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Executing Juvenile Offenders: A Reexamination of Stanford v. Kentucky in Light of Atkins v. Virginia

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EXECUTING JUVENILE OFFENDERS:  
A REEXAMINATION OF STANFORD v. KENTUCKY  
IN LIGHT OF ATKINS v. VIRGINIA  

INTRODUCTION  

The body of three-year-old Ollie Brown was found in 1995 alongside those of her mother and her sister.1 The ensuing murder investigation led to the arrest and the conviction of Toronto Patterson, a relative of all three victims.2 The State of Texas executed Patterson on August 28, 2002, after the United States Supreme Court denied his application for stay of execution.3 At the time of the murders, Patterson was only 17 years old.4  

The Court’s denial of Patterson’s application for stay of execution was not without controversy; three Supreme Court Justices dissented, which is uncommon in these rulings.5 The three dissenting Justices were Stevens, Ginsburg, and Breyer.6  

Justice Stevens believed that the Eighth Amendment prohibited the execution of persons who committed their relevant crimes when under the age of 18.7 Justice Stevens had previously joined Justice Brennan’s dissenting opinion in Stanford v. Kentucky,8 where the Court upheld the constitutionality of imposing the death penalty on 16- and 17-year-old murderers.9 While dissenting from the denial of Patterson’s stay of execution, Justice Stevens wrote:

2. See id.
4. Id.
5. See Patterson v. Texas, 536 U.S. 984 (2002); Liptak, supra note 3.
6. See Patterson, 536 U.S. at 984-85.
7. Id. at 984. The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.
9. Id. at 380.
The issue [of capital punishment for teenage offenders] has been the subject of further debate and discussion [since the *Stanford* decision] both in this country and in other civilized nations. Given the apparent consensus that exists among the states and in the international community . . . I think it would be appropriate for the Court to revisit the issue at the earliest opportunity.  

Justices Ginsburg and Breyer agreed, adding that the Court’s decision last term in *Atkins v. Virginia* “made it tenable for a petitioner to urge reconsideration of *Stanford v. Kentucky.*”  

In *Atkins*, the Court overturned its prior decision in *Penry v. Lynaugh* and held that applying capital punishment to mentally retarded offenders violated the Eighth Amendment. Central to Justice Ginsburg’s assertion that the Court’s decision in *Atkins* made it “tenable” to reconsider the *Stanford* holding is that many traits of mildly mentally retarded offenders, such as limitations in reasoning, judgment, and impulse control, apply with similar force to juvenile offenders. Notably, the issues of the constitutionality of executing juvenile offenders and mentally retarded offenders have “moved in tandem in the past.” The Supreme Court decided *Stanford v. Kentucky* and *Penry v. Lynaugh* on the same day in 1989. A re-examination of the *Stanford* decision is also particularly appropriate.

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at this time to resolve the Court’s apparent split in methodology used to answer Eighth Amendment questions.\textsuperscript{18}

However, the Supreme Court dismissed its most recent opportunity to revisit the issue.\textsuperscript{19} Justice Stevens once again dissented from the Court’s denial of the petition for writ of habeas corpus, this time joined by Justices Breyer, Ginsburg, and Souter.\textsuperscript{20} Justice Stevens wrote that “[t]he practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society”; he went on to describe these executions as “shameful.”\textsuperscript{21}

Part I of this Note briefly reviews the history of death penalty jurisprudence in the United States as applied to juvenile offenders.\textsuperscript{22} Part II analyzes the Supreme Court’s methodology in applying the Eighth Amendment to death penalty controversies.\textsuperscript{23} Finally, Part III discusses whether the United States’ current tolerance of executing minors is coming to an end in light of the Court’s analysis and decision in Atkins.\textsuperscript{24} This Note concludes that, applying the Court’s methodology in Atkins, the execution of juvenile offenders violates the Eighth Amendment.\textsuperscript{25}

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\textbf{18.} See generally Atkins v. Virginia, 536 U.S. 304, 322-28 (2002) (Rehnquist, C.J., dissenting). Chief Justice Rehnquist argued that the plurality’s reliance on international law, views of professional organizations, and public-opinion polls was a mistake. See id. Additionally, in a separate dissenting opinion, Justice Scalia criticized the plurality’s willingness to exercise its own judgment on the “acceptability of the death penalty” by conducting a proportionality analysis. See id. at 348-52 (Scalia, J., dissenting).


\textbf{20.} Stanford, 537 U.S. at 968.

\textbf{21.} Id. at 972.

\textbf{22.} See discussion infra Part I.

\textbf{23.} See discussion infra Part II.

\textbf{24.} See discussion infra Part III.

\textbf{25.} See discussion infra Conclusion.
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I. JUVENILE DEATH PENALTY JURISPRUDENCE IN THE UNITED STATES

At common law, all homicides carried the death penalty. However, children received some special treatment and protection from this harsh rule. Nonetheless, if the government was able to overcome a rebuttable presumption that the child lacked criminal intent, it could, at least theoretically, execute a child over the age of seven. While no child as young as seven has been executed under the authority of the United States Constitution, young children were in no way immune to the possibility of capital punishment. Thomas Grauinger was executed in 1642, in what later became the State of Massachusetts, making him the first known person under the age of 18 to be executed on "American soil." Over 350 children have been executed in the United States since that time.

