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## Eighth Amendment--The Death Penalty for Juveniles: A State's Right or a Child's Injustice

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## **EIGHTH AMENDMENT—THE DEATH PENALTY FOR JUVENILES: A STATE'S RIGHT OR A CHILD'S INJUSTICE?**

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

### **I. INTRODUCTION**

On June 29, 1988, the United States Supreme Court vacated the death sentence of William Wayne Thompson, a fifteen year old Oklahoman found guilty of first degree murder.<sup>1</sup> The case was decided under the auspices of the eighth amendment's prohibition against the infliction of "cruel and unusual punishment."<sup>2</sup> By examining the treatment of chronological age in state and federal capital punishment statutes, the behavior of juries, and the disproportionality between the death penalty and a juvenile's culpability, a plurality of the Court determined that the execution of a person less than sixteen years of age at the time of the commission of a capital offense<sup>3</sup> is unconstitutional. Justice O'Connor, in a concurring opinion, rejected the plurality's bright line rule but nevertheless vacated Thompson's death penalty due to the Oklahoma legislature's apparent lack of careful deliberation in permitting a juvenile to be transferred from juvenile court to criminal court where he would thereby be subjected to the state's capital punishment statute.

After challenging the import of the Court's survey of legislation and jury behavior, this Note proposes that the great strength of the Court's opinion lies in its affirmance of the fundamental precepts and objects of the juvenile justice system, a system that has until recently suffered the harsh criticism of a skeptical Court.

### **II. FACTUAL BACKGROUND**

In the early morning hours of January 23, 1983, fifteen year old

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<sup>1</sup> Thompson v. Oklahoma, 108 S. Ct. 2687 (1988).

<sup>2</sup> The eighth amendment provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

<sup>3</sup> A capital offense is a crime for which one of the possible punishments is death.

William Wayne Thompson along with three older persons murdered Thompson's brother-in-law, Charles Keene.<sup>4</sup> The victim's body was discovered February 18, 1983, anchored to a concrete block in the Washita River.<sup>5</sup> Keene had received gunshot wounds in both the head and chest, a broken leg, cuts on his throat, chest and abdomen,<sup>6</sup> and multiple bruises and abrasions about his head and face.<sup>7</sup> The four defendants were each sentenced to death at separate trials in Oklahoma courts.<sup>8</sup>

In light of William Wayne Thompson's status as a child under Oklahoma law,<sup>9</sup> the district attorney petitioned the court to certify Thompson to stand trial as an adult.<sup>10</sup> In the certification hearing, the district court found probable cause to believe that Thompson had committed first degree murder,<sup>11</sup> supported in large part by Thompson's frequent admissions of his role in the murder.<sup>12</sup> Fur-

<sup>4</sup> *Thompson*, 108 S. Ct. at 2690.

<sup>5</sup> *Id.*

<sup>6</sup> One of Thompson's codefendants ultimately testified that Thompson had cut Keene before throwing him in the river "so the fish could eat his body." *Id.* at 2712 (Scalia, J., dissenting).

<sup>7</sup> *Id.* at 2690.

<sup>8</sup> *Id.*

<sup>9</sup> The relevant Oklahoma statute provides in pertinent part:

When used in this title, unless the context otherwise requires: 1. "Child" means any person under eighteen (18) years of age, except for any person sixteen (16) or seventeen (17) years of age who is charged with murder, kidnapping for purposes of extortion, robbery with a dangerous weapon, rape in the first degree, use of a firearm or other offensive weapon while committing a felony, arson in the first degree, burglary with explosives, shooting with intent to kill, manslaughter in the first degree, or nonconsensual sodomy.

OKLA. STAT. ANN. tit. 10, § 1101 (West 1987).

<sup>10</sup> *Thompson*, 108 S. Ct. at 2713 (Scalia, J., dissenting). The relevant Oklahoma statute provides in pertinent part:

(b) Except as otherwise provided by law, if a child is charged with delinquency as a result of an offense which would be a felony if committed by an adult, the court on its own motion or at the request of the district attorney shall conduct a preliminary hearing to determine whether or not there is prosecutive merit to the complaint. If the court finds that prosecutive merit exists, it shall continue the hearing for a sufficient period of time to conduct an investigation and further hearing to determine the prospects for reasonable rehabilitation of the child if he should be found to have committed the alleged act or omission. . . .

OKLA. STAT. ANN. tit. 10, § 1112 (West 1987).

