

1990

## Death Be Not Proud: A Note On Juvenile Capital Punishment

Glenn M. Bieler

Follow this and additional works at: [https://digitalcommons.nyls.edu/journal\\_of\\_human\\_rights](https://digitalcommons.nyls.edu/journal_of_human_rights)



Part of the [Law Commons](#)

---

### Recommended Citation

Bieler, Glenn M. (1990) "Death Be Not Proud: A Note On Juvenile Capital Punishment," *NYLS Journal of Human Rights*: Vol. 7 : Iss. 2 , Article 7.

Available at: [https://digitalcommons.nyls.edu/journal\\_of\\_human\\_rights/vol7/iss2/7](https://digitalcommons.nyls.edu/journal_of_human_rights/vol7/iss2/7)

This Notes and Comments is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Journal of Human Rights by an authorized editor of DigitalCommons@NYLS.

# DEATH BE NOT PROUD: A NOTE ON JUVENILE CAPITAL PUNISHMENT

## I. INTRODUCTION

"Texan Put to Death for a Murder Committed at 17"<sup>1</sup>

"South Carolina Executes Killer, Age Stirs Protest--  
Pleas for Man Convicted at 17 are rejected"<sup>2</sup>

"Texas Man Executed By Lethal Injection in Deaths of  
Women"<sup>3</sup>

Mention the death penalty and arguments abound. Proponents claim the threat of death deters severe criminal behavior. Opponents claim that society should not advocate an "eye-for-an-eye"<sup>4</sup> approach to sentencing. This paper discusses not the death penalty itself but its application to a specific class of persons: juveniles<sup>5</sup> who kill.

Juvenile capital punishment has become one of the major controversial issues to unfold in the last decade. This issue adds a new dimension to the emotional debates surrounding the death penalty. While it seems likely that death sentences

---

1. N.Y. Times, Sept. 12, 1985, at A19, col. 1.

2. N.Y. Times, Jan. 11, 1986, at A6, col. 1.

3. N.Y. Times, May 15, 1986, at B18, col. 3.

4. This is known as the talion principle. This principle is rooted in the Old Testament's requirement of "burning for burning, wound for wound, stripe for stripe." Exodus 21:25. This principle is also found in the Code of Hammurabi where it was written: "If a man destroy the eye of another man, they shall destroy his eye"; and "if a man knock out a tooth of a man of his own rank, they shall knock out his tooth." See Schoenfeld, *The Desire to Abolish Capital Punishment: A Psychoanalytically Oriented Analysis*, 1983 J. PSYCHIATRY & L. 168 (quoting 2 R.F. HARPER, THE CODE OF HAMMURABI, KING OF BABYLON ABOUT 2250 B.C. (1904)).

5. The age of eighteen represents a common viewpoint, or general legal consensus, as to when the age of majority has been achieved. See *Generally* United States v. E.K., 471 F. Supp. 924 (D. Or. 1979).

will continue to be rendered,<sup>6</sup> the question becomes to what extreme will society go to allow the imposition of such a penalty. In other words, does the death penalty become cruel and unusual punishment in violation of the eighth amendment to the United States Constitution<sup>7</sup> when a juvenile offender is involved?<sup>8</sup>

Two recent Supreme Court decisions have answered this question. In 1988, the Court set an historical precedent by holding that juveniles under sixteen years of age cannot be executed.<sup>9</sup> A year later, however, the Court firmly applied the constitutional brakes and refused to increase the age limit to include all juveniles under eighteen years of age.<sup>10</sup> Thus, there exists today a judicial gap in which juveniles between the ages of sixteen and eighteen can be sentenced to death.

As this paper will argue, modern principles of law dictate that no persons should be sentenced to death unless they are at least eighteen years of age.<sup>11</sup> The Court's creation of a gap

---

6. The fact that thirty-five states have death penalty statutes is reflective of a legislative trend in favor of such a punishment. See Amicus Brief of the American Bar Association for the Petitioner at 11, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86-6169).

7. The eighth amendment states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII (emphasis added).

8. All age delineations mentioned or proposed in this paper apply to the offender at the time of the crime.

9. *Thompson v. Oklahoma*, 108 S. Ct. 2711 (1988) (plurality opinion).

10. *Wilkins v. Missouri*, 109 S. Ct. 2969 (1989).

11. While this paper expresses the view that eighteen is the age at which a bright line should be drawn for capital punishment, it is recognized that nothing magical happens at this age in terms of an adolescent becoming an adult; rather, this age represents a consensus viewpoint generally utilized in the law as to when the age of majority arrives. See generally *United States v. E.K.*, 471 F. Supp. 924 (D. Ore. 1979):

Psychologists, psychiatrists, youth counselors and all parents recognize how arbitrary such a distinction based on age [is]. . . . Few of us over the age of 18 can recall gaining any significantly greater measure of wisdom, insight or skill on the day after our 18th birthday which we did not already possess in the very days before that birthday.

*Id.* at 932.

Also, this paper will not proffer arguments for alternate punishments in lieu of death. However, the author believes that juvenile murderers should be given life sentences with the possibility of eventual parole based on successful rehabilitation. This argument is grounded in the belief that the penal system should be responsible for ensuring that juvenile killers partake in rehabilitative programs. While in prison, these juveniles should be provided with

between ages sixteen and eighteen falls short of contemporary standards of decency which mark a progressing society.<sup>12</sup> By creating such a gap, the Court has failed to acknowledge that *all* "children have a special place in life which the law should reflect."<sup>13</sup>

## II. BACKGROUND OF THE DEATH PENALTY

Prior to 1972, the constitutionality of the death penalty had never been seriously challenged.<sup>14</sup> Beginning with the Court's decision in *Furman v. Georgia*,<sup>15</sup> the death penalty underwent a constitutional facelift in an attempt to bring it in line with the modern era. Contrary to popular belief, the Court in *Furman* did not completely ban the use of the death penalty as a legitimate form of punishment. Rather, what the Court decided in *Furman* was that the manner in which the death penalty was being imposed was unconstitutional because it allowed the sentencing authority unchecked discretion to impose the penalty.<sup>16</sup> Although the decision, which included nine separate opinions, left unanswered the question of the specific constitutional requirements for sentencing in capital cases, the concurring opinions agreed that such a severe and irreversible punishment should not be imposed under sentencing procedures that created a substantial risk that infliction would be arbitrary and unpredictable.<sup>17</sup>

As a result of *Furman*, the capital punishment statutes of many states were revised.<sup>18</sup> These revisions were placed

---

therapeutic services which promote social and moral development. Otherwise, without the possibility of parole, a life sentence would be tantamount to execution.

12. *Trop v. Dulles*, 356 U.S. 86, 101 (2d Cir. 1958).

13. *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

14. *Furman v. Georgia*, 408 U.S. 238, 407-08 (Blackmun, J., dissenting).

15. *Id.* at 238 (per curiam). Concurring in the opinion were Justices Stewart, White, Brennan, Douglas and Marshall.

16. *Id.* at 238.

17. *Id.*

18. See England, *Capital Punishment in the light of Constitutional Evolution: An Analysis of Distinction Between Furman and Gregg*, 52 NOTRE DAME L. REV. 596, 598 (1977).

under judicial scrutiny in 1976 when the Court decided a series of cases which in effect launched the current era of capital punishment jurisprudence. In *Gregg v. Georgia*,<sup>19</sup> the Court held that the penalty of death does not violate the eighth amendment.<sup>20</sup> As one commentator notes, "[t]he unmistakable emphasis of [*Gregg*] is that the sentencing authority must view each defendant as an individual to conform to eighth amendment standards."<sup>21</sup> Three of the death penalty statutes<sup>22</sup> were held to be constitutional because they provided guided discretion in sentencing by mandating that a jury weigh both the aggravating and mitigating circumstances of each case. The age of the defendant gained brief attention in this case as an example of a factor the sentencing body should consider in evaluating the unique characteristics of the defendant.<sup>23</sup>

In 1978, the Court in *Lockett v. Ohio*<sup>24</sup> enunciated unequivocally the requirement that the sentencing authority must consider all mitigating factors unique to any defendant before capital punishment may be imposed. *Lockett* involved an Ohio statute which allowed a jury to consider only three mitigating factors.<sup>25</sup> This limitation precluded the jury from

---

19. *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion). This case was decided along with several other cases. See *infra* note 22.

20. *Gregg*, 428 U.S. at 153.

21. Homan, *The Juvenile Death Penalty: Counsel's Role in the Development of a Mitigation Defense*, 53 BROOKLYN L. REV. 767, 784 (1987).

22. TEX. PENAL CODE ANN. § 19.03 (Vernon 1974), TEX. CRIM. PROC. CODE ANN. art. 37.071 (Vernon Supp. 1975-1976) (*construed in* *Jurek v. Texas*, 428 U.S. 262 (1976)); Fla. Stat. Ann. §§ 782.04, 775.082, 921.141 (West Supp. 1976-77) (*construed in* *Proffitt v. Florida*, 428 U.S. 242 (1976)); and Georgia (*construed in* *Gregg v. Georgia*, 428 U.S. 153 (1976)).

23. "Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth . . .)?" *Gregg*, 428 U.S. at 196-98 (Stewart, J., plurality opinion). Also, the Texas statute provided that the sentencing body "could further look to the age of the defendant." *Jurek*, 428 U.S. at 273.

24. *Lockett v. Ohio*, 438 U.S. 586 (1978).