In the ensuing years, the American colonies, and later the states, attempted to "develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." Towards this end, the legal system began separating murder into various "degrees," with only the most severe, or first degree, warranting the death penalty. Near the end of the 19th century, the legal system also began to consider the uniqueness of juvenile offenders, leading some states to create a

27. See Suzanne D. Stratton, The Juvenile Death Penalty: In the Best Interests of the Child?, 26 LOY. U. CHI. L.J. 147, 150 (1995) (noting that, at common law, children under seven were incapable of possessing criminal intent, while children between the ages of seven and 14 enjoyed a rebuttable presumption that they lacked criminal intent).
29. See Stratton, supra note 27, at 151. "The youngest offender ever executed under the United States Constitution was James Arcene, a ten-year-old Cherokee, who was hanged in Arkansas in 1885 for participating in a robbery and a murder." Id.
31. See Executions, supra note 30.
33. Id. at 111; Marcotte, supra note 26, at 622.
separate system for children that stressed rehabilitation over punishment.\textsuperscript{34} The movement for a separate juvenile justice system proved to be influential, and today juvenile justice remains largely committed to rehabilitating young offenders.\textsuperscript{35} However, some states remove certain violent offenses "such as murder, manslaughter, rape, and robbery" from the juvenile justice system's reach.\textsuperscript{36} As a result, these states can subject a child accused of such an offense to more severe adult penalties, including capital punishment.\textsuperscript{37} Additionally, in 13 states, the juvenile courts' jurisdiction does not extend to all children under 18 years of age; instead, the maximum age is set at 16 or 17.\textsuperscript{38}

The United States Supreme Court brought the death penalty in this country to a temporary halt, for adults as well as children, in \textit{Furman v. Georgia}.\textsuperscript{39} In his concurring opinion in \textit{Furman}, Justice Brennan stated that death penalty sentencing, as courts were imposing it, lacked sufficient guidelines and therefore violated the Eighth and Fourteenth Amendments.\textsuperscript{40} The "substantial risk that [the death penalty] would be inflicted in an arbitrary and capricious manner" concerned the Court.\textsuperscript{41} Significantly, however, the Court refrained from holding the death penalty unconstitutional per se, leading a majority of states to alter their death penalty statutes so that the statutes complied with \textit{Furman}'s mandates.\textsuperscript{42} Less than five years later, in \textit{Gregg v. Georgia},\textsuperscript{43} the Court upheld an altered state death

\begin{itemize}
\item 34. Nguyen, supra note 28, at 403.
\item 35. See id.
\item 36. Id. at 403-04.
\item 37. Id. at 404.
\item 39. See 408 U.S. 238, 239-40 (1972) (per curiam).
\item 40. See id. at 291-95 (Brennan, J., concurring).
\item 43. 428 U.S. 153 (1976).
\end{itemize}
penalty statute and reaffirmed that capital punishment did not violate the Eighth Amendment per se.\(^{44}\)

The Supreme Court directly addressed the constitutionality of the death penalty as applied to juvenile offenders in *Thompson v. Oklahoma*.\(^{45}\) There, the Court vacated the death sentence of an Oklahoma teenager who was 15 years old when he participated in the murder of his former brother-in-law, concluding that executing a juvenile offender who committed his relevant offense while under the age of 16 was "cruel and unusual punishment."\(^{46}\) In *Thompson*, the Court refused to "draw a line" at 18 years old, preferring instead "to decide the case before [it]."\(^{47}\) Therefore, the question of whether it was unconstitutional to execute juvenile offenders for offenses they committed at the age of 16 or 17 remained unanswered.\(^{48}\)

In its next term, the Court answered this question in *Stanford v. Kentucky*.\(^{49}\) The Court faced two consolidated cases in *Stanford*: one involving Kevin Stanford, who raped and murdered a gas station attendant when he was 17, and the other involving Heath Wilkins, who likewise murdered a convenience store attendant when he was 16 years old.\(^{50}\) The Court upheld the death sentences of both juveniles, concluding that applying the death penalty to juvenile offenders 16 and older did not offend the Eighth Amendment.\(^{51}\) Therefore, the Court’s decisions in *Thompson* and *Stanford* established the minimum age for constitutionally permissible execution as 16 at the time of the offense.\(^{52}\)

Sixteen- and seventeen-year-old offenders are not without some safeguards when facing the possibility of being sentenced to death: the offender’s age is a relevant mitigating factor that the sentencing

\(^{44}\) *Id.* at 169.


\(^{46}\) *See id.* at 818-19, 838.

\(^{47}\) *See id.* at 838.


\(^{49}\) *Id.*; see 492 U.S. 361 (1989).

\(^{50}\) *Stanford*, 492 U.S. at 364-66.

\(^{51}\) *Id.* at 380.

\(^{52}\) *See Gasparini, supra note 48, at 1080.*
party must consider before selecting an appropriate punishment.\textsuperscript{53} However, the dissenting Justices in Stanford, among others, have seriously challenged the adequacy of such safeguards.\textsuperscript{54} Justice Brennan, dissenting in Stanford, questioned how much credence age receives as a factor in the determination, arguing instead that "the seriousness of the offense, the extent of prior delinquency, and the response to prior treatment within the juvenile justice system" are the factors given the most consideration.\textsuperscript{55}

II. EIGHTH AMENDMENT ANALYSIS OF THE DEATH PENALTY

Analysis of the death penalty's constitutionality rests on the Eighth Amendment.\textsuperscript{56} The Supreme Court has made it clear that the Eighth Amendment prohibition against cruel and unusual punishment is "judged not by the standards that prevailed . . . when the Bill of Rights was adopted, but rather by those that currently prevail."\textsuperscript{57} The Court expressed this interpretation of the Eighth Amendment in Trop v. Dulles.\textsuperscript{58} In reviewing a soldier's penalty of denationalization for desertion, the Court stated that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."\textsuperscript{59} Therefore, the Court must

\textsuperscript{53} See Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) ("[W]e conclude that the Eighth . . . Amendment['] require[s] that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense . . . .") (alteration in original) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)); see also Marcotte, supra note 26, at 634-35 (noting the requirement that consideration be given to all mitigating factors, including age, before an offender is sentenced to die).

