and the interpretations that the Supreme Court has given to the eighth amendment of the Constitution.

D. Retribution and Deterrence: Seeking to Justify the Death Penalty

The death penalty has been recognized as " 'serv[ing] two principle social purposes: retribution and deterrence of capital crimes by prospective offenders . . . .' "[173] If the penalty, when applied to William Wayne Thompson, did not measurably contribute to either of these goals, it would be " 'nothing more than the purposeless and needless imposition of pain and suffering' and hence an unconstitutional punishment."[174] This note will now present reasons that the death penalty as applied to minors does not measurably contribute to either of the two social principles recognized by the Supreme Court.

1. Retribution

Retribution is not a new concept in our society – the words "an eye for an eye" have long been spoken among the members of our society. Retribution is premised on the notion that the offender should get what he deserves, but it also provides an

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167. Comment, *Capital Punishment for Minors*, *supra* note 138, at 1494.

168. *Id.*

169. Note, *The Decency of Capital Punishment for Minors*, *supra* note 154, at 770; *see also* Comment, *Capital Punishment for Minors*, *supra* note 138, at 1495 n.143.

170. 455 U.S. 104 (1982).

171. *Id.* at 115 n.11.

172. Note, *The Decency of Capital Punishment for Minors*, *supra* note 154, at 776.

173. Thompson v. Oklahoma, 487 U.S. 815, 836 (1988) (Stevens, J., plurality opinion) (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976) (Stewart, Powell, and Stevens, JJ., plurality opinion)).

174. Enmund v. Florida, 458 U.S. 782, 798 (1982) (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977) (White, J., plurality opinion)).

avenue for society to vent its frustration and desire for vengeance against the criminal.[175]

The justification for retribution is the individual's culpability.[176] Considering a juvenile's lesser culpability, it is obvious that " 'they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.' "[177]

Granting the premise that society shares the responsibility for juvenile crime, society should not feel the need to execute juveniles when they go astray. In fact, society should recognize that one of its institutions has failed and should apply the same amount of legal protection after the crime is committed as before. It seems inconsistent to establish a dual legal system to treat juveniles and to rehabilitate them and then, when one strays and commits a serious crime, to ignore the juvenile system and execute him as though he were an adult. Even acknowledging that there are juveniles that are beyond any hope of being rehabilitated, the justifications for imposing the death penalty simply do not apply to juveniles. Specifically, the juvenile is less culpable than his adult counterpart; therefore, the justification of retribution is inapplicable to the juvenile.

Transferring juveniles to the adult system has been criticized but is nonetheless a recognized process. Even so, retribution has never been a justifiable basis or factor in the transfer process.[178] The reason for transfer most likely is that the juvenile system lacks the proper resources to deal with some capital offenders. If retribution is not recognized as a basis for subjecting a juvenile to the adult system, it should likewise not be a justification for sentencing him to death in the adult system.

2. Deterrence

Whether the death penalty serves as a deterrent has been an area of disagreement among scholars and courts for many years.[179] Justices Brennan and Marshall argue that no "verifiable general deterrent effect exists."[180] There are two major criticisms concerning deterrence, and these will now be discussed with particular emphasis on how they apply to juveniles.

The Court in *Enmund* recognized that " 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.' "[181] Child development researchers and the Supreme Court have noted that juveniles lack the cognitive ability and social experience to make mature, moral judg-

175. Comment, *Capital Punishment for Minors, supra* note 138, at 1506-10.

176. *Enmund*, 458 U.S. at 800.

177. Eddings v. Oklahoma, 455 U.S. 104, 115 n.11 (1982).

178. Comment, *Capital Punishment for Minors, supra* note 138, at 1509.

179. Streib, *The Eighth Amendment and Capital Punishment of Juveniles, supra* note 38, at 392-93.

180. *Id.*

181. Enmund v. Florida, 458 U.S. 782, 799 (1982) (quoting Fisher v. United States, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)).

ments.[182] The Supreme Court has stated that " 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.' "[183]

Furthermore, it has been recognized that if a particular offender can be distinguished from the rest of society, failure to punish him will not diminish the deterrent effect on the rest of society.[184] If potential murderers are going to be deterred by the execution of an offender, it is most likely that they will be deterred if the executed offender has characteristics with which they can readily identify.[185] Therefore, executing minors will have no general deterrent effect on the adult population, and it is also doubtful that executing minors will have any deterrent effect on juveniles.