25. The three mitigating factors were: 1) Did the victim of the offense induce or facilitate the offense? 2) Would the offense not have taken place but for the fact that the offender was under duress, coercion, or strong provocation? and 3) Was the offense primarily the product of the offender's psychosis or mental deficiency? See OHIO REV. CODE ANN. § 2929.04(B) (Anderson 1975).

considering such personal aspects as the defendant's character, prior record, *age*, lack of specific intent to cause death and relatively minor role in the offense.<sup>26</sup>

As the death sentence was carefully being molded into its new image, the age of the offender remained but one factor within the dearth of mitigating circumstances sentencing bodies had to consider.<sup>27</sup> The issue of the constitutionality of juvenile death sentences remained hidden in the background awaiting its day to become a forefront issue of its own merit. Then in 1982, the Court agreed to hear the specific issue of the constitutionality of capital punishment for an offender who was only sixteen years old when it granted *certiorari* in *Eddings v. Oklahoma*.<sup>28</sup>

Eddings was charged with the killing of a highway patrolman.<sup>29</sup> Upon being certified to stand trial as an adult,<sup>30</sup> and based upon his plea of *nolo contendere*, Eddings was found guilty of murder in the first degree.<sup>31</sup> After a hearing on the aggravating and mitigating circumstances of the case, the trial judge sentenced Eddings to death. The Oklahoma court of appeals affirmed the conviction<sup>32</sup> and the United States Supreme Court granted *certiorari*.<sup>33</sup> While the Court initially intended to decide the constitutionality issue of capital punishment imposed on juveniles, the end result found no resolution in this regard. Rather, in a 5-4 decision, the Court

---

26. *Lockett*, 438 U.S. at 608 (emphasis added).

27. See, e.g., *Bell v. Ohio*, 438 U.S. 637 (1978) (under the eighth and fourteenth amendments, a sentencer must consider any mitigating circumstances defendant presents).

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

29. *Id.* at 105-06. The presentation of facts in death penalty cases is noteworthy. Opponents of the death penalty try to play down the facts and concentrate more on the legal arguments. Proponents of the death penalty elucidate each fact in detail. Compare the plurality opinion with the dissenting opinion in *Thompson v. Oklahoma*, 479 U.S. 1084 (1988), *vacated*, 487 U.S. 815 (1988).

30. Because of its significance in the juvenile death penalty context, the certification process, which enables a juvenile to be tried as an adult, is discussed more fully in a later section. See *infra* text accompanying notes 127-53.

31. *In re M.E.*, 584 P.2d 1340 (Okla. Crim. App. 1978), *cert. denied*, 436 U.S. 921 (1978).

32. *Eddings v. State*, 616 P.2d 1159 (Okla. Crim. App. 1980).

33. *Eddings v. Oklahoma*, 450 U.S. 1040 (1981).

bypassed the issue by vacating the death sentence on the ground that the trial judge had failed to consider *all* of the mitigating factors proffered by Eddings.<sup>34</sup> While Eddings' age was considered by the trial judge as a major factor in mitigation of the death sentence, the judge considered none of the other evidence offered by Eddings such as his disturbed background<sup>35</sup> or sociopathic and antisocial personality.<sup>36</sup> In fact, the trial judge stated that such additional evidence was *irrelevant* to his decision.<sup>37</sup> This ruling, the Court held, violated *Lockett* - although the sentencing body has the power to determine the weight to be given relevant mitigating evidence, it does not have the power to give no weight to such important evidence.<sup>38</sup>

Eddings' case was remanded<sup>39</sup> over the dissent of Chief Justice Burger, who was joined by Justices Blackmun, Rehnquist, and White. The Chief Justice argued that *Lockett* did not preclude a sentencing body from according relatively little weight to any mitigating evidence when such evidence is properly balanced against the circumstances of the crime and the potential for future dangerous behavior of the offender.<sup>40</sup>

Since *Eddings*, the Supreme Court has repeatedly declined to resolve the constitutionality issue of juvenile capital

---

34. *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1981) (emphasis added).

35. For example, Eddings was repeatedly beaten by his father and stepfather, and had an alcoholic mother. See Brief for Petitioner at 66, *Eddings v. Oklahoma*, 455 U.S. 104 (1981) (No. 80-5727) (LEXIS, Genfed library, Briefs file).

36. See *infra* note 174.

37. *Eddings*, 455 U.S. at 109.

38. *Id.* at 114-15.

39. Upon remand, the Oklahoma Court of Criminal Appeals decided it could not weigh evidence in regard to sentencing and further remanded the case to the district court. *Id.* at 117. After a rehearing in which the trial judge heard additional evidence proffered by the defendant, the death sentence was reinstated upon Eddings. Appealing this decision, the Court of Criminal Appeals realized it had made an error in remanding the case to the district court for resentencing, and in an opinion consistent with the Supreme Court's holding, modified Eddings' sentence to life imprisonment. *Eddings v. Oklahoma*, 688 P.2d 342 (Okla. Crim. App. 1984).

40. *Eddings*, 455 U.S. at 126 (Burger, C.J., dissenting).

punishment.<sup>41</sup> As a result, juvenile offenders were condemned to death row and states were allowed to continue making their own death penalty rules as long as age was considered a mitigating factor by the sentencing body.<sup>42</sup>

Each stamp of refusal by the Court to grant certiorari sounded a death knell for juvenile offenders on death row.<sup>43</sup> Within the past three years, death sentences were carried out upon three men who committed murders while juveniles.<sup>44</sup> Two of these cases went to the Supreme Court where petitions for certiorari were denied over the consistent dissenting voices of Justices Marshall and Brennan.<sup>45</sup> In the third case, the defendant opted to forego any further appeals

---

41. See, e.g., *Burger v. Kemp*, 753 F.2d 930 (11th Cir. 1985), *cert. denied*, 107 S. Ct. 3114 (1987); *Roach v. Martin*, 757 F.2d 1463 (4th Cir. 1985), *cert. denied*, 474 U.S. 865 (1985), *stay denied, cert. denied*, 474 U.S. 1039 (1986); *Trimble v. State*, 300 Md. 387, 478 A.2d 1143 (1984), *cert. denied*, 469 U.S. 1230 (1985); *Cannaday v. State*, 455 So. 2d 713 (Miss. 1984), *cert. denied*, 469 U.S. 1221 (1985); *High v. Zant*, 250 Ga. 693, 300 S.E.2d 654 (1983), *cert. denied*, 467 U.S. 1220 (1984); *Tokman v. State*, 435 So. 2d 664 (Miss. 1983), *cert. denied*, 467 U.S. 1256 (1984).

42. See, e.g., *Jurek v. Texas*, 428 U.S. 262, 273 (1976).

43. As of August, 1987, there were thirty-eight juvenile offenders on death row. See Brief of Amici Curiae for Respondent Oklahoma, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86-6169) (LEXIS, Genfed library, Briefs file).

44. Charles Rumbaugh on Sept. 11, 1985 (See N. Y. Times, Sept. 12, 1985, at A19, col. 1). Charles Rumbaugh was the first person in more than two decades to be executed for a crime committed under the age of 18. Rumbaugh's case, which was presented to two separate juries, involved the 1975 holdup/murder of a Texas jeweler. Both juries found the death penalty appropriate in light of Rumbaugh's age. *Id.* James Terry Roach on January 10, 1986 (See N. Y. Times, Jan. 11, 1986, at A6, col. 1). Terry Roach was the first person involuntarily executed for a crime committed while a juvenile. Roach was 17 when he pleaded guilty to the 1977 murder of two Columbia, S.C. teenagers. In the face of appeals for clemency by Mother Teresa, Jimmy Carter, the U.N., and O.A.S., the Supreme Court refused to grant a stay. *Id.* Jay Kelly Pinkerton on May 15, 1986 (See N. Y. Times, May 15, 1986, at B18, col. 3). Jay Kelly Pinkerton, convicted of stabbing two women to death while a juvenile, was executed after numerous appeals.

45. See *Pinkerton v. McCotter*, 476 U.S. 1109, 1110 (1986) (Marshall, J., dissenting) ("I believe it is time for this Court to address this issue [whether imposition of the death penalty is so antagonistic to civilized notions of morality] of profound significance."); *Roach v. Aiken*, 474 U.S. 1039 (1986) (Brennan, J., dissenting) ("Although [c]rimes committed by youths may be just as harmful to victims as those committed by older persons, . . . they [the youthful criminals] deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.") (quoting from Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, *Confronting Youth Crime* 7 (1978)).



to the Court.<sup>46</sup>

### III. THE *Thompson v. Oklahoma*<sup>47</sup> DECISION

Finally, in 1987, the Court decided it would hear the issue it had originally planned to resolve in *Eddings*.<sup>48</sup> With its controversial issue at stake,<sup>49</sup> *Thompson* attracted widespread attention. Seven amicus briefs were filed on behalf of the defendant.<sup>50</sup> All briefs for the defendant espoused the same message to the Court: a bright-line should be drawn at age eighteen for imposition of the death penalty.<sup>51</sup> However, the Court's holding fell short of this mark.

Thompson, a fifteen year old youth, was charged with the murder of his brother-in-law.<sup>52</sup> Finding no reasonable prospects for rehabilitation in the juvenile court system,<sup>53</sup> the trial court certified the fifteen year old Thompson to stand trial as an adult.<sup>54</sup> Thompson was convicted of first degree murder.<sup>55</sup> At the penalty phase, the jury found the murder to

---

46. Charles Rumbaugh, *supra* note 44.

47. 108 S. Ct. 2687 (1988).

48. See *Eddings v. Oklahoma*, 455 U.S. 104 (1981).

49. *Thompson* actually involved two issues--whether a sentence of death is cruel and unusual punishment for a crime committed by a fifteen year-old child and whether photographic evidence that a state court deemed erroneously admitted but harmless at the guilt phase nonetheless violates a capital defender's constitutional rights by being considered at the penalty phase. *Thompson*, 108 S. Ct. at 2691. This paper addresses the former issue.