<sup>11</sup> *Thompson*, 108 S. Ct. at 2713 (Scalia, J., dissenting).

<sup>12</sup> *Id.* at 2712 (Scalia, J., dissenting). Although Thompson claimed that the murder was justified due to Keene's abuse of Thompson's sister, Thompson expressed little regret when admitting his participation in the murder on several occasions. First, on the night of the murder, Thompson told his girlfriend, "we're going to kill Charles." Second, upon his return, he declared, "we killed him. I shot him in the head and cut his throat and threw him in the river." Third, another witness later heard Thompson tell his mother that "he killed him. Charles was dead and Vicki [Thompson's sister] didn't have to worry about him anymore." Fourth, yet another witness asked Thompson the source of some hair adhering to Thompson's boots; he replied that he had kicked Keene

thermore, the district court determined that "no *reasonable* prospects for rehabilitation" existed for Thompson, and therefore ordered that he stand trial as an adult.<sup>13</sup> Thompson appealed to the Oklahoma Court of Criminal Appeals, which subsequently affirmed certification.<sup>14</sup>

A jury found Thompson guilty of first degree murder on December 9, 1983.<sup>15</sup> The same jury determined at the penalty phase of the trial that the murder was especially heinous, atrocious, and cruel, but could not conclude that the defendant was likely to commit further criminal acts of violence constituting a continuing threat to society.<sup>16</sup> The jury thereby fixed Thompson's punishment at death.<sup>17</sup> The Court of Criminal Appeals affirmed Thompson's conviction and sentence on August 29, 1986,<sup>18</sup> stating that "'once a minor is certified to stand trial as an adult, he may also, without

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in the head with the boots and, moreover, that he had cut Keene's throat and chest and shot him in the head. Finally, after a witness claimed to have seen Keene dancing at a local bar, Thompson remarked that that would be hard to do since Keene had a bullet in his head. *Id.* at 2712 (Scalia, J., dissenting).

<sup>13</sup> *Id.* at 2690 (emphasis in original). In determining whether prospects for reasonable rehabilitation exist, the court must consider the following:

1. The seriousness of the alleged offense to the community, and whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
2. Whether the offense was against persons or property, greater weight being given to offenses against persons especially if personal injury resulted;
3. The sophistication and maturity of the juvenile and his capability of distinguishing right from wrong as determined by consideration of his psychological evaluation, home, environmental situation, emotional attitude and pattern of living;
4. The record and previous history of the juvenile, including previous contacts with community agencies, law enforcement agencies, schools, juvenile courts and other jurisdictions, prior periods of probation or prior commitments to juvenile institutions;
5. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile if he is found to have committed the alleged offense, by the use of procedures and facilities currently available to the juvenile court; and
6. Whether the offense occurred while the juvenile was escaping or in an escape status from an institution for delinquent children.

OKLA. STAT. ANN. tit. 10, § 1112 (West 1987).

<sup>14</sup> *Thompson*, 108 S. Ct. at 2713 (Scalia, J., dissenting).

<sup>15</sup> *Id.* (Scalia, J., dissenting). The relevant Oklahoma statute provides in pertinent part: "A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof." OKLA. STAT. ANN. tit. 21, § 701.7 (West 1982).

<sup>16</sup> *Thompson*, 108 S. Ct. at 2690.

<sup>17</sup> *Id.* The relevant Oklahoma statute provides in pertinent part: "A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death, by imprisonment for life without parole or by imprisonment for life." OKLA. STAT. ANN. tit. 21, § 701.9 (West 1988)(amended in 1987 to include the "imprisonment for life without parole" penalty option).

<sup>18</sup> *Thompson*, 108 S. Ct. at 2690.

violating the Constitution, be punished as an adult.'"<sup>19</sup>

The United States Supreme Court granted certiorari<sup>20</sup> to consider whether a death sentence constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments for a crime committed by a fifteen year old child,<sup>21</sup> as well as whether certain photographic evidence, deemed erroneously admitted at the guilt phase, violates a capital defendant's constitutional rights if considered at the penalty phase.<sup>22</sup>