\textsuperscript{54} Stanford, 492 U.S. at 396-97 (Brennan, J., dissenting) ("[I]t is not sufficient . . . that an individual youth's culpability may be taken into account in the decision to transfer him or her from the juvenile to the adult court system . . . or that a capital sentencing jury is instructed to consider youth and other mitigating factors."). See generally Amnesty International, United States of America: Indecent and Internationally Illegal: The Death Penalty Against Child Offenders, at 29, at http://www.amnestyusa.org/news/2002/usas09252002_2.html (Sept. 25, 2002) [hereinafter Amnesty] (calling for the U.S. Supreme Court to revisit its Stanford decision "at the earliest opportunity").

\textsuperscript{55} Stanford, 492 U.S. at 397.


\textsuperscript{57} Atkins v. Virginia, 536 U.S. 304, 311 (2002).

\textsuperscript{58} See 356 U.S. 86 (1958).

\textsuperscript{59} Id. at 87, 101.
examine shifting contemporary values to give the Amendment meaning.\(^{60}\)

Traditionally, the Court has used a related “proportionality” analysis in examining punishments under the Eighth Amendment.\(^{61}\) Such an analysis asks first “whether the ‘nexus between the punishment imposed and the defendant’s blameworthiness’ is proportional.”\(^{62}\) Further, the proportionality analysis requires an examination of “whether a punishment makes any ‘measurable contribution to acceptable goals of punishment.’”\(^{63}\)

While these standards provide an initial framework in determining whether a punishment is cruel and unusual, the Court in \textit{Trop}\(^{64}\) neglected to identify the methods of determining “the modern standards of decency.” Additionally, the plurality in \textit{Stanford}\(^{65}\) questioned the continued relevance of the proportionality analysis as a related but distinct determination.\(^{65}\) As the cases that follow demonstrate, the Court has left open for debate the methodology that should be employed when analyzing a particular punishment under the Eighth Amendment.\(^{66}\)

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\footnotesize \textit{Stanford}, 492 U.S. at 382 (O'Connor, J., concurring in part) (quoting \textit{Thompson}, 487 U.S. at 853 (O'Connor, J., concurring in the judgment)).
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\footnotesize \textit{Gasparini, supra} note 48, at 1081-82.
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\footnotesize \textit{See Stanford}, 492 U.S. at 379.
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\footnotesize \textit{Gasparini, supra} note 48, at 1082.
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A. Thompson v. Oklahoma

William Thompson was 15 years old when he and three other men participated in murdering Charles Keene.\textsuperscript{67} The attackers severely beat Keene; forced him into a car; shot him twice; cut his throat, chest, and abdomen; and finally attached Keene’s body to blocks and threw it into a nearby river.\textsuperscript{68} Afterwards, Thompson repeatedly bragged about his participation in the murder.\textsuperscript{69} Keene was Thompson’s former brother-in-law, and Thompson’s motive for the killing was apparently retribution for past domestic violence by Keene towards Thompson’s sister.\textsuperscript{70} A jury subsequently convicted Thompson of murder in the first degree, and he received a death sentence.\textsuperscript{71}

In deciding whether applying the death penalty to Thompson would constitute cruel and unusual punishment, the Court first sought to ascertain whether such punishment was contrary to the “evolving standards of decency that mark the progress of a maturing society.”\textsuperscript{72} To make such a determination, the Court first looked to objective factors such as “legislative enactments” and the sentencing behavior of juries.\textsuperscript{73}

Reviewing the state statutes on point, the Court noted that, at the time of the decision, 13 states and the District of Columbia refused to apply the death penalty entirely.\textsuperscript{74} Eighteen other states had directly addressed the issue, and each of these had set the minimum age for imposition of the death penalty at 16.\textsuperscript{75} According to the majority, the remaining 19 states had not focused specifically on setting a minimum age for the death penalty, and, as a result, it was “reasonable to put this group . . . to [the] . . . side.”\textsuperscript{76} Furthermore, the

\begin{itemize}
  \item \textsuperscript{67} Thompson v. Oklahoma, 487 U.S. 815, 819, 860 (1988).
  \item \textsuperscript{68} Id. at 860-61.
  \item \textsuperscript{69} See id.
  \item \textsuperscript{70} See id. at 860.
  \item \textsuperscript{71} Id. at 818.
  \item \textsuperscript{72} Id. at 821 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
  \item \textsuperscript{73} Thompson, 487 U.S. at 822.
  \item \textsuperscript{74} Id. at 826 & n.25.
  \item \textsuperscript{75} Id. at 829.
  \item \textsuperscript{76} Id. In dissent, Justice Scalia argued that in setting these 19 states aside, the majority was ignoring that “a majority of the [s]tates for which the issue exists (the rest do not have capital punishment) are of
majority noted that, in conducting a "general comparison of [the states]," Thompson's execution would not even be "theoretically" possible in 32 states, while it would be "theoretically" possible in merely 19.\textsuperscript{77} The Court also noted that in 2 of the 19 states in which Thompson's execution was still theoretically possible, those states had not executed anyone since the Court effectively put a temporary moratorium on the death penalty in \textit{Furman}, thereby questioning the continued vitality of the death penalty in those states.\textsuperscript{78}

Looking next at the behavior of sentencing juries, the majority found that these juries had only sentenced five offenders below the age of 16 to death between 1982 and 1986.\textsuperscript{79} The Court determined that the rarity of sentencing offenders below the age of 16 to death favors the argument that such a penalty constitutes cruel and unusual punishment according to current societal values.\textsuperscript{80}

However, the majority in \textit{Thompson} did not restrict its analysis of the evolving "standards of decency" to these two objective factors.\textsuperscript{81} The Court noted that "respected professional organizations" opposed executing a person who was under 16 at the commission of the crime.\textsuperscript{82} The majority also took into account the international community's anti-death-penalty views.\textsuperscript{83} These factors led the Court to conclude that a consensus had developed against executing a person who committed the relevant offense before the age of 16.\textsuperscript{84}

Turning its attention to a subjective proportionality analysis, the Court stated, "[T]he imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community." \textit{Id.} at 832.\textsuperscript{85}

The view that death is not different insofar as the age of juvenile criminal responsibility is concerned." \textit{Id.} at 868 (Scalia, J., dissenting).\textsuperscript{86}

\textsuperscript{77} \textit{Id.} at 829 n.29.