50. Amicus briefs on behalf of Thompson were filed by the Office of the State Appellate Defender of Illinois, Amnesty International, the American Bar Association, the National Legal Aid and Defender Association (along with whom the National Association of Criminal Defense Lawyers and the American Jewish Committee joined), the American Society for Adolescent Psychiatry and the American Orthopsychiatric Association, the International Human Rights Law Group, and the Child Welfare League of America. See *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86-6169) (LEXIS, Genfed library, Briefs file).

51. *Id.*

52. *Thompson*, 108 S. Ct. at 2690 (plurality opinion).

53. See *infra* text accompanying notes 127-53.

54. *Thompson*, 108 S. Ct. at 2690.

55. *Id.* at 2689.

be especially heinous and fixed the sentence at death.<sup>56</sup> The court of criminal appeals, citing its earlier decision in *Eddings*, affirmed the conviction on the ground that once a minor is certified to stand trial as an adult, he can also be punished as an adult.<sup>57</sup>

In a 4-1-3 opinion,<sup>58</sup> the Supreme Court held that sixteen was the dividing line, below which the death penalty becomes cruel and unusual punishment in violation of the eighth amendment.<sup>59</sup> The basic disagreement between the three opinions in *Thompson* was the extent to which a consensus could be defined in terms of society's acceptance of juvenile capital punishment.<sup>60</sup> While the dissent and concurrence would look only to state and federal legislation to determine the consensus, the plurality applied a more expansive viewpoint by scrutinizing both objective and subjective factors.<sup>61</sup> Included within these factors were legislative enactments and resolutions,<sup>62</sup> international opinion,<sup>63</sup> jury behavior,<sup>64</sup> and the juvenile's reduced culpability.<sup>65</sup> This paper is premised on the belief that the plurality was correct in including both sets of factors in its decision. As such, each factor will be separately scrutinized to illustrate that the plurality's finding of a consensus at age sixteen falls short of the line that should have been drawn to protect all persons under eighteen years of age from being executed.

---

56. *Id.* at 2690. Justice Scalia began his dissenting opinion by stating that a detailed examination of the brutal factual background of the case helped to shed light on Oklahoma's decision to prosecute William Wayne Thompson as an adult. *Id.* at 2712.

57. *Thompson v. Oklahoma*, 724 P.2d 780, 784 (Okla. Crim. App. 1986).

58. Justice Stevens announced the plurality opinion, in which Justices Brennan, Marshall and Blackmun joined. Justice O'Connor filed a separate concurring opinion. Justice Scalia wrote a dissenting opinion in which White and Chief Justice Rehnquist joined. Justice Kennedy took no part in the decision. *Thompson*, 108 S. Ct. at 2689.

59. *Id.* at 2700.

60. See *infra* text accompanying notes 197-223.

61. *Thompson*, 108 S. Ct. at 2690-2700 (plurality opinion).

62. See *infra* text accompanying notes 66-88.

63. See *infra* text accompanying notes 89-101.

64. See *infra* text accompanying notes 102-11.

65. See *infra* text accompanying notes 112-89.

#### IV. LEGISLATIVE ENACTMENTS AND RESOLUTIONS

In prior cases, the Court has held that objective factors are good indicia of how contemporary society views a particular form of punishment.<sup>66</sup> One of these objective factors is legislative enactments.<sup>67</sup> Thus, the *Thompson* plurality reviewed the statutes of each state to see whether or not capital punishment is allowed.<sup>68</sup> The plurality also noted any age limitations prescribed by these statutes.<sup>69</sup>

At the time of the *Thompson* decision, fourteen states had no death penalty statutes,<sup>70</sup> nineteen states had death penalty statutes but with no minimum age stated,<sup>71</sup> and

66. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 277-79 (1972) (Brennan, J., concurring); See also *Enmund v. Florida*, 458 U.S. 782, 788-93 (1982).

67. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976); See also *Coker v. Georgia*, 433 U.S. 584, 593-97 (1977) (White, J., plurality opinion).

68. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2694 (1988).

69. *Id.* at 2694-95.

70. Alaska (H.B. 99, ch. 132 (1957)); District of Columbia (*United States v. Lee*, 489 F.2d 1242, 1246-47 (D.C. Cir. 1973), death penalty unconstitutional in light of *Furman v. Georgia*, 408 U.S. 238 (1972)); Hawaii (H.B. 706, Act 282 (1957)); Iowa (H.F. 8, ch. 435 (1965)); Kansas (death penalty still on books, KAN. STAT. ANN. Art. 40, §§ 22-4001 to 22-4014 (1981), but death sentence not included in sentences for first-degree murder which is a Class A felony. KAN. STAT. ANN. Art. 45, § 21-4501(a) (1981)); Maine (Public Laws, ch. 133 (1887)); Massachusetts (death penalty still on books, MASS. ANN. LAWS ch. 279, § 57-71 (Supp. 1987), but declared unconstitutional. See *Commonwealth v. Colon-Cruz*, 393 Mass. 150, 470 N.E.2d 116 (1984)); Michigan (MICH. CONST., art. 4, § 46 (1985)); Minnesota (H.F. No. 2, ch. 387 (1911)); New York (death penalty still on books, N.Y. CRIM. PROC. LAW § 60.06 (Consol. 1987), but declared unconstitutional. See *People v. Smith*, 63 N.Y.2d 41, 468 N.E.2d 879, 479 N.Y.S.2d 706 (1984)); North Dakota (1985 N.D. LAWS ch. 115, § 41); Rhode Island (*State v. Cline*, 121 R.I. 299, 397 A.2d 1309 (1979), mandatory death penalty unconstitutional after *Woodson v. North Carolina*, 428 U.S. 280 (1976)); West Virginia (W. VA. CODE § 61-11-2 (1984); Wisconsin (General Acts, ch. 103 (1853)).

71. Alabama (ALA. CODE §§ 13A-5-39-59, 13A-6-2 (1982 & Supp. 1989)); Arizona (ARIZ. REV. STAT. ANN. §§ 13-703 to 13-706, 13-1105 (1989)); Arkansas (ARK. STAT. ANN. §§ 5-4-104(b), 5-4-601-617, 5-10-101, 5-51-201 (1987 & Supp. 1989)); Delaware (DEL. CODE ANN. tit. 11, §§ 636, 4209 (1987 & Supp. 1988)); Florida (FLA. STAT. ANN. §§ 775.082, 782.04(1), 921.141 (West 1986 & Supp. 1990)); Idaho (IDAHO CODE §§ 18-4001-4004, 19-2515 (1987 & Supp. 1989)); Louisiana (LA. REV. STAT. ANN. §§ 14:30, 14:113 (1986 & 1990)); Mississippi (MISS. CODE ANN. §§ 97-3-21, 97-7-67, 99-19-101-107 (1973 & Supp. 1989)); Missouri (MO. ANN. STAT. §§ 565.020, 565.030-.040 (1979 & Supp. 1990)); Montana (MONT. CODE ANN. §§ 45-5-102, 46-18-301 to 46-18-310 (1989)); Oklahoma (OKLA. STAT. tit. 21, §§ 701.10 to 701.15 (1983 & Supp. 1990)); Pennsylvania (PA. STAT. ANN. tit. 18, § 1102(a), tit. 42, § 9711 (1983 & Supp. 1989)); South Carolina (S.C. CODE ANN. §§ 16-3-10, 16-3-20 (1985 & Supp. 1989)); South Dakota (S.D. CODIFIED LAWS ANN. §§ 22-16-4, 22-16-12, 23A-27A-1 to 23A-27A-41

eighteen states had death penalty statutes with minimum ages expressed.<sup>72</sup> To make for a more convincing argument, the plurality purposely skewed its proportional analysis. First, it ignored those states which had no death penalty statute.<sup>73</sup> Second, it refused to look at the nineteen states which had death penalty statutes with no minimum age limitations on the premise that current standards of decency would not tolerate the execution of little children, something these statutes seemingly allow.<sup>74</sup> Therefore, when confined to the eighteen states that allowed the death penalty with minimum age limitations, the plurality noted that every one of these states required the defendant to have "attained *at least* the age of sixteen."<sup>75</sup>

The plurality's analysis of these statistics can be attacked on two different grounds. First, in restricting its analysis to the *minimum* age limitations of eighteen states, the

---

(1988 & Supp. 1989)); Utah (UTAH CODE ANN. §§ 76-3-206, 76-3-207 (1978 & Supp. 1989)); Vermont (VT. STAT. ANN. tit. 13, §§ 2303, 2403, 7101 to 7107 (1974 & Supp. 1989)); Virginia (VA. CODE ANN. §§ 18.2-31, 19.2-264.2 to 19.2-264.5 (1988 & Supp. 1989)); Washington (WASH. REV. CODE §§ 10.95.010-.900 (1980 & Supp. 1989)); and Wyoming (WYO. STAT. §§ 6-2-101-103 (1988)).