### III. THE PLURALITY—EVOLVING STANDARDS OF DECENCY

Justice Stevens delivered the opinion of a plurality of the United States Supreme Court in *Thompson v. Oklahoma*.<sup>23</sup> Justice Stevens first noted that the Framers of the Constitution failed to clearly define the contours of the eighth amendment's prohibition against the infliction of cruel and unusual punishment,<sup>24</sup> and that as a result judges must continually examine the "'evolving standards of decency that mark the progress of a maturing society.'"<sup>25</sup> The Court has traditionally considered state legislation<sup>26</sup> and jury determinations, in addition to its own judgment,<sup>27</sup> as representative of society's evolving standards of decency.<sup>28</sup>

#### A. STATE LEGISLATION

The plurality initially noted that state legislatures, including Oklahoma's, recognize a basic distinction between children and

<sup>19</sup> *Id.* at 2691 (quoting *Thompson v. State*, 724 P.2d 780, 784 (Okla. Crim. App. 1986)).

<sup>20</sup> 479 U.S. 1084 (1987).

<sup>21</sup> *Thompson*, 108 S. Ct. at 2691.

<sup>22</sup> *Id.* Neither the plurality nor the concurrence attempted to resolve the second question presented "given the Court's disposition of the principal issue." *Id.* at 2700 n.48. Moreover, the dissent stated, "we have never before held that the excessively inflammatory character of concededly relevant evidence can form the basis for a constitutional attack, and I would decline to do so in this case." *Id.* at 2722 (Scalia, J., dissenting).

<sup>23</sup> *Id.* at 2687. Justice Stevens was joined by Justices Blackmun, Brennan and Marshall.

<sup>24</sup> *Id.* at 2691.

<sup>25</sup> *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)(plurality opinion)).

<sup>26</sup> *Id.* (citing *Furman v. Georgia*, 408 U.S. 238, 277-79 (1972)(Brennan, J., concurring); *Enmund v. Florida*, 458 U.S. 782, 789-93 (1982)).

<sup>27</sup> *Id.* at 2692 (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

<sup>28</sup> *Id.* at 2691 (citing *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976); *Coker*, 433 U.S. at 593-97; *Enmund*, 458 U.S. at 789-796).

The plurality explained that reliance upon evolving standards of decency is necessitated by the eighth amendment's use of the term "unusual." The term means frequency of occurrence or magnitude of acceptance. Thus, determining what constitutes "unusual" entails reference to society's evolving standards. *Id.* at 2692 n.7.

adults.<sup>29</sup> In searching for a bright line between childhood and adulthood, the plurality noted that "the normal [fifteen year old] is not prepared to assume the full responsibilities of an adult."<sup>30</sup> To substantiate its assertion, the Court observed that none of the state jurisdictions<sup>31</sup> allows a fifteen year old to vote<sup>32</sup> or serve on a jury.<sup>33</sup> Furthermore, all but one of the states prohibit a fifteen year old from driving without parental consent,<sup>34</sup> all but four prohibit a fifteen year old from marrying without parental consent,<sup>35</sup> all but one prohibit a fifteen year old from purchasing pornographic materials,<sup>36</sup> and most of those states permitting legalized gambling prohibit minors from participating in this activity without parental consent.<sup>37</sup> Additionally, the Court placed great emphasis upon the fact that the maximum age for juvenile court jurisdiction in each state does not exceed sixteen.<sup>38</sup>

The plurality then focused on the status of the death penalty in each state, particularly with regard to juvenile offenders.<sup>39</sup> The Court noted that most state legislatures have not deliberated over the establishment of a minimum age for capital punishment.<sup>40</sup> The reason behind this inactivity may be found in the fact that fourteen states do not authorize the death penalty,<sup>41</sup> and nineteen other

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<sup>29</sup> *Id.* at 2692 (citing *Goss v. Lopez*, 419 U.S. 565, 590-91 (1975)(Powell, J., dissenting)).

Minors in Oklahoma are persons under eighteen years of age. OKLA. STAT. ANN. tit. 15, § 13 (West 1983). Oklahoma does not allow minors to vote, sit on a jury, marry without parental consent, purchase alcohol or cigarettes, patronize bingo parlors unaccompanied by an adult, consent to health care services unless emancipated, or operate or work at a shooting gallery. Additionally, minors are generally not held criminally responsible (except when certified to stand trial as an adult as Thompson was), and minors may disaffirm contracts except for "necessaries" (such as indispensable transportation to and from work). *Thompson*, 108 S. Ct. at 2692, 2692 n.14.

<sup>30</sup> *Thompson*, 108 S. Ct. at 2693. Furthermore, the plurality stated:

The very assumptions we make about our children when we legislate on their behalf tells us that it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent, who may be deterred by the harshest of sanctions and toward whom society may legitimately take a retributive stance.