\textsuperscript{78} \textit{Id.} (noting that South Dakota and Vermont have not imposed the death penalty since 1972).

\textsuperscript{79} \textit{Thompson}, 487 U.S. at 832-33.

\textsuperscript{80} \textit{Id.} at 833. "[T]he imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community." \textit{Id.} at 832.

\textsuperscript{81} \textit{See id.} at 830-31.

\textsuperscript{82} \textit{Id.} at 830. "[T]he American Bar Association and the American Law Institute have formally expressed their opposition to the death penalty for juveniles." \textit{Id.}

\textsuperscript{83} \textit{Id.} at 830-31. "The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union." \textit{Id.} at 831. In dissent, Justice Scalia argued this factor was irrelevant; "[w]e must never forget that it is a Constitution for the United States of America that we are expounding." \textit{Id.} at 868 n.4.

\textsuperscript{84} \textit{See id.} at 838.
Amendment permits imposition of the death penalty[,] on one such as petitioner who committed a heinous murder when he was only 15 years old."85 The majority cited *Marbury v. Madison*86 to support this contention.87 Justice Scalia took exception to this in his dissent, arguing that such a subjective analysis was inappropriate in answering this constitutional question.88 Conducting its proportionality analysis, the Court noted that teenagers are "more vulnerable, more impulsive, and less self-disciplined than adults," that they are more easily influenced by their peers, and that they "live[] in an intense present."89 As a result, the majority concluded that juveniles are less blameworthy than adults who commit comparable offenses.90 Juveniles' diminished culpability, coupled with their "capacity for growth" and dependence on society, led the majority to conclude that executing an offender who committed the offense when under the age of 16 would constitute a disproportionate punishment.91 Justice Scalia strongly criticized the majority's conclusion, stating it was "implausible" "[a]s a sociological and moral conclusion."92 The majority also concluded that imposing a

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86. *I. Cranch 137* (1803) (holding that the Supreme Court is the ultimate authority for constitutional interpretation).
88. *Id.* at 873 (Scalia, J., dissenting).
89. *Id.* at 834-35 & n.43.
90. *Id.* at 835.
91. *See id.* at 815, 836-37.
92. *Id.* at 864 (Scalia, J., dissenting).
death sentence on a 15-year-old offender would not further the death penalty's goal of deterrence.\(^{93}\)

**B. Stanford v. Kentucky**

Kevin Stanford was 17 years old when he and an accomplice robbed a service station.\(^{94}\) During the robbery, they raped the attendant, Barbel Poore, and then the pair drove Poore to a "secluded area" where Stanford fatally shot her in the head.\(^{95}\) A jury convicted Stanford of multiple charges related to the crime and sentenced him to death.\(^{96}\)

In an entirely unrelated offense, 16-year-old Heath Wilkins, along with an accomplice, robbed a convenience store killing the attendant during the course of the robbery by stabbing her repeatedly in the chest and neck.\(^{97}\) Wilkins pled guilty to multiple charges stemming from the robbery and murder, and he received a death sentence.\(^{98}\)

The Court considered these two cases together to resolve the question explicitly left unanswered in *Thompson*: whether imposing the death penalty on an offender who commits a capital crime at the age of 16 or 17 constitutes cruel and unusual punishment in violation of the Eighth Amendment.\(^{99}\) Chief Justice Rehnquist and Justice White, who joined the dissenting opinion in *Thompson*, again joined Justice Scalia, this time writing for the plurality.\(^{100}\) Justice Kennedy, who took no part in the *Thompson* decision, also joined the plurality opinion.\(^{101}\) Justice O'Connor concurred in the judgment.\(^{102}\)

Like the Court in *Thompson*, the plurality began its Eighth Amendment analysis by looking towards "the 'evolving standards of

\(^{93}\) *Thompson*, 487 U.S. at 837. "The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." *Id.*


\(^{95}\) *Id.*

\(^{96}\) *Id.* at 366.

\(^{97}\) *Id.*

\(^{98}\) *Id.* at 367-68.


\(^{100}\) *See Stanford*, 492 U.S. at 364; *Thompson*, 487 U.S. at 859.

\(^{101}\) *See Stanford*, 492 U.S. at 364; *Thompson*, 487 U.S. at 838.

\(^{102}\) *See Stanford*, 492 U.S. at 380.
decency that mark the progress of a maturing society.”¹⁰³ To determine whether a “national consensus” was apparent, the Court again analyzed state statutes addressing the issue.¹⁰⁴ This time, the Court concluded that no national consensus had developed against executing offenders who were 16 or 17 years old at the time of the commission of a capital crime.¹⁰⁵

The plurality in Stanford refused to conduct a “general comparison of [the s]tates” as the Court did in Thompson,¹⁰⁶ concluding that the number of jurisdictions that prohibit the death penalty entirely is irrelevant to the question of whether a national consensus exists against the imposition of the death penalty for minors specifically.¹⁰⁷ Therefore, the Court restricted its analysis to those [s]tates that permitted the death penalty to determine whether a consensus had developed as to whether executing juvenile offenders was contrary to society’s contemporary standards.¹⁰⁸ The plurality noted that less than half of the jurisdictions that permitted the death penalty prohibited its imposition upon 16- or 17-year-old offenders.¹⁰⁹ The Court stated that “[t]his does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual.”¹¹⁰