Minors often display risk-taking behavior and develop an attitude of defiance toward death. This is evidenced by activities such as the use of hazardous drugs and alcohol, reckless driving, and responding to dangerous dares.[186] If a minor ever consciously planned and thought about committing his crime, the death penalty might, in the minor's eyes, propel him into a position that would gain him notoriety and respect from his peers, thereby making the crime of murder possibly more appealing to the juvenile.[187]

The most important consideration is the premise that juveniles will rarely, if ever, consider the death penalty before committing their crime; therefore, no deterrent effect can exist. In an interview aired on ABC's World News Tonight on April 15, 1985, Thompson was asked if he had ever thought about the death penalty before committing his crime. His response was that he only had thoughts of "playing ball or just hanging around with his friends."[188]

This remark by Thompson could be interpreted as a result of various factors. It could be interpreted as evidence of the juvenile justice system's failure to deter him. It could also be interpreted as a failure of the criminal justice system as a whole. It may also show that Thompson is a hardened youth who has no conception of right or wrong. What Thompson's remarks certainly show is that the death penalty was no deterrent to him.

The second criticism of deterrence is that in order for deterrence to be effective there must exist the certainty of receiving a particular punishment.[189] There are two considerations which support the proposition that no certainty exists that a juvenile may receive the death penalty. First, "[m]ost minors . . . do not think that they will get caught," and available evidence shows that they usually are not

182. Streib, *The Eighth Amendment and Capital Punishment of Juveniles*, *supra* note 38, at 394.

183. Bellotti v. Baird, 443 U.S. 622, 635 (1979) (Powell, J., plurality opinion).

184. Comment, *Capital Punishment for Minors*, *supra* note 138, at 1511.

185. *Id.* at 1510-11.

186. *Id.* at 1512.

187. *Id.*

188. Streib, *The Eighth Amendment and Capital Punishment of Juveniles*, *supra* note 38, at 393 n.179.

189. Comment, *Capital Punishment for Minors*, *supra* note 138, at 1512-13.

caught.[190] Second, because of the subjective and arbitrary transfer system, a juvenile is never sure that he will be tried as an adult. Further, if he does consider being tried as an adult, he knows his age will be a mitigating factor in his sentencing, which further extinguishes the possibility in a juvenile's mind of receiving the death penalty.[191] The foregoing reasons evidence a tenuous link between a juvenile, his crime, the juvenile system, the transfer process, the adult system, and, finally, the sentence of death. As a result, deterrence can hardly find any justification as applied to juveniles.

V. TODAY'S YOUTH—YESTERDAY'S JUVENILE JUSTICE SYSTEM

When the social reformers of the 1800's pushed for the establishment of a juvenile system to separate minors from hardened adult criminals and to rehabilitate the minors, they could never have imagined the impact of drugs and gangs that presently plague our nation's youth. However the system was established for the protection of minors, and this concern is no less valid today. Minors are the children of our society, and society must extend to them every possible chance for rehabilitation so that they can become productive adults.

With the current poverty and unemployment levels, the gangs, and the lure of easy "crack" money, juveniles are being exploited and are exploiting each other. The original founders of the crack empire recognized early on that juveniles could be their most valuable resource. With the temptation of being able to make thousands of dollars per week, even children as young as nine[192] are being lured into the trade.