*Id.* at 2693 n.23.

<sup>31</sup> This encompasses all 50 States as well as the District of Columbia.

<sup>32</sup> *Thompson*, 108 S. Ct. at 2701 app. A.

<sup>33</sup> *Id.* at 2701-02 app. B.

<sup>34</sup> *Id.* at 2702-03 app. C.

<sup>35</sup> *Id.* at 2703-04 app. D.

<sup>36</sup> *Id.* at 2704-05 app. E (Arkansas is the only state that has no legislation pertaining to the purchase of pornographic materials by minors).

<sup>37</sup> *Id.* at 2705-06 app. F.

<sup>38</sup> *Id.* at 2693.

<sup>39</sup> *Id.* at 2693-96.

<sup>40</sup> *Id.* at 2693-94.

<sup>41</sup> *Id.* at 2695. The states in this group are: Alaska, the District of Columbia, Hawaii,

states do not specify a minimum age for the operation of their death penalty statutes.<sup>42</sup> As a result, the Court decided to put these thirty-three statutes to one side "because they do not focus on the question of where the chronological age line should be drawn."<sup>43</sup> Instead, the plurality narrowed its focus to the eighteen states that require a criminal defendant to have attained at least a minimum age of sixteen years at the time of the commission of the crime before the death penalty may be imposed.<sup>44</sup>

Finally, the plurality cited as authority the views of certain professional organizations and the international community.<sup>45</sup> The Court observed that the American Bar Association and the American Law Institute oppose the death penalty for any person under

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Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, West Virginia and Wisconsin. *Id.* at 2694-95 n.25.

<sup>42</sup> *Id.* at 2694-95. The states in this group are: Alabama, Arizona, Arkansas, Delaware, Florida, Idaho, Louisiana, Mississippi, Missouri, Montana, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington and Wyoming. *Id.* at 2695 n.26.

<sup>43</sup> *Id.* at 2695. The plurality maintained, though, that a general comparison of the states whose death penalty statutes would or would not permit the execution of a fifteen year old would yield a two to one result in favor of disallowing capital punishment. To arrive at this ratio, the Court added the fourteen states with no death penalty at all to the eighteen states that have a minimum age of no less than sixteen years in their death penalty statutes, along with South Dakota and Vermont, two states that have not imposed the death penalty since 1972. The total of thirty-four is twice the total number of states that can theoretically impose the death penalty on a fifteen year old. *Id.* at 2695 n.29.

In 1972, a majority of the Court held in five separate concurring opinions that certain state death penalty provisions as written constituted cruel and unusual punishment in violation of the eighth amendment because the provisions often led to the imposition of infrequent and haphazard death sentences. *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>44</sup> *Thompson*, 108 S. Ct. at 2695-96. The eighteen states, with the minimum age for the imposition of the death penalty in parentheses, are: California (18), Colorado (18), Connecticut (18), Georgia (17), Illinois (18), Indiana (16), Kentucky (16), Maryland (18), Nebraska (18), Nevada (16), New Hampshire (17), New Jersey (18), New Mexico (18), North Carolina (17, except for an individual committing first-degree murder while serving a prison sentence for prior murder or while on escape from such sentence, in which case the death penalty may be imposed), Ohio (18), Oregon (18), Tennessee (18) and Texas (17). *Id.* at 2696 n.30.

<sup>45</sup> *Id.* at 2696. The Court stated, "we have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual." *Id.* at 2696 n.31 (citing *Enmund v. Florida*, 458 U.S. 782, 796-97 n.22 (1982); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977); *Trop v. Dulles*, 356 U.S. 86, 102 n.35 (1958)).

A complete discussion of the relevance of the international community's standards as applied to the execution of juvenile offenders is provided by several amici curiae briefs submitted to the Court. Brief for Amicus Curiae International Human Rights Law Group, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988)(No. 86-6169); Brief for Amicus Curiae Defense for Children International-USA, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988)(No. 86-6169); Brief for Amicus Curiae Amnesty International in Support of Petitioner, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988)(No. 86-6169).

age eighteen at the time of the offense.<sup>46</sup> In addition, the United Kingdom, New Zealand, West Germany, France, Portugal, the Netherlands, the Scandinavian countries, Canada, Italy, Spain, Switzerland and the Soviet Union all prohibit the death penalty for juveniles.<sup>47</sup> The Court also noted that three human rights treaties, two signed but not ratified by the United States and one ratified by the United States, explicitly prohibit the death penalty for juveniles under certain circumstances.<sup>48</sup> To complement its survey of legislation and professional and international opinion, the Court next examined the behavior of juries.