72. California (CAL. PENAL CODE § 190.5 (1988 & Supp. 1990)) (age 18); Colorado (COLO. REV. STAT. § 16-11-103(1)(a) (1986 & Supp. 1989)) (age 18); Connecticut (CONN. GEN. STAT. ANN. § 53a-46a(g)(1) (1985 & Supp. 1989)) (age 18); Georgia (GA. CODE ANN. § 17-9-3 (1982 & Supp. 1989)) (age 17); Illinois (ILL. ANN. STAT. ch. 38, para. 9-1(b) (Smith-Hurd 1987 & Supp. 1989)) (age 18); Indiana (IND. CODE ANN. § 35-50-2-3 (West 1987 & Supp. 1989)) (age 16); Kentucky (KY. REV. STAT. ANN. § 640.040(1) (Baldwin 1987 & Supp. 1988)) (age 16); Maryland (MD. ANN. CODE art. 27, § 412(f) (1987 & Supp. 1989)) (age 18); Nebraska (NEB. REV. STAT. § 28-105.01 (1989)) (age 18); Nevada (1987 NEV. REV. STAT. 176.025)) (age 16); New Hampshire (N.H. REV. STAT. ANN. § 630:5(XIII) (Prohibiting the execution of one who was a minor at the time of the crime), § 21:44 (Defining age 18 as the age of majority) (1986 & Supp. 1989)) (age 18); New Jersey (N.J. REV. STAT. §§ 2A:4A-22(a)(b) (Defining age 18 as the age of majority), 2C:11-3(g) (Prohibits a sentencer from imposing the death penalty on an individual under the age of majority) (1982 & Supp. 1989)) (age 18); New Mexico (N.M. STAT. ANN. §§ 28-6-1(A), 31-18-14(A) (1987 & Supp. 1989)) (age 18); North Carolina (N.C. GEN. STAT. § 14-17 (1986 & Supp. 1989)) (age 17); Ohio (OHIO REV. CODE ANN. § 2929.02(A) (Anderson 1987 & Supp. 1989)) (age 18); Oregon (OR. REV. STAT. §§ 161.620, 419.476(1) (1989)) (age 18); Tennessee (TENN. CODE ANN. §§ 37-1-102(3), 37-1-102(4), 37-1-103, 37-1-134(a)(1) (1984 & Supp. 1989)) (age 18); and Texas (TEX. PENAL CODE ANN. § 8.07(d) (Vernon 1974 & Supp. 1990)) (age 17).

73. *Thompson*, 108 S. Ct. at 2695.

74. *Id.*

75. *Id.* (emphasis added)

plurality ignored the already existing consensus against imposing death sentences on offenders under the age of eighteen.<sup>76</sup> Indeed, twelve of the eighteen states have set death penalty limits at age eighteen.<sup>77</sup> In fact, only two states require the defendant to be sixteen and one of these states had set its minimum age for capital punishment at age ten until 1987.<sup>78</sup> Based on these states, it is clear that there is a consensus minimum age of eighteen for imposing the death penalty.<sup>79</sup>

The second ground upon which the plurality's analysis can be attacked is that a true proportionality analysis should have included 51 jurisdictions.<sup>80</sup> Since other factors<sup>81</sup> were taken into account by the plurality, the purposeful omission of 31 states and the District of Columbia was unnecessary.<sup>82</sup> Of the 51 jurisdictions, 27 would not execute a person under eighteen years of age.<sup>83</sup> While this ratio may not create a clear consensus, it does indicate that a majority of the states would not execute a person under eighteen years of age. This majority viewpoint should be the beginning point of eighth amendment analysis.<sup>84</sup>

---

76. See *infra* text accompanying notes 197-223.

77. See *supra* note 72.

78. See IND. CODE ANN. § 35-50-2-3 (Burns 1988). See also Streib, *Eighth Amendment and Capital Punishment*, 34 CLEV. ST. L. REV. 363, 370 (1987).

79. Statistical "gerrymandering" is popular in the juvenile death penalty context. For instance, the *Thompson* dissent argued that an accurate analysis should include all 37 states which have a death penalty statute. See *Thompson*, 108 S. Ct. at 2716 (1988) (Scalia, J., dissenting). See also *Wilkins v. Missouri*, 109 S. Ct. 2969, 2975 n.2 (1989). Also, in *Wilkins*, the *Thompson* plurality, which became the dissent, "adjusted" its proportional analysis to include the fifteen states which have no death penalty statute, finding that 27 states would not execute an eighteen year old. See *Wilkins*, 109 S. Ct. at 2982-83 (1989) (Brennan, J., dissenting). The reason behind such divergent analyses is clear: to make a more favorable argument for either supporting or refuting whether or not there is a consensus. See *infra* text accompanying notes 197-231.

80. 51 jurisdictions include the fifty states and the District of Columbia.

81. Legislative enactments and resolutions, international opinion, jury behavior and the juvenile's reduced culpability. See text accompanying notes 66-189.

82. In fact, the plurality did take into account all 51 jurisdictions in its dissenting opinion in *Wilkins v. Missouri*, 109 S. Ct. at 2982-83 (1989) (Brennan, J., dissenting).

83. See *supra* notes 70-72.

84. See *Wilkins*, 109 S. Ct. at 2983 (1989) (Brennan, J., dissenting).

Other legislatures and professional organizations also adhere to the setting of a bright line at age eighteen. For example, the Senate recently passed the Gekas Bill<sup>85</sup> which calls for the death penalty of any person who intentionally kills another during a drug-related felony.<sup>86</sup> However, the Bill expressly excludes the death penalty for the mentally ill and those who are under eighteen at the time of their crime.<sup>87</sup> The American Bar Association also condemns capital punishment for an offender under the age of eighteen.<sup>88</sup> These additional sources exemplify what should be the modern trend towards saving juveniles from death row.

### V. INTERNATIONAL OPINION

Recognizing the relevance of the views of other nations in determining whether a punishment is cruel and unusual, the plurality in *Thompson*, unlike the concurrence or the dissent,<sup>89</sup> was willing to examine the international community in helping it to find a consensus.<sup>90</sup> Even here, the plurality was willing to compromise its position. Rather than recognizing the true consensus among the leading nations that persons under eighteen should not be executed, the plurality settled for the position that the consensus among the international community was that juveniles (without mentioning any age) should not be executed.<sup>91</sup> This assessment of the international community is

---

85. Codified now as part of the Continuing Criminal Enterprise Act. 21 U.S.C.S. § 848 (1) (West 1989).

86. *Id.*

87. *Id.*

88. Editorial, 74 A.B.A. J. 66 (1988).

89. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2706-11 (O'Connor, J., concurring) (mentions nothing about international opinion), *Id.* at 2716 (Scalia, J., dissenting) (will only look to state and federal legislatures to determine a national consensus).

90. The plurality noted that in prior eighth amendment cases, the views of the international community were considered helpful in determining what is "cruel and unusual punishment." *Thompson*, 108 S. Ct. at 2696 n.31. See, e.g., *Trop v. Dulles*, 356 U.S. 86, 102 (2d Cir. 1958); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (plurality opinion).

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

only partially accurate.

Since 1979, more than 11,000 executions were carried out in over eighty countries, yet only eight involved juveniles under the age of eighteen.<sup>92</sup> In 1973, the Secretary General of the United Nations stated that the "great majority of member nations report never condemning to death persons under eighteen years of age."<sup>93</sup> Also, although the death penalty is still allowed, a person under age eighteen may not be executed in the United Kingdom, New Zealand, Australia, or in the Soviet Union.<sup>94</sup>

International draft conventions also follow a definite trend that treats people under eighteen different than adults. The drafting of the International Covenant on Civil and Political Rights<sup>95</sup> has a separate article dealing exclusively with the rights of children. This article states that a "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women."<sup>96</sup> Eighty-six nations have ratified this document, and seven others, including the United States, have signed it.<sup>97</sup> During this draft convention, the Country of Tanganyikan, a third-world nation, stated that the true goal of developing nations is to improve the lives of children and future generations.<sup>98</sup> To Tanganyikan, killing a child under eighteen only serves to impair this goal.<sup>99</sup> The draft Convention on the Rights of the Child<sup>100</sup> agrees with this contention. Article 19(2)(b) of the convention prohibits capital punishment or life

---

92. Amicus Brief of Amnesty International for the Petitioner at 23-24, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86-6169) (LEXIS, Genfed library, Briefs file).

93. *Id.* at 23 (citing the United Nations Economic and Social Council, Report of the Secretary General on Capital Punishment at 10, U.N. Doc. E/5242 (1973)).

94. *Id.*

95. G.A. Res. 2200A, 21 U.N. GAOR. Supp. (No. 16) at 53, U.N. Doc. A/6316 (1966).

96. *Id.* at Art. 6(5).

97. Amicus Brief, *supra* note 92, at screen 25.

98. See Cohen, *The Human Rights of Children*, 12 CAP. U. L. REV., 369, 379 (1982).

99. *Id.*

100. U.N. Docs E/CN.4/NGO 265 and 276 (1980).

imprisonment for anyone under eighteen years of age.<sup>101</sup> Therefore, setting the age barrier at sixteen falls short of international consensus.

## VI. JURY BEHAVIOR

Since the focus of the eighth amendment is punishment that is cruel and unusual, determining how often juries have imposed a particular sentence is indicative of how society accepts such punishment.<sup>102</sup> In this regard, the plurality in *Thompson* confined its analysis of jury behavior to two important statistics. First, in the 20th century, approximately nineteen people under age sixteen have been sentenced to death, most often in the earlier part of the century.<sup>103</sup> Secondly, during the years 1982 through 1986, 82,094 people were arrested for willful homicide, 1,393 received death sentences, and of those only five, including Thompson, were under sixteen at the time of the crime.<sup>104</sup> These statistics indicated to the plurality that the sentences received by those offenders under the age of sixteen were cruel and unusual in the same manner that "being struck by lightning is cruel and unusual."<sup>105</sup>

This rudimentary analysis misses more important points. For instance, executions of persons under eighteen have fallen significantly from 53 of 1,288 (4.1%) in the 1940's to 6 of 255 (2.4%) between 1960 and 1986.<sup>106</sup> Although it is possible to say that the execution of children is in vogue because three

---

101. *Id.* at Art. 19(2)(b).

102. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2692 n.7 (1988). The concurrence and dissent in *Thompson* also agreed that jury behavior is a factor to assess in deciding whether a punishment is cruel and unusual. However, neither opinion could decipher any consensus from the statistics relied upon by the plurality. *Id.* at 2708 (O'Connor, J., concurring), *Id.* at 2716-17 (Scalia, J., dissenting).

103. *Id.* at 2697.

104. *Id.*

105. *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring)).