Juveniles do not receive mandatory sentences for dealing drugs, as would their older counterparts. Additionally, they are rarely detained for any significant length of time due to the lenience and lack of resources of the juvenile system. Accordingly, dealers are saved the trouble of training new workers; they only have to wait a short time for the experienced ones to return.[193] According to George Robinson, Assistant District Attorney for Fulton County, Georgia, " '[t]here is no provision under our law to mandate restrictive custody for these youths. They're selling drugs, and we're just spanking them on the hands.' "[194] These youths are being tempted by, and awarded with, cars, gold, furs, clothes, large amounts of cash, and "hero" status among their peers. In the inner cities, many families desperately need the money their young crack dealers bring in and actually encourage their quitting school to deal.[195] It is easy money; they see that they do not get caught; and, when they do, nothing very severe happens to them.

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190. *Id.* at 1513.

191. *Id.*

192. Hackett & Lerner, *L.A. Law: Gangs and Crack*, NEWSWEEK, Apr. 27, 1987, at 35, 366.

193. Lamar, *Kids Who Sell Crack*, TIME, May 9, 1988, at 20, 22.

194. *Id.*

195. *Id.* at 23.

These young dealers are also heavily armed with automatic weapons and are not in any way hesitant to use them.[196] They do not fully comprehend the value of life and are an exceptionally dangerous drug-dealing force.[197] They live for today and make the best of it. They do not see into the future nor do they comprehend that they may die an early death.[198] This ease of success for these young criminals is largely facilitated by the juvenile justice system. It allows them to be smacked on the hand and then to be let back out to resume operations. The legal system must adapt to this crisis and readjust the penalty structure to allow these juveniles to be adequately punished. The juvenile justice system should not be used to exploit the nation's children.

The Court's decision in *Thompson* merely adds to the bargaining power of the drug lords and increases the problem. Young dealers know that the juvenile system protects them, and even if they are waived to the adult system, their worst fear now is imprisonment. Normally, juveniles do not weigh the punishments involved before they act, but in the drug world, the experienced drug lords fully educate the youngsters about their special place in the law. The drug lords use this as a recruiting device by showing the youngsters that they can earn substantial amounts of money, while having no fear of harsh punishment.

This is not to suggest that the death penalty should be applied to juveniles; rather, it suggests that we should undertake an examination of how the juvenile justice system operates with regard to today's youth. Furthermore, this struggle with the question of whether the system is a success or a failure is partly due to the fact that juveniles have never fitted neatly into the criminal justice system and probably never will. *Thompson* demonstrates this struggle to fit the juvenile into the system.

VI. CONCLUSION

Although the *Thompson* plurality's decision has received many criticisms, it survives as a sound interpretation of the eighth amendment's "cruel and unusual punishment" clause. The plurality recognized that juveniles are afforded different and special protections and treatments within the legal system. The plurality also recognized juveniles' lesser culpability and responsibility, thereby making the death penalty as applied to them "cruel and unusual punishment."

This issue is a moral one evoking powerful emotions within each of us. The plurality was criticized for acting in accordance with its emotions, but even so, the plurality found enough reasons to justify its decision as a rationally based judicial interpretation of the eighth amendment.

Putting the moral issue aside, the decision of the plurality is justifiable. It has been the history of this country to establish a dual legal system, thereby creating a separate juvenile justice system in order to treat juveniles with special care in hopes of rehabilitating them. This country adopted a Constitution that centers on

196. *Id.* at 24.
197. *Id.*
198. *Id.* at 27, 30.

protecting the rights of citizens and, particularly applicable here, the underlying premise of the eighth amendment – the dignity of all persons. It has also been the history of this country to set examples and impress upon other countries the principles of democracy and protection of human dignity. We, as a country, are the forerunner in criticizing other countries for oppressive and undignified treatment of their citizens.

With these reasons in mind, it, therefore, is totally inconsistent with our country's principles that the United States be in the minority of countries that allow execution of minors. The practice of executing minors does not protect the dignity of the nation's children; moreover, it does not protect the dignity of the nation. To summarize what has been said, the following quote is offered:

> The lesson is simply this: A decent society places certain absolute limits on the punishments that it inflicts – no matter how terrible the crime or how great the desire for retribution. And one of those limits is that it does not execute people for crimes committed while they were children.[199]

J. David Clark, Jr.

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199. Bruck, *Executing Juveniles For Crime*, N.Y. Times, June 16, 1984, at 23, col. 3.