#### B. JURY DETERMINATIONS

To determine the public's acceptance of the death penalty for juveniles, the plurality reviewed the frequency with which American juries have imposed the death penalty on a criminal defendant under sixteen years of age at the time of the commission of the crime.<sup>49</sup> The Court cited its earlier decision in *Furman v. Georgia* for the proposition that infrequent and haphazard death penalty sentences are unconstitutional.<sup>50</sup> The data, the Court maintained, supported such a conclusion in *Thompson* in that only between eighteen and twenty persons have been executed in the twentieth century for crimes committed while under age sixteen,<sup>51</sup> with Louisiana executing the last in 1948.<sup>52</sup> From this data, the Court concluded that "[t]he road we have traveled during the past four decades—in which thousands of juries have tried murder cases—leads to the unambiguous conclusion that the imposition of the death penalty on a [fifteen year old] offender is now generally abhorrent to the conscience of the community."<sup>53</sup>

To further support its conclusion, the plurality reviewed United

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<sup>46</sup> *Thompson*, 108 S. Ct. at 2696 n.32-33 (citing AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES 17 (1983 Annual Meeting); MODEL PENAL CODE § 210.6 commentary at 133 (Official Draft and Revised Comments 1980)).

<sup>47</sup> *Id.* at 2696, 2696 n.34. A sentence of death is a potential penalty for exceptional crimes such as treason in Canada, Italy, Spain and Switzerland. *Id.*

<sup>48</sup> *Id.* at 2696 n.34 (citing International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6(5), 6 I.L.M. 368, 370; American Convention on Human Rights, Nov. 22, 1969, art. 4(5), 9 I.L.M. 673, 676; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365).

<sup>49</sup> *Id.* at 2697.

<sup>50</sup> *Id.* (citing *Furman v. Georgia*, 408 U.S. 238, 249, 274-77, 299-300, 312, 314 (1972) (Douglas, Brennan, White, JJ., concurring separately); *Enmund v. Florida*, 458 U.S. 584, 794-96 (1982)).

<sup>51</sup> *Id.* at 2697 (citing V. STREIB, DEATH PENALTY FOR JUVENILES 190-208 (1987)).

<sup>52</sup> *Id.* at 2697 n.37.

<sup>53</sup> *Id.* at 2697.



States Justice Department statistics.<sup>54</sup> Of the 82,094 persons arrested for willful criminal homicide between 1982 and 1986, juries sentenced 1,393 of these individuals to death, five of whom were less than sixteen years of age at the time of their offense.<sup>55</sup> The Court admitted that such statistics are subject to different interpretations, but it suggested nevertheless that the death sentences imposed on the five juveniles between 1982 and 1986 were "cruel and unusual in the same way that being struck by lightning is cruel and unusual."<sup>56</sup>

#### C. DISPROPORTIONALITY BETWEEN ADULT STANDARDS AND JUVENILE CULPABILITY

In the last phase of its analysis, the plurality questioned whether it is appropriate to measure a juvenile's culpability by adult standards.<sup>57</sup> The Court stated that "'punishment should be directly related to the personal culpability of the criminal defendant.'"<sup>58</sup> Furthermore, Justice Stevens maintained that ultimately the Supreme Court should determine the proper interpretation of the "sweeping clauses" of the Constitution,<sup>59</sup> including the "cruel and unusual" clause of the eighth amendment.<sup>60</sup>

To underscore the mitigating force a young capital defendant's age should wield,<sup>61</sup> the Court noted that "adolescents as a class are less mature and responsible than adults."<sup>62</sup> Consequently, less culpability should attach to a juvenile offender than to an adult offender even when both are guilty of comparable crimes.<sup>63</sup> Indeed,

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<sup>54</sup> *Id.* (citing UNITED STATES DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 174 (1986); *id.* at 174 (1985); *id.* at 172 (1984); *id.* at 179 (1983); *id.* at 176 (1982); UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: CAPITAL PUNISHMENT 4 (1986); *id.* at 5 (1985); *id.* at 6 (1984); V. STREIB, *supra* note 51, at 168-69).