106. See Streib, *supra* note 78, at 380.



such executions have taken place within the past three years,<sup>107</sup> these statistics must be viewed in their proper perspective. Data compiled by Professor Victor L. Streib, an authority on juvenile capital punishment, show that the southern United States accounts for the majority of persons under age eighteen who are on death row.<sup>108</sup> As of July 1986, 25 of the 32 juveniles (92%) on death row were sentenced in southern states.<sup>109</sup> Therefore, only 8% of these juveniles on death row were put there by juries outside the south. In addition, the last three executions were performed by Texas and South Carolina.<sup>110</sup>

One commentator, who sees no constitutional implication in sentencing juveniles to death, writes that if a statistical study could prove quantitatively that juries prefer not to give juveniles death sentences, it would be convincing evidence that the public dislikes sentencing juveniles to death.<sup>111</sup> The statistics compiled by Professor Streib seem to fulfill this need. Removing what seems to be a southern preference to execute juveniles would virtually eliminate all such sentences.

## VII. THE JUVENILE'S REDUCED CULPABILITY

It has long been recognized that juveniles and adults do not share equal responsibility for their crimes.<sup>112</sup> That juveniles possess a reduced culpability in committing crimes is a basic standard accepted by our legal system.<sup>113</sup> In fact, the plurality in *Thompson* considered such a conclusion "too

---

107. See *supra* note 44.

108. Streib, *supra* note 78, at 386.

109. *Id.*

110. See *supra* note 44.

111. Hill, *Can the Death Penalty Be Imposed on Juveniles: The Unanswered Question in Eddings v. Oklahoma*, 20 CRIM. L. BULL. 5, 18 (1984).

112. See, e.g., *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948); *In Re Gault*, 387 U.S. 1, 14-31 (1966).

113. See generally *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1981).

obvious to require extended explanation."<sup>114</sup> The general societal belief that juvenile and adult criminals be treated differently should apply with equal force to the death penalty. Three areas which support this proposition are the state's duty as *parens patriae* to protect minors,<sup>115</sup> the arbitrary nature of the waiver system from juvenile court into adult court,<sup>116</sup> and "time of life" aspects of adolescence which makes juveniles more susceptible than adults to committing crimes (including murder), yet less culpable than adults in terms of punishment.<sup>117</sup>

### A. *State as Parens Patriae*

The power of the state to act as *parens patriae*<sup>118</sup> in protecting its minors has long been recognized by the Supreme Court.<sup>119</sup> In *Bellotti v. Baird*,<sup>120</sup> a case involving a minor's right to have an abortion without the need for parental or judicial consent, the Court noted that:

[s]tates . . . may limit the freedom of children  
to choose for themselves in the making of

114. *Thompson v. Oklahoma*, 108 S. Ct. at 2698-99 (1988) (plurality opinion).

115. See *infra* text accompanying notes 118-26.

116. See *infra* text accompanying notes 127-53.

117. See *infra* text accompanying notes 154-89.

118. Literally "parent of the country" "refers traditionally to the role of state as sovereign and guardian of persons under legal disability. . . . It is a concept of standing utilized to protect those quasi-sovereign interests such as health, comfort and welfare of the people, interstate water rights, general economy of the state." BLACKS LAW DICTIONARY 1003 (5th ed. 1979) (citations omitted).

119. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (Burger, C.J., concurring) ("[T]he states are vested with the historic *parens patriae* power, including the duty to protect 'persons under legal disabilities to act for themselves.'" *Id.* at 583) (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972)). Although *Donaldson* involved a mentally retarded person, minors are also considered persons possessed with legal disabilities in terms of the state's power to protect such persons. See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979) (right of pregnant minor to seek an abortion was found to be unconstitutionally burdened by statute requiring minor to obtain consent from parents or to obtain judicial approval following notification to parents)).

120. 443 U.S. 622 (1979).

important, affirmative choices with potentially serious consequences . . . *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.*<sup>121</sup>

State and federal legislatures also recognize the inherent difficulty of minors to make responsible decisions. For instance, people under eighteen are not allowed to vote,<sup>122</sup> serve as jurors,<sup>123</sup> or join the armed forces.<sup>124</sup> The premise behind such deprivations (which, if applied to adults, would necessarily have constitutional implications) is that minors are not possessed with the full capacity to make individual choices.<sup>125</sup> Therefore, it is difficult to understand how states

---

121. *Id.* at 635 (emphasis added).

122. U.S. CONST. amend. XXVI, § 1. "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any state on the account of age." *Id.*

123. N.Y. JUD. LAW § 510 (Consol. 1988). § 510 Qualifications provide:

In order to qualify as a juror a person must:

1. Be a citizen of the United States, and a resident of the county.
2. Be less than seventy-six and *not less than eighteen years of age*.
3. Be in possession of his natural faculties and not incapable, by reason of mental or physical infirmity, of rendering satisfactory jury service.
4. Not have been convicted of a felony.
5. Be intelligent of good character, able to read and write the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification questionnaire, and be able to speak the English language in an understandable manner.

*Id.* (emphasis added).

124. 10 U.S.C § 505 (a) (1988) provides:

- (a) The Secretary concerned may accept original enlistments in the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard, as the case may be, of qualified, effective, and able-bodied persons who are not less than seventeen years of age. However, *no person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control.*

*Id.* (emphasis added).

125. *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring). In *Bellotti*, the Court recognized three specific reasons justifying the conclusion that the constitutional rights of minors cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing. *Bellotti v. Baird*, 443 U.S.

can execute minors. Can a state at one moment say that minors are incapable of making adult decisions, then at the next moment say that minors should be held as responsible as adults for their acts? Such a standard of convenience should not be tolerated when it involves criminal punishment. As the Court stated in *Eddings*:

Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they [the crimes] deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share the responsibility for the development of America's youth.<sup>126</sup>

### B. The Waiver System

---

662, 634 (1979).

That minors cannot make fully-informed decisions is also illustrated by the reluctance of states to emancipate minors. Emancipation allows a minor to usurp his minority status and assume the rights and responsibilities of adulthood regardless of age. Only fourteen states have emancipation statutes. See Comment, *The Uncertain Status of the Emancipated Minor: Why We Need a Uniform Statutory Emancipation of Minors Act (USEMA)*, 15 U.S.F. L. REV. 473, 477-78 (1981) (noting that most of the emancipation statutes were enacted by the Southern states in the late nineteenth and early twentieth century). In the common law as well, courts are reluctant to grant a minor emancipated status. See generally *Newburgh v. Arrigo*, 88 N.J. 529, 443 A.2d 1031 (1982) ("Although emancipation need not occur at any particular age, a rebuttable presumption against emancipation exists prior to attaining the age of majority, now 18." *Id.* at 535, 443 A.2d at 1037); *Abbott v. Abbott*, 673 S.W.2d 723 (Ky. Ct. App. 1984) ("As to a child who is not handicapped, . . . emancipation (citation omitted) . . . occurs when such a child becomes 18 years of age." *Id.* at 725).

126. *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982) (quoting from the 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Towards Young Offenders). But see *Fare v. Michael C.*, 442 U.S. 707 (1979) (Powell, J., dissenting) ("Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully 'street-wise,' hardened criminals, deserving no greater consideration than that properly accorded all persons suspected of crime." *Id.* at 734 n.4).

The waiver system from juvenile court into criminal court allows the juvenile to be sentenced as an adult.<sup>127</sup> It is another area which supports the proposition that eighteen is the appropriate line to draw for imposition of the death penalty.<sup>128</sup>

In 1899, the first juvenile court was established in Cook County, Illinois.<sup>129</sup> This new court was created due to the popular belief that juveniles should not be held equally accountable as adults for similar crimes.<sup>130</sup> It was recognized that youths were less mature, less able to exercise control and judgment, and more easily influenced by others.<sup>131</sup> Because of their environment, these youngsters seemed less culpable than adults for their actions.<sup>132</sup> Today, all states have a juvenile court system.<sup>133</sup> Thirty-eight states set age eighteen as the maximum age for juvenile court jurisdiction.<sup>134</sup> Thus, there is a rebuttable presumption in most states that a person under eighteen is not "mature and responsible enough to be

---

127. All 50 states and the District of Columbia have some form of waiver. Feld, *Changes In Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987). There are three forms of waiver proceedings: legislative waiver, judicial waiver, and prosecutor waiver. G. VITO & D. WILSON, *THE AMERICAN JUVENILE JUSTICE SYSTEM* 60 (1985). Judicial waiver allows the juvenile court judge, at his or her discretion, to request that the criminal court handle a particular matter. *Id.* Legislative waiver is governed by state statutes which guide the transfer proceedings. *Id.* Finally, prosecutor waiver allows the prosecutor to decide which court - juvenile or criminal - he or she wishes to try the minor. The prosecutor's decision is then reviewed by the respective judge for conformity with the state's juvenile waiver statute. *Id.*

128. Many waiver statutes, rules and guidelines focus on the age of 18 as the dividing line between childhood and adulthood. See *infra* text accompanying notes 143-46.

129. See Kalogerakis, *Legal Issues*, 5 ADOLESCENT PSYCHOLOGY ANN. REV., 497, 498 (1986).

130. See generally *In re Gault*, 387 U.S. 1, 12-31 (1967). The recognition that juvenile offenders should be treated differently from adult offenders was labelled by one commentator as "The Period of Enlightenment" because rehabilitation replaced punishment as the form of state intervention. Kalogerakis, *supra* note 129, at 498.

131. Amicus brief of the American Bar Association for the Petitioner at 5, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86 - 6169) (LEXIS, Genfed Library, Briefs file).

132. *Id.*

133. Amicus Brief of the National Legal Aid and Defender Association for Petitioner at 10, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (No. 86-6169) (1988) (LEXIS, Genfed library, Briefs file).