Justice Brennan, writing for the dissent, argued that the Court could not exclude from the analysis the number of jurisdictions that refused to apply the death penalty altogether; rather, it should exclude those jurisdictions that had failed to set a minimum age for applying the death penalty because whether these state legislatures had directly considered the decency of executing juvenile offenders and made an

¹⁰³. See id. at 369 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
¹⁰⁴. See id. at 370 & n.2.
¹⁰⁵. See id. at 370-71.
¹⁰⁶. Thompson, 487 U.S. at 829.
¹⁰⁷. Stanford, 492 U.S. at 370 n.2. To make such a comparison, the plurality argued, would be “like discerning a national consensus that wagering on cockfights is inhumane by counting within that consensus those [s]tates that bar all wagering.” Fourteen states plus the District of Columbia, and arguably Vermont as well, prohibited the death penalty when the Court decided the case. See id. at 384 & n.1.
¹⁰⁸. See id. at 370 & n.2.
¹⁰⁹. See id. at 370.
¹¹⁰. Id. at 370-71.
informed decision was unclear.111 Further, the dissent argued that, even including the 19 states that had not set a minimum age for the death penalty, a majority of the states still would not allow the executions of Stanford or Wilkins.112

The Court next analyzed the sentencing behavior of juries.113 The plurality noted that death sentences for juvenile offenders were rare.114 The Court in Stanford gave this fact much less weight than the Court in Thompson, however, concluding that this rarity "does not establish the requisite proposition that the death sentence for offenders under 18 is categorically unacceptable to prosecutors and juries."115

Departing from precedent, the Court in Stanford refrained from considering the anti-death-penalty views of professional organizations and the international community in its determination of the evolving standards of decency.116 The plurality argued that the views of the international community were irrelevant to the question of whether the death penalty was acceptable to American society.117 Further, the Court argued that the views of professional organizations, while relevant, were of a too "uncertain foundation[]" to support a constitutional determination.118 For the same reason, the plurality refused to consider other evidence from "public opinion polls" and "the views of interest groups."119

The Court in Stanford, again departing from the methodology employed in Thompson and in other precedent, expressly refused to

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111. Id. at 385 (Brennan, J., dissenting). "[T]he decisions of legislatures that are only implicit ... lack the 'earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty.'" Id. (quoting Thompson, 487 U.S. at 857 (O'Connor, J., concurring in judgment)).
112. See id. (noting that there would be no possibility of sentencing Stanford to death in 27 states, and no possibility of sentencing Wilkins to death in 30 states).
113. Stanford, 492 U.S. at 373.
114. See id. at 373-74. The Court noted that executions resulting from crimes committed by juvenile offenders constituted merely 2% of all executions between 1942 and 1986. Id.
115. See id. at 374. "[T]he very considerations which induce petitioners and their supporters to believe that death should never be imposed on offenders under 18 cause prosecutors and juries to believe that it should rarely be imposed." Id.
116. See id. at 369 n.1; Lechner, supra note 56, at 114-15.
117. Stanford, 492 U.S. at 369 n.1.
118. Id. at 377.
119. Id.
conduct a subjective proportionality analysis to decide Eighth Amendment controversies. The Court argued that, if it could be clearly shown that applying the death penalty to minors would not deter future crime, or if it could always be shown that, because of age, a juvenile offenders’ culpability is sufficiently diminished to the extent that execution would be a disproportionate punishment, the Court would strike down such punishment under the Fourteenth Amendment as lacking a rational basis. The plurality argued that these two propositions, however, had not been demonstrated. The plurality acknowledged that prior precedent had included proportionality analysis but argued that courts had not struck down any punishment as being cruel and unusual solely on that basis. Justice O’Connor, while concurring in the decision, refused to join the plurality’s rejection of the proportionality analysis, arguing that there was a “constitutional obligation” to examine the “nexus between the punishment imposed and the defendant’s blameworthiness.” Justice Brennan, writing for the dissenting Justices, was very critical of the plurality’s departure from precedent. The dissent noted that “[t]he constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.”

120. See id. at 379. “To say . . . that ‘it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty’ . . . on the basis of what we think ‘proportionate’ and ‘measurably contributory to acceptable goals of punishment’ . . . is to replace judges of the law with a committee of philosopher-kings.” Id. (quoting Enmund v. Florida, 458 U.S. 782, 797 (1982)); see also Lanier, supra note 42, at 1104.
121. Stanford, 492 U.S. at 377-78.
122. See id. at 378.
123. Id. at 379.
124. Id. at 382 (O’Connor, J., concurring in part) (quoting Thompson v. Oklahoma, 487 U.S. 815, 853 (1988)).
125. See id. at 383-91 (Brennan, J., dissenting). “The method by which this Court assesses a claim that a punishment is unconstitutional because it is cruel and unusual is established by our precedents, and it bears little resemblance to the method four Members of the Court apply in this case.” Id. at 383; see also Lanier, supra note 42, at 1105-06.
C. Atkins v. Virginia

In 1996, Daryl Atkins, with an accomplice, robbed Eric Nesbitt.\textsuperscript{127} The pair abducted Nesbitt, forced him to withdraw money from an automated teller machine, and then drove him to a remote location where they then fatally shot Nesbitt.\textsuperscript{128} A jury convicted Atkins of the offense and sentenced him to death.\textsuperscript{129} Although the evidence conflicted, a subsequent psychological examination of Atkins “indicated that [he] had a full scale IQ of 59.”\textsuperscript{130} The Supreme Court granted certiorari to re-examine whether imposing the death penalty on mentally retarded offenders is cruel and unusual punishment, and thereby prohibited by the Eighth Amendment.\textsuperscript{131}

The Court in Atkins, consistent with precedent, examined the “evolving standards of decency that mark the progress of a maturing society” to interpret the Eighth Amendment.\textsuperscript{132} The Court first looked towards the “objective” factor of legislative action.\textsuperscript{133} The Court noted that since 1986, 18 of the states that continued to apply capital punishment had enacted legislation forbidding its imposition on the mentally retarded.\textsuperscript{134} The dissent noted that 38 states continue to permit capital punishment; therefore, the 18 states that prohibit the execution of the mentally retarded remain a minority among the jurisdictions that do not forbid capital punishment entirely.\textsuperscript{135}

In its analysis, the majority in Atkins did not expressly include the 13 remaining jurisdictions that prohibit capital punishment entirely, as the Court had done in Thompson; however, it also did not reject the appropriateness of doing so.\textsuperscript{136} Rather, the Court relied on “the consistency of the direction of the change” to find that a national

\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 309. “‘Mild’ mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70.” Id. at 308 n.3.
\textsuperscript{131} Id. at 307.
\textsuperscript{132} Id. at 311-12 (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)).
\textsuperscript{133} See Atkins, 536 U.S. at 312.
\textsuperscript{134} Id. at 313-15. The 1986 Georgia execution of Jerome Bowden, who had an IQ of 65, strongly influenced the movement against the execution of mentally retarded offenders. Id. at 313 & n.8.
\textsuperscript{135} See id. at 342 (Scalia, J., dissenting).
\textsuperscript{136} See id. at 314-16; see also supra notes 74-78 and accompanying text.
The majority argued that, because legislation that is tough on crime is “far more popular” than protective legislation for offenders, the movement against applying the death penalty to mentally retarded offenders is “powerful evidence” that this punishment is contrary to society’s contemporary standards. The majority also noted that the movement was “overwhelmingly” approved in those states that had directly addressed the issue. Justice Scalia, in dissent, argued that the majority ignored the fact that change could not have gone in any other direction.

The majority opinion did not address the sentencing behavior of juries in much detail when considering whether imposing the death penalty on mentally retarded offenders was contrary to the evolving standards of decency. Dissenting, Chief Justice Rehnquist suggested such a consideration would not support finding a national consensus prohibiting the punishment in question.

The majority bolstered its conclusion that a national consensus had developed against the execution of mentally retarded offenders with evidence of anti-death-penalty views held by “organizations with germane expertise,” “religious communities,” and the “world community.” Additionally, the Court found relevant for consideration “polling data” showing a “widespread consensus among Americans” against executing mentally retarded offenders. Chief Justice Rehnquist objected to the consideration of this evidence in his dissenting opinion, stating that “[t]he Court’s suggestion that these sources are relevant to the constitutional question finds little

137. Atkins, 536 U.S. at 315-16.
138. Id.
139. Id. at 316.
140. Id. at 344 (Scalia, J., dissenting). “Given that 14 years ago all the death penalty statutes included the mentally retarded, any change . . . was bound to be in the one direction the Court finds significant enough to overcome the lack of real consensus.” Id. at 344-45 (Scalia, J., dissenting).
141. Id. at 324 (Rehnquist, C.J., dissenting).
142. See id. “[E]xperts have estimated that as many as 10[9%] of death row inmates are mentally retarded . . . a number which suggests that sentencing juries are not as reluctant to impose the death penalty on defendants like petitioner . . . .” Id.
143. See Atkins, 536 U.S. at 316 n.21.
144. Id. at 317 n.21.
support in our precedents."\textsuperscript{145} This assertion that consideration of such evidence is unsupported by precedent is questionable at best.\textsuperscript{146}

Finally, the majority renewed the application of a subjective proportionality analysis that the plurality in \textit{Stanford} had discarded.\textsuperscript{147} The Court concluded that mentally retarded offenders have less culpability than non-mentally retarded offenders.\textsuperscript{148}

Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.\textsuperscript{149}

Because of these impairments, the Court determined that applying the death penalty to mentally retarded offenders did not "measurably contribute[]" to the punishment's goals of "retribution and deterrence."\textsuperscript{150} The Court stated that the same impairments that cause a mentally retarded offender to be less culpable also lessen such an offender's ability to understand the potential for execution as a punishment and to control his behavior due to this possibility.\textsuperscript{151} Dissenting, Justice Scalia renewed his objection to such subjective analysis.\textsuperscript{152}

\textsuperscript{145} \textit{Id.} at 322 (Rehnquist, C.J., dissenting).
\textsuperscript{146} See \textit{Gasparini}, supra note 48, at 1086-88; \textit{Lanier}, supra note 42, at 1104; \textit{Lechner}, supra note 56, at 114-15.
\textsuperscript{147} \textit{See \textit{Atkins}}, 536 U.S. at 311-12.
\textsuperscript{148} \textit{Id.} at 319.
\textsuperscript{149} \textit{Id.} at 318.
\textsuperscript{150} \textit{Id.} at 319, 321. Citing its decision in \textit{Godfrey v. Georgia}, 446 U.S. 420 (1980), in which it vacated a death sentence because the defendant's crime "did not reflect 'a consciousness materially more 'depraved' than that of any person guilty of murder,'" the Court reasoned that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the [s]tate, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." \textit{Id.} at 319.
\textsuperscript{151} \textit{Id.} at 320.
\textsuperscript{152} See \textit{id.} at 341, 348-49 (Scalia, J., dissenting) ("The arrogance of this assumption of power takes one's breath away.").
III. HAS THE TIME COME TO OVERTURN STANFORD?