134. *Id.* at 11.

punished as an adult."<sup>135</sup>

The theory behind the waiver system from juvenile court into adult court is that some juveniles are simply not amenable to treatment and rehabilitation in the juvenile justice system.<sup>136</sup> The two types of waiver systems utilized by states are judicial and legislative.<sup>137</sup> Legislative waiver involves the use of objective criteria while judicial waiver is based mainly on the discretion of the judge.<sup>138</sup> Forty-five states utilize some form of judicial waiver.<sup>139</sup>

In *Kent v. United States*,<sup>140</sup> the Supreme Court outlined several criteria courts should use in making the waiver decision. These criteria include the seriousness of the alleged offense, the manner in which the offense was committed, whether the offense was against person or property, the prior record of the juvenile offender, and the likelihood that the juvenile could be rehabilitated.<sup>141</sup> In making the waiver decision, the judge should also scrutinize such subjective factors as the "chances of protecting the safety of the public" and the "sophistication and maturity of the juvenile."<sup>142</sup>

A judicial waiver system is necessarily subjective. This subjectivity is apparent in the federal system where youthful offenders are treated under the Federal Comprehensive Crime Control Act of 1984 (CCA).<sup>143</sup> A principle purpose of the CCA is to rehabilitate persons who are unusually vulnerable to the danger of recidivism because of their youth.<sup>144</sup> The

---

135. *Thompson*, 108 S. Ct. at 2693 n.22 (quoting DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM, App. B (2d ed. 1987)).

136. See Hill, *supra* note 111, at 27.

137. *Id.* at 28.

138. *Id.*

139. *Id.*

140. 383 U.S. 541 (1966).

141. *Id.* at 566-68.

142. Hill, *supra* note 111, at 29.

143. 18 U.S.C. §§ 5032-5041 (1982 & Supp. 1988).

144. See *Ralston v. Robinson*, 454 U.S. 201, 206 (1981); *U.S. v. Alexander*, 695 F.2d 398, 401 (9th Cir. 1982). At the time of these two cases, the Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5006 (1982) (repealed 1984), was still in force.

CCA defines a "juvenile" as a "person who has not attained his eighteenth birthday" and "juvenile delinquency" as a "violation . . . committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult."<sup>145</sup> Thus, the federal government also recognizes the rebuttable presumption that a person under eighteen is not "mature and responsible enough to be punished like an adult."<sup>146</sup>

For a juvenile to be transferred into a district court, the CCA requires that the juvenile be at least fifteen years of age<sup>147</sup> and have committed an alleged act that would have been a felony if done by an adult. The transfer must also be in the *interest of justice*.<sup>148</sup> To guide this discretion, Congress has directed the court to consider six factors. These factors are the juvenile's age and social background, the nature of the alleged offense, the prior record of the offender, the juvenile's intellectual development and psychological maturity, the nature of and response to past treatment, and the availability of programs designed to treat the juvenile's problems.<sup>149</sup>

In the same manner that state court judges must utilize subjective criteria in weighing the transfer process, federal court judges also must grapple with the subjective yardstick in deciding whether the transfer would be in the interest of justice. Such a standard cannot be applied consistently since it is inherently subjective in nature.<sup>150</sup> The decision to try a juvenile as an adult is nothing more than a prediction of the possibility of rehabilitation if the juvenile is found to be guilty

---

145. 18 U.S.C. § 5031 (1982 & Supp. 1988).

146. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2693 n.22 (1988) (plurality opinion).

147. The age limit was lowered from sixteen to fifteen in 1984. See 18 U.S.C. § 5032 (1982 & Supp. 1988).

148. 18 U.S.C. § 5032 (1982 & Supp. 1988) (emphasis added). In his dissenting opinion in *Thompson*, Justice Scalia cited the lowering of the waiver age in the CCA as support for his contention that Congress believes juveniles at a *younger* age can be responsible enough to be tried and sentenced as an adult. *Thompson*, 108 S. Ct. at 2715 (Scalia, J., dissenting).

149. 18 U.S.C. § 5032 (1982 & Supp. 1988).

150. Cf. *U.S. v. Alexander*, 695 F.2d 398 (9th Cir. 1982) with *U.S. v. E.K.*, 471 F. Supp. 924 (D. Or. 1979).

of the crime alleged.<sup>151</sup> As one commentator notes, "[Judicial waiver systems] ask the impossible. Accurate assessments of future criminal involvement are beyond our society's present technical capabilities and certainly beyond the capabilities of a single judge."<sup>152</sup> A juvenile, therefore, should not be made death-eligible simply because a judge has subjectively determined that juvenile to be "mature."<sup>153</sup> As a proposed solution to this problem, either the waiver system should be abandoned, or special circumstances should be implemented in those states which have the death penalty to remove those juveniles transferred into adult court from being sentenced to death.

### C. "Time of Life" Aspects of Adolescence

"Time of life" aspects of adolescence are perhaps the most telling evidence in understanding the reduced culpability inherent in this period of life. These aspects of life include both the psychological and emotional makeup of the adolescent. The significance of this intangible evidence was discussed by the *Thompson* plurality. The plurality explicitly embraced the notion that youth is much more than "just a chronological fact."<sup>154</sup> This belief, however, was not shared by the other members of the Court.<sup>155</sup>

---

151. *Alexander*, 695 F.2d at 401.

152. Hill, *supra* note 111, at 29.

153. As another commentator notes, the time period from 1975 to the present has been marked by public disillusionment with the juvenile court system due to the increase in violent juvenile crime. As a result of this negative reaction, there was a shift in emphasis from separate treatment of juveniles to the protection of society. Among the demands to curb violent youthful offenders has been a call for lower age limits for waiver into adult courts, and "just deserts" punishment. This shift to stricter measures has been labelled by this commentator as the "Period of Retrenchment." Kalogerakis, *supra* note 129, at 498-504.

154. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2698 (1988) (Stevens, J., plurality opinion) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1981)). See also *Haley v. Ohio*, 332 U.S. 596, 599 (1948) (recognizing the "period of great instability which the crisis of adolescence produces."); *Bellotti v. Baird*, 443 U.S. 622 (1979).

155. See *Thompson*, 108 S. Ct. at 2706 (O'Connor, J., concurring), and 2719 (Scalia, J., dissenting).



Utilization of this criteria is proper when attempting to find the consensus with respect to juvenile capital punishment. Beginning with the Court's historical decision in *Marbury v. Madison*,<sup>156</sup> the judiciary rule of thumb has been expounded in Chief Justice Marshall's phrase: "[i]t is emphatically the province and duty of the judicial department to say what the law is."<sup>157</sup> Recognizing that this duty applies equally to eighth amendment analysis, the Court emphasized in *Enmund v. Florida*<sup>158</sup> that "[a]lthough the judgment of legislatures, juries and prosecutors weigh heavily in the balance, it is for us [the judiciary] ultimately to judge whether the Eighth Amendment permits imposition of the death penalty . . . ."<sup>159</sup> Understanding the nature of adolescence is important in making this judgment.

Adolescents are egotists.<sup>160</sup> They often view their opinions as being right and other contradictory opinions as being wrong.<sup>161</sup> This special feeling leads to a belief in immortality and allows the adolescent to dehumanize others into abstract objects rather than human beings.<sup>162</sup> Adolescence is characterized by emotion rather than rationality.<sup>163</sup> These youngsters often live for the moment with little thought of future consequences for their present actions.<sup>164</sup> They typically

---

156. 5 U.S. (1 Cranch) 137 (1803).

157. *Id.* at 177.

158. 458 U.S. 782 (1982).

159. *Id.* at 797. See also *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion).

160. Amicus Brief for the American Society for Adolescent Psychiatry and the American Orthopsychiatric Association for the Petitioner at 6, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86-6169).

161. *Id.* This may also help to explain why many juvenile criminals believe that they are too young to be punished severely by the law.

162. Homan, *supra* note 21, at 790. See also Miller & Looney, *The Prediction of Adolescent Homicide: Episodic Dyscontrol and Dehumanization*, 34 AM. J. PSYCHOANALYSIS 187, 189 (1974).

163. Amicus Brief for the American Society for Adolescent Psychiatry, *supra* note 160.

164. *Id.* at 5. Many of the adolescent's behaviors are ego-syntonic in that they are responsive to environmental pressures such as peer groups. See *Id.* at 7. In a study performed on violent youths, researchers found that many forms of violence, including homicide, were done by members of a gang which sanctioned such behavior, and that such murderous activity espoused by the group may not have the same connotation as murderous

have not yet learned to accept the finality of death.<sup>165</sup> Together, a feeling of omnipotence and an inability to fear death contributes to the adolescent performing potentially destructive acts like attempting suicide,<sup>166</sup> taking dangerous drugs, racing cars, and other hazardous behaviors.<sup>167</sup>

Adolescents who murder usually suffer additional handicaps. Studies of homicidal minors reveal that these juveniles are frequently subjected to intense emotional deprivation and physical violence in their homes.<sup>168</sup> In many instances, the child suffers severe and repeated physical abuse.<sup>169</sup> Frequent brutal fights between the child's parents are commonplace.<sup>170</sup> In addition, substance abuse by one or both parents often figures prominently in the childhood of the juvenile murderer.<sup>171</sup> Also, such adolescents tend to be intellectually immature and educationally deficient,<sup>172</sup> and are more apt to exhibit signs of paranoia and illogical thoughts than nonviolent youths.<sup>173</sup> Juvenile murderers may also be suffering from some sort of chronological impairment which

---

activity undertaken alone or with a passive partner. See Yates, Beutler & Crago, *Characteristics of Young Violent Offenders*, 11 J. PSYCHOLOGY & L. 137, 147 (1983) [hereinafter Yates]. But see *State v. Shaw*, 273 S.C. 194, 215, 255 S.E.2d 799, 823 (1979), *reh'g denied*, 444 U.S. 1027 (1980) (peer pressure considered a mitigating factor).

165. Amicus Brief for the American Society for Adolescent Psychiatry, *supra* note 160.

166. Adolescents often view suicide as a form of running away without any consideration that death will occur. *Id.*

167. *Id.* at 5.