A. Evolving Standards of Decency

The legislative movement that the Court recognized in Atkins against imposing the death penalty on mentally retarded offenders is not as pronounced on the issue of executing juvenile offenders.\(^\text{153}\) However, the Atkins decision appears to renew the possibility that a “general comparison of the [s]tates” is relevant in analyzing whether a “national consensus” has developed against imposing a specific penalty.\(^\text{154}\) Including states that prohibit the death penalty entirely in the consideration of whether the death penalty for juvenile offenders is consistent with society’s standards of decency makes sense.\(^\text{155}\) This comparison reveals that 38 states currently permit capital punishment, leaving 12 states and the District of Columbia that forbid imposition of the death penalty entirely.\(^\text{156}\) Sixteen of the 38 states that allow the death penalty, however, refuse to apply such a penalty to offenders under the age of 18.\(^\text{157}\) Therefore, imposition of the death penalty on a juvenile offender is possible in only a minority of states.\(^\text{158}\) Five additional states prohibit the imposition of the death penalty on persons who committed their offense below the age of 17.\(^\text{159}\)

The Court in Atkins also introduced a new consideration in determining whether a national consensus had developed: “the consistency of the direction of change.”\(^\text{160}\) Compared to legislation concerning the imposition of the death penalty on the mentally

\(^{153}\) See Atkins, 536 U.S. at 315 n.18 (recognizing that while 18 states had passed legislation prohibiting the death penalty for the mentally retarded, only two states had passed similar legislation on the juvenile issue); Liptak, supra note 3.

\(^{154}\) See supra note 136 and accompanying text.

\(^{155}\) See Amnesty, supra note 54. “Needless to say, a state which does not allow the execution of anyone, juvenile or adult, has by definition taken a stronger stand against the death penalty than by only exempting youthful offenders from it.” Id. at 4.

\(^{156}\) See Streib, supra note 38.

\(^{157}\) Id. Those states are: California, Colorado, Connecticut, Illinois, Indiana, Kansas, Maryland, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Tennessee, and Washington. Id.

\(^{158}\) See id. A juvenile offender could possibly receive the death penalty in 22 states (44%). See id.

\(^{159}\) Id. Those states are: Florida, Georgia, New Hampshire, North Carolina, and Texas. Id.

retarded, the direction of change in legislation concerning juvenile offenders is equally consistent against the allowance of such punishment.\footnote{See In re Stanford, 537 U.S. 968, 972 (2002) (Stevens, J., dissenting) (stating that “it is clear that the treatment of this issue by the legislatures has led to a trend in only one direction — toward abolition of the death penalty for juvenile offenders”); Amnesty, supra note 54, at 3. “No state has lowered the age of death penalty eligibility since executions resumed in 1977,” while five additional states have decided to prohibit the imposition of the death penalty against juvenile offenders since the Stanford decision. Id. at 3-4.}

While the Court in Stanford minimized the relevance of the behavior of sentencing juries in determining the evolving standards of decency, another look at this accepted objective factor is appropriate.\footnote{See generally Atkins, 536 U.S. at 316; Thompson v. Oklahoma, 487 U.S. 815, 822 n.7 (1988); Amnesty, supra note 54, at 6-7.} Jurisdictions in the United States have executed 21 people since 1977 for crimes they committed under the age of 18, while “a conservative analysis” finds that jurisdictions in the United States have executed over 30 mentally retarded offenders during that same time period.\footnote{Amnesty, supra note 54, at 8-9.} Also, there were far fewer juvenile offenders on death row before the Atkins decision than there were mentally retarded offenders.\footnote{See id. at 9.} Nonetheless, the Court in Atkins supported its finding of a national consensus with the assertion that executions of mentally retarded offenders had “become truly unusual.”\footnote{Atkins, 536 U.S. at 316.} Juries have been even more reluctant to sentence juvenile offenders to death.\footnote{See Amnesty, supra note 54, at 9; see also In re Stanford, 537 U.S. 968, 972 (2002) (Stevens, J., dissenting) (noting that juvenile offenders constitute merely 2% of the death row population).}

The Court’s willingness in Atkins to include the views of the international community, professional organizations, and the results of public opinion polls, is particularly significant to the issue of imposing the death penalty on juvenile offenders.\footnote{See Liptak, supra note 3; Amnesty, supra note 54, at 1; cf. Laurence A. Grayer, Comment, A Paradox: Death Penalty Flourishes in U.S. While Declining Worldwide, 23 DENV. J. INT’L L. & POL’Y 555, 555 (1995).} The Court determined this evidence to be irrelevant when it addressed the issue in Stanford.\footnote{See Stanford v. Kentucky, 492 U.S. 361, 369-75 (1989).}
executing juvenile offenders is widely accepted. In fact, the majority of the world's known executions of juvenile offenders since 1990 occurred in the United States.

Additionally, numerous professional organizations disapprove of the execution of juvenile offenders. The results obtained from public opinion polls also largely support the proposition that a national consensus has developed against executing child offenders.

B. Proportionality Analysis

Many of the characteristics that the Court recognized in Atkins as lessening the culpability of mentally retarded offenders are also found in children. "Adolescents 'are more vulnerable, more impulsive, and less self-disciplined than adults,' and are without the same 'capacity to control their conduct and think in long-range terms' . . . . They are [also] particularly impressionable and subject to peer pressure." In comparison, the Court in Atkins stated that mentally retarded offenders have a "diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses." Therefore, the conclusion of the Court's proportionality analysis in Atkins that mentally retarded

169. See In re Patterson, 536 U.S. 984, 984 (Stevens, J., dissenting) (noting "the apparent consensus that exists . . . in the international community against the execution of a capital sentence imposed on a juvenile offender"); Grayer, supra note 167, at 556-64; Nguyen, supra note 28, at 423-24; Amnesty, supra note 54, at 23-28.

170. Amnesty, supra note 54, at 25.

171. Stanford, 492 U.S. at 388-89 & n.4 (Brennan, J., dissenting); Amnesty, supra note 54, at 8 (citing the American Bar Association, the American Psychiatric Association, the Children's Defense Fund, and the Child Welfare League of America, among others).


173. See supra note 15.

174. Stanford, 492 U.S. at 395 (Brennan, J., dissenting); see also Gasparini, supra note 48, at 1091 (noting juveniles are more apt to "live for the moment"); Lechner, supra note 56, at 120 (stating that "[j]uvenile thinking is characterized by a false sense of power and impaired judgment" and that children are "more impulsive and less self-disciplined than adults").

offenders are not sufficiently culpable to further the death penalty goal of retribution is particularly persuasive precedent for a future analysis of whether executing juvenile offenders constitutes cruel and unusual punishment.\textsuperscript{176} While these arguments were made to the Court in \textit{Stanford}, the plurality refused to consider a proportionality analysis in responding to Eighth Amendment controversies.\textsuperscript{177} Therefore, the Court’s rejection of \textit{Stanford}’s restricted methodology and willingness to conduct a proportionality analysis in \textit{Atkins} makes a re-examination of \textit{Stanford} particularly appropriate.\textsuperscript{178}

As the Court recognized in \textit{Atkins}, the death penalty’s goal of deterrence is also not “measurably further[ed]” by executing those persons with such diminished culpabilities.\textsuperscript{179} “Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct . . . .”\textsuperscript{180} Executing people with diminished culpability, where the punishment will not measurably further the goals of retribution and deterrence, is a disproportionate punishment.\textsuperscript{181} “[I]f the Court’s reasoning in \textit{Atkins} is applied to the execution of child offenders, the only reasonable conclusion is that that practice, too, violates contemporary standards of decency” and constitutes a disproportionate punishment in violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.\textsuperscript{182}

\textbf{CONCLUSION}

While the Supreme Court has recently declined to reexamine the constitutionality of executing juvenile offenders, such a reexamination is particularly appropriate in light of the Court’s

\textsuperscript{176} \textit{See generally} Amnesty, \textit{supra} note 54, at 11-12.
\textsuperscript{177} \textit{See supra} notes 120-23 and accompanying text.
\textsuperscript{179} \textit{Atkins}, 536 U.S. at 320.
\textsuperscript{181} \textit{Id.} at 835-38.
\textsuperscript{182} Amnesty, \textit{supra} note 54, at 29.
EXECUTING JUVENILE OFFENDERS

decision last term in *Atkins v. Virginia*.\(^ {183}\) Our legal system has long recognized that juvenile offenders are unique and may require rehabilitation rather than severe forms of punishment.\(^ {184}\) Nevertheless, offenders who committed their relevant crimes while they were under the age of 18 are still subject to the death penalty in some jurisdictions.\(^ {185}\) As long as an offender is 16 years of age or older at the time of the offense, the Supreme Court has decided that the offender can constitutionally be executed.\(^ {186}\)

In deciding whether a punishment is constitutional, the Court must consider whether the punishment implicates the Eighth Amendment’s prohibition against cruel and unusual punishment.\(^ {187}\) The methodology that the Court has utilized to determine whether a punishment is cruel and unusual has varied.\(^ {188}\) In *Stanford v. Kentucky*, when the Court held that the execution of 16- and 17-year-old offenders did not constitute cruel and unusual punishment, the Court utilized a restricted methodology.\(^ {189}\) In determining whether this punishment was “contrary to the evolving standards of decency,” the Court refused to consider factors that it had found relevant in previous cases, such as the views of professional organizations and the international community, as well as evidence from opinion polls.\(^ {190}\) The Court also refused to subjectively consider whether this punishment was proportional to the culpability of juvenile offenders.\(^ {191}\)

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183. *See* discussion *supra* Part III. Prior to publication of this Comment, the Court granted certiorari to the Supreme Court of Missouri to examine the constitutionality of a death sentence imposed on Christopher Simmons, who at the age of 17, robbed and murdered Shirley Crook. *See* Roper v. Simmons, No. 03-633, 2004 U.S. LEXIS 836 (Jan. 26, 2004). The Missouri Supreme Court, applying the methodology utilized by the Supreme Court in *Atkins*, found, as suggested, that a national consensus has developed against the execution of juvenile offenders, and set aside Simmon’s death sentence. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 413 (Mo. 2003).

184. *See* discussion *supra* Part I.

185. *See* discussion *supra* Part I.

186. *See* discussion *supra* Part I.

187. *See* discussion *supra* Part II.

188. *See* discussion *supra* Part II.

189. *See* discussion *supra* Part II.B.

190. *See* discussion *supra* Part II.B.

191. *See* discussion *supra* Part II.B.
In *Atkins v. Virginia*, however, the Court refused to utilize such a limited methodology. The Court examined the views of the international community and professional organizations, as well as information gathered from public opinion polls in reaching its conclusion that the execution of mentally retarded offenders was "contrary to the evolving standards of decency" and therefore cruel and unusual. The Court also renewed the importance of conducting a proportionality analysis while considering Eighth Amendment questions.

Applying the methodology utilized by the Court in *Atkins* to the issue of the juvenile death penalty leads to a finding that executing juveniles is "contrary to the evolving standards of decency." The possibility of executing a juvenile offender exists only in a minority of states, there is a consistent trend against such punishment, and it is very unusual for juries to sentence juveniles to death. Moreover, the international community overwhelmingly disapproves of the execution of juvenile offenders. Finally, many characteristics found in juvenile offenders, such as impulsivity, lack of self-discipline, inability to think in long-range terms, and proneness to peer pressure, lessen the culpability of juveniles, making the death penalty a disproportionate punishment for these offenders.

*Bryan Graff*

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192. See discussion supra Part II.C.
193. See discussion supra Part II.C.
194. See discussion supra Part II.C.
195. See discussion supra Part III.
196. See discussion supra Part III.
197. See discussion supra Part III.
198. See discussion supra Part III.