168. Homan, *supra* note 21, at 769-70.

169. Child abuse is continually cited as a leading cause of multiple personality disorders in adolescents. See Elliot, *State Intervention and Childhood Multiple Personality Disorder*, 11 J. PSYCHOLOGY & L. 441 (1982). Such disorders are characterized by the presence of one or more actor personalities each of which possess different sets of values and behaviors from the other. *Id.* It is possible then that one of the personalities may possess murderous instincts and be responsible for the youth's actions at the time of the killing. *Id.* This in turn would mean that any youth found to have a multiple personality disorder should not be held fully responsible for the murder committed so as to be sentenced to death. *Id.* The problem is that this disease is not well known among lawyers, judges, or even mental health professionals and may go undiagnosed in the condemned youth. *Id.*

170. Amicus Brief for the American Society for Adolescent Psychiatry, *supra* note 160.

171. Homan, *supra* note 21, at 770.

172. *Id.*

173. See Yates, *supra* note 164, at 141.

often times may be impossible to diagnose until the juvenile has aged.<sup>174</sup>

A clinical study was performed on juvenile murderers who live on death row.<sup>175</sup> The juveniles used in the study were chosen exclusively because of their age at the time they committed murder.<sup>176</sup>

The study found many similarities between these young offenders.<sup>177</sup> Background histories included difficulties at birth, head injuries,<sup>178</sup> illnesses, drug overdoses known to affect the central nervous system, loss of consciousness, fainting, blackouts or other lapses, and seizures and symptoms suggestive of psychomotor epilepsy.<sup>179</sup> All fourteen juveniles exhibited psychiatric disturbances of some sort.<sup>180</sup> Twelve of the fourteen subjects also had I.Q. scores below ninety.<sup>181</sup> The

---

174. One of the more common impairments in this category is antisocial personality disorder. The *Psychiatric Diagnostic and Statistical Manual* (DSM III) indicates that this disorder begins to develop prior to age fifteen *but cannot be diagnosed until the youth has at least reached the age of eighteen*. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 319 (3d ed. 1980) (emphasis added). A study done on convicted felons notes that most criminals are sociopaths, and that while there is no concrete evidence to indicate that sociopathy is a treatable disorder with currently available treatment methods, sociopathic behavior does begin to show improvement in the later part of the fourth decade of the person's life. Garvey, *The Criminal: A Psychiatric Viewpoint*, 8 J. PSYCHOLOGY & L. 457, 457-64 (1980). Together, the DSM III and the study are persuasive indicia negating the idea of executing juvenile murderers.

Also, during the appeal process of James Terry Roach's death sentence, it was discovered that Mr. Roach was suffering from Huntington's disease, a fatal genetic disorder that progressively hampers mental and physical capabilities. See N.Y. Times, Jan. 11, 1986, at 6, col. 1. Mr. Roach's lawyers argued unsuccessfully that this disease could not have been diagnosed in 1977 when the murders occurred, and that the sentence of death should be reduced. *Id.*

175. D. Lewis, J. Pincus, B. Bard, E. Richardson, M. Feldman, L. Prichep & C. Yeager, Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States (October 1987) (unpublished paper referenced in the Amicus Brief for the American Society for Adolescent Psychiatry, *supra* note 160).

176. *Id.* at 3A.

177. *Id.*

178. The victims of the head injuries were also found to have localized brain damage, grand mal seizures and abnormal head circumference. *Id.* at 6A.

179. *Id.*

180. Either psychosis, severe mood disorders, or periodic paranoia. *Id.*

181. An I.Q. score of 100 is considered average. A person with an I.Q. score of 90 falls into the bottom 25% of other individuals of the same age. *Id.* at 7A.

study concluded that: the multiple battering suffered by these youths sometimes caused actual brain damage which resulted in increased impulsiveness; the severe parental violence functioned as a model for the youth's abnormal behavior;<sup>182</sup> and the extreme brutality to which the youth was exposed promoted rage which was displaced onto other individuals in their environment.<sup>183</sup> These conclusions are persuasive evidence that such juveniles should not be held fully responsible for their acts.

Adolescence is "the period of physical and psychological development from the onset of puberty to maturity."<sup>184</sup> It is the transitional period between childhood and adulthood.<sup>185</sup> This stage of life lasts roughly from age twelve to age nineteen.<sup>186</sup> While it can be argued that all murderers, adult and juvenile, suffer the same emotional turmoil, the primary difference is that juveniles have not had the time to mature or been given the chance to change.<sup>187</sup> There is a presumption still existing for persons within the stage of adolescence that they have not developed the judgment, fully-formed identity, or character of adults.<sup>188</sup> If punishment is to be "directly related to the personal culpability of the criminal defendant,"<sup>189</sup> this correlation does not justify the imposition of a death sentence on juveniles.

---

182. Early paternal influence seems stronger than the maternal influence in determining the presence or absence of violent activity. Many authors have found that positive identification with the father acts as a deterrent to delinquency and that a lack of paternal contact is a powerful predictor of antisocial behavior. Yates, *supra* note 164, at 141.

183. See *supra* note 165.

184. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 17 (1st ed. 1976).

185. Brunstetter & Silver, *Normal Adolescent Development*, in COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1608 (4th ed. 1985).

186. GORDON, *The Tattered Cloak of Immortality*, in ADOLESCENCE AND DEATH 12, 17-19 (1986).

187. Statistics show that people have a lesser propensity to commit crimes as they mature into adulthood. See Zimring, *American Youth Violence: Issues and Trends*, in CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 67, 67 (1979).

188. See Amicus Brief for the American Society for Adolescent Psychiatry, *supra* note 160.

189. California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

*D. Penal Justifications of the Death Penalty*

The reduced culpability of the juvenile also negates the two penal justifications for having the death penalty--general deterrence and retribution.<sup>190</sup> As the Court previously held, the death penalty has little deterrent effect against defendants who have a reduced capacity for considered choice<sup>191</sup> since such persons are unlikely to precede their murderous acts with "cold calculus" of thought.<sup>192</sup> And even where it can be said that juveniles do calculate, the fear of death will not be a deterrent since such young offenders have not yet learned to accept the finality of death.<sup>193</sup>

Retribution, which the Court defines as "the expression of society's moral outrage at particularly offensive conduct,"<sup>194</sup> is also an unsatisfactory justification for the juvenile death penalty. Retribution goes to the degree of culpability of the offense and not the extent of the injury on the victim. By sentencing youths to death, society is inflicting an irreversible form of punishment on a class of persons whose degree of responsibility mandates less severe measures.<sup>195</sup> As Justice Stewart wrote in dissent in *In Re Gault*, "[the effort to treat the criminal behavior of minors differently than adults is] the

---

190. *Gregg v. Georgia*, 428 U.S. 153, 183-87 (1976) (plurality opinion).

191. See generally *Skipper v. South Carolina*, 106 S. Ct. 1669, 1675 (1986) (Powell, J., concurring).

192. *Gregg*, 428 U.S. at 186. Unlike, for instance, "contract" killers or terrorists.

193. See *supra* text accompanying note 165. Proponents of the death penalty often argue that to deter severe behavior, the punishment must be just as severe. As the noted English jurist Sir James Fitzjames Stephen stated, "No other punishment deters men so effectively from committing crimes as the punishment of death." Schoenfeld, *The Desire to Abolish Capital Punishment: A Psychoanalytically Oriented Analysis*, J. PSYCHIATRY & L., Summer 1983, at 157 (emphasis added) (quoted in Roche, *A Psychiatrist Looks at the Death Penalty*, 38 PRISON J. 46, 47 (1958)). The distinction between men (meaning persons of adult status, or over the age of 18, the general legal age of majority and responsibility) and children is important. See generally *United States v. E.K.*, 471 F. Supp. 924 (D. Ok. 1979). This argument, therefore, loses its vitality when a juvenile offender is involved.

194. *Gregg*, 428 U.S. at 183.

195. *Enmund v. Florida*, 458 U.S. 782, 800 (1982) ("American criminal law has long considered a defendant's intention--and therefore his moral guilt--to be critical to the degree of [his] culpability.").

enlightened task of bringing us out of the world of Charles Dickens in meeting our responsibilities to the child in our society."<sup>196</sup> The *lex talionis* approach to youthful killers serves no legitimate form of retribution.

### VIII. DEFINING A CONSENSUS

Through all its dicta, the primary dispute in *Thompson* was reduced to a single question: what defines a consensus in terms of eighth amendment analysis? The importance of this question cannot be overstated--it formed the basis of each opinion as to the ultimate meaning of "cruel and unusual punishment." The plurality, concurrence, and dissent each formulated various interpretations of a consensus, utilizing different criteria to arrive at divergent meanings.

The necessity of finding a consensus in eighth amendment jurisprudence is clear. Whether a punishment is "unusual" is directly tied into the frequency of its occurrence or the magnitude of its acceptance.<sup>197</sup> This, in turn, demonstrates the "evolving standards of decency"<sup>198</sup> of a present-day society and what is considered "implicit in the concept of ordered liberty."<sup>199</sup> No Justice on the Court would seem to disagree with this rationale. Yet, there is disagreement on what constitutes a consensus.

A consensus is defined as a "general agreement" or "collective opinion."<sup>200</sup> For Eighth Amendment analysis, the

---

196. *In re Gault*, 387 U.S. 1, 78-79 (1967) (Stewart, J., dissenting).

197. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2692 n.7 (1988) (plurality opinion).

198. See *Trop v. Dulles*, 356 U.S. 86, 101 (2d Cir. 1958).

199. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). See also *Weems v. U.S.*, 217 U.S. 349 (1910) ("The [cruel and unusual punishment clause] . . . is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 374).

200. See generally NEW WORLD DICTIONARY, SECOND EDITION 302 (1974); THE AMERICAN HERITAGE DICTIONARY, NEW COLLEGE EDITION 283 (1976). A "consensus of opinion," or "consensus opinion," though often used expressions, are redundant and should be replaced by the phrase, "collective opinion." See generally THE AMERICAN HERITAGE DICTIONARY, NEW COLLEGE EDITION 283 (1976).

Court in the past has included within this general definition "history and precedents, legislative attitudes, and the response of juries reflected in their sentencing decisions . . . ." <sup>201</sup> The *Thompson* plurality utilized the full selection of criteria in arriving at its decision that executing persons under sixteen is cruel and unusual punishment. <sup>202</sup>

While the plurality's definition of a consensus is the only one which attempted to expound the "collective opinion" in terms of objective and subjective factors, its analysis could have been expanded to include all persons under age eighteen. <sup>203</sup> Its unwillingness to go this extra step represents a compromise to this definition. In light of this compromising position, the plurality's definition of a consensus more appropriately seems to be "the minimum threshold as established by the collective opinion."

Justice O'Connor, in her concurrence, agreed with the plurality that there "likely does exist" a national consensus against executing persons under sixteen. <sup>204</sup> However, Justice O'Connor would have agreed with the dissent that there was no such consensus had the nineteen states that have a death penalty but no minimum age limitation expressly stated that their death penalty statutes applied to persons under 16. <sup>205</sup> O'Connor was concerned that these 19 states might not have

---

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

202. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2691-92 (1988) (plurality opinion). While the plurality did not use the word "consensus" in its opinion, its analysis of the various objective and subjective factors was nonetheless an attempt to espouse the collective opinion. *Id.* at 2706 (O'Connor, J., concurring).

203. Indeed, in *Stanford v. Kentucky/Wilkins v. Missouri*, 109 S. Ct. 2969 (1989), the *Thompson* plurality explicitly stated in its dissenting opinion that these factors apply to *all persons under eighteen years of age*. *Id.* at 2982.

204. *Thompson*, 108 S. Ct. at 2706 (O'Connor, J., concurring).

205. *Id.* at 2707-08. This was also the ground upon which she concurred in *Thompson*. *Id.* at 2711

In this unique situation, I am prepared to conclude 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 defender's execution.

*Id.*

fully considered the fact that juveniles waived into the adult court might become death-eligible.<sup>206</sup> Even so, O'Connor saw these 19 states and the federal government's CCA<sup>207</sup> as obstacles in support of finding a consensus.<sup>208</sup> Also, she could find no clear support of a consensus in such other factors as jury behavior or the reduced culpability of the juvenile offender.<sup>209</sup> To O'Connor, therefore, a consensus seems to be "a clear and convincing indication of the collective opinion."

Justice Scalia, writing for the dissent, phrased the foundational question of *Thompson* as follows:

[Is there] a *national* consensus 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[?]<sup>210</sup>

While the plurality was satisfied to exclude from its analysis those states which have the death penalty but no minimum age limitation, and include international opinion. To Justice Scalia, a consensus on capital punishment had to have a purely American definition, established solely within the four corners of the United States.<sup>211</sup> This consensus, Justice Scalia believed, could best<sup>212</sup> be measured through objective criteria in the form of state and federal legislation.<sup>213</sup>

---

206. *Id.*

207. *See supra* text accompanying notes 143-53.

208. *Thompson*, 108 S. Ct. at 2708.

209. *Id.* at 2708-09.

210. *Id.* at 2712 (Scalia, J., dissenting) (emphasis added).

211. *Id.* at 2715, 2716 n.4 ("We must never forget it is the Constitution of the United States of America we are expounding." *Id.*).

212. The word "best" is relevant in this context; however, after the decision in *Wilkins v. Missouri*, 109 S. Ct. 2969 (1989), the more appropriate word to use would seem to be "only." *See infra* text accompanying notes 224-31.

213. *Thompson*, 108 S. Ct. at 2716 (Scalia, J., dissenting).



The dissent, of course, was unwilling to concede those states with a death penalty but no minimum age requirement.<sup>214</sup> When viewed in its entirety, the statistics indicated that almost 40% of the states (19) as well as the federal government would allow the execution of a 16 year old.<sup>215</sup> Even though this meant that over 60% of the states<sup>216</sup> would not execute an offender under sixteen, a consensus was not readily apparent to the dissent. Therefore, to Justice Scalia, a consensus seemed to be "something more than the collective opinion."<sup>217</sup>

The main thrust of Justice Scalia's dissent was that the statistics relied upon by the plurality for both legislative enactments and jury behavior were inconclusive as to whether they indicated a consensus.<sup>218</sup> Justice Scalia was afraid that if the statistics did show a "consensus," the same analysis used by the plurality could justify the conclusion that all persons under eighteen should not be executed.<sup>219</sup> Justice Scalia was willing to admit that at some age a bright line does exist, but he saw no objective factors justifying the conclusion that sixteen was where the line should be drawn.<sup>220</sup>

The dissent's unwillingness to include subjective factors in its analysis also implies a rigid application of the term consensus. Finding this portion of the plurality's opinion as "irrelevant,"<sup>221</sup> Justice Scalia opined that a consensus as to what is cruel and unusual punishment must be comprised of society's beliefs and not those of the members of the Court.<sup>222</sup>

---

214. *Id.* at 2716.

215. *Id.*

216. Congress has also supported this in proposed legislation. *See supra* text accompanying notes 85-88.

217. *Thompson*, 108 S. Ct. at 2716-18. This definition was more clearly defined in Justice Scalia's opinion for the court in *Wilkins v. Missouri*, 109 S. Ct. 2969 (1989). *See infra* text accompanying notes 224-31.

218. *Thompson*, 108 S. Ct. at 2718.

219. *Id.*

220. *Id.*

221. *Id.* at 2719.

222. *Id.*

Therefore, a more accurate definition of the word consensus to Justice Scalia would seem to be "a clear and objective indication of something more than the collective opinion."<sup>223</sup>

#### IX. DEFINING A NEW CONSENSUS:

##### *Wilkins v. Missouri*

*Wilkins v. Missouri*<sup>224</sup> tested the resultant age gap created by the Court's decision in *Thompson* for juveniles between sixteen and eighteen years of age. Heath Wilkins and Kevin Stanford, sixteen and seventeen years of age respectively, hoped the Court would make capital punishment unconstitutional for juveniles in their respective age group. By ruling in favor of both juveniles, the Court would have protected all persons under eighteen years of age from being sentenced to death. With the "new" Court<sup>225</sup> deciding these cases, however, the appeals of both youths failed.

In the final analysis, the *Wilkins* decision proved to be merely restatements of the opinions expressed in *Thompson*. The only differences between the two decisions were the addition of Justice Kennedy to the *Thompson* dissenting block in forming the new majority and Justice O'Connor's concurrence based on her *Thompson* requirement that each of the death penalty statutes in question expressed minimum age limitations. Otherwise, *Wilkins* was basically the same as *Thompson* in substance.

The *Wilkins* decision did, however, clarify the new Court's definition of a consensus. Writing for the majority, Justice Scalia intimates that a consensus is basically a

---

223. See *infra* text accompanying notes 226-31.

224. 109 S. Ct. 2969 (1989). This case was decided together with *Stanford v. Kentucky*.

225. The "new" court means the addition of Justice Kennedy who seems to have further solidified an already conservative majority vote.

"unanimous"<sup>226</sup> opinion. That is, the majority truly must see a "united states" before it will perceive a consensus. Citing precedents as established by *Coker v. Georgia*,<sup>227</sup> *Ford v. Wainwright*,<sup>228</sup> and *Solem v. Helm*,<sup>229</sup> Justice Scalia espouses phrases such as "sole jurisdiction," "no state in the union," and "in any other state" to buttress his belief that a consensus can be found only in the absolute.<sup>230</sup> This definition of a consensus is clearly beyond the literal context of the word and its use in eighth amendment analysis.<sup>231</sup> Unfortunately, it may be a definition that we will have to live with, and juveniles between the ages of sixteen and eighteen will die with, for many more years.

## X. CONCLUSION

Murder is appalling whether it is committed by a juvenile or an adult. No one will argue that assumption. However, it must be remembered that punishment is determined by the degree of culpability of the offender. The fact that juveniles are less responsible than adults for their crimes makes the imposition of the death penalty on this class of persons unjust. Life imprisonment with the possibility of eventual parole is an acceptable standard in a modern society where rehabilitation, rather than destruction, should be the penal goal. Our society has progressed far enough to acknowledge that the "killing-back" of youths is wrong.

---

226. The New World Dictionary defines "unanimous" as "agreeing completely," and "united in opinion." See 2 THE NEW WORLD DICTIONARY 1543 (1974).

227. 433 U.S. 584 (1977).

228. 106 S.Ct. 2595 (1986).

229. 463 U.S. 277 (1983).

230. Justice Scalia also cites *Enmund v. Florida*, 458 U.S. 782 (1982), where the Court recognized that only eight jurisdictions allowed the death penalty to be imposed in situations where the defendant participated in a robbery in the course of which a murder was committed. This citation presents an interesting question: Would Justice Scalia be satisfied with this lesser percentage if faced with the issue today? Until such a situation arises, *Enmund* must be deemed an anomaly, thrown in by Justice Scalia to bolster an argument based upon percentages much less than those in *Enmund*.

231. See *supra* text accompanying notes 197-201.

Future decisions involving the juvenile death penalty will again hinge on each Justice's definition of the consensus. While objective factors play a major role in defining this consensus, the Court should not be blinded to the subjective aspects of adolescence. Together, both sets of factors present persuasive evidence that the death penalty is cruel and unusual punishment when applied to persons under eighteen years of age. Society's killer instinct should not be deemed legal until the offender is held in the same regard.

*Glenn M. Bieler*