<sup>55</sup> *Id.* The Court observed that 1.7% of those over sixteen years of age arrested for willful criminal homicide received the death penalty while 0.3% of those under sixteen years of age arrested for willful criminal homicide received the death penalty. *Id.* at 2697 n.39.

<sup>56</sup> *Id.* at 2697-98 (quoting *Furman v. Georgia*, 408 U.S. 238, 309 (1972)(Stewart, J., concurring)).

<sup>57</sup> *Id.* at 2698.

<sup>58</sup> *Id.* (citations omitted).

<sup>59</sup> *Id.* at 2698 n.40 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

<sup>60</sup> *Id.* at 2698 (citing *Furman*, 408 U.S. at 598 (Brennan, J., concurring); *Coker v. Georgia*, 433 U.S. 584, 598 (1977)).

<sup>61</sup> See *Lockett v. Ohio*, 438 U.S. 586 (1978)(juries in capital cases must consider the youth of a juvenile defendant as a mitigating circumstance for sentencing purposes).

<sup>62</sup> *Thompson*, 108 S. Ct. at 2698 (citing *Bellotti v. Baird*, 443 U.S. 622, 635 (1979); *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982)).

<sup>63</sup> *Id.* The Court relied extensively on the following passage from *Eddings*:

"Adolescents, particularly in the early and middle teen years, are more vulnerable,

the Court argued that the juvenile justice system embodies the principle that a child " 'has no criminal responsibility.' " <sup>64</sup> Citing extensive scholarship on the subject, the plurality concluded that special considerations, such as a juvenile's intelligence, background, education and experience, should result in less severe penalties for juvenile offenders than those imposed upon adults. <sup>65</sup>

The plurality reviewed, as applied to juveniles convicted of a capital crime, the dual purpose of capital punishment: retribution and deterrence. <sup>66</sup> With regard to retribution, <sup>67</sup> the Court held that its premise is inapplicable to the execution of a juvenile offender "[g]iven the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children." <sup>68</sup> As for deterrence, the Court first noted that it is questionable whether capital punishment actually deters criminals of any age. <sup>69</sup> Furthermore, before committing a capital crime a juvenile will unlikely make a cost-benefit analysis that might attach weight to

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

*Eddings*, 455 U.S. at 115 n.11 (quoting TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 7 (1978)).

<sup>64</sup> *Thompson*, 108 S. Ct. at 2698-99 (quoting S. FOX., *THE JUVENILE COURT: ITS CONTEXT, PROBLEMS AND OPPORTUNITIES* 11-12 (1967)).

<sup>65</sup> *Id.* at 2699 (citations omitted).

Several amici curiae briefs were submitted to the Court concerning juvenile characteristics and behavior. The briefs strenuously argued that juvenile offenders do indeed deserve special treatment and consideration. Brief of the Office of the State App. Defender of Ill. as Amicus Curiae, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988)(No. 86-6169); Brief of Amicus Curiae the Am. Bar Ass'n, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988)(No. 86-6169); Brief of the Am. Soc'y for Adolescent Psychiatry & the Am. Orthopsychiatric Ass'n as Amici Curiae in Support of Petitioner, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988)(No. 86-6169); Brief of the Child Welfare League of America *et al.* as Amici Curiae in Support of Petitioner, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988)(No. 86-6169).

<sup>66</sup> *Thompson*, 108 S. Ct. at 2699.

<sup>67</sup> Retribution, according to the Court, denotes " 'an expression of society's moral outrage at particularly offensive conduct.' " *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)(Stewart, J., plurality opinion)).

<sup>68</sup> *Id.* The Court emphasized that it has in the past invalidated death sentences which lack the retributive effect. *Id.* at 2699 n.44 (citing *Enmund v. Florida*, 458 U.S. 782, 801 (1982); *Ford v. Wainwright*, 477 U.S. 399 (1986)).

<sup>69</sup> *Id.* at 2700 n.45 (citing *Lockett v. Ohio*, 438 U.S. 586, 624-28 (1978)(White, J., concurring); *Spaziano v. Florida*, 468 U.S. 447, 480 (1984)(Stevens, J., dissenting); *Enmund*, 458 U.S. at 798-800 (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 301-02 (1972)(Brennan, J., concurring); *id.* at 345-54 (Marshall, J., concurring)).

the possibility of execution.<sup>70</sup> Nor will a juvenile likely be deterred by the knowledge that only a handful of juvenile offenders have been executed in this century.<sup>71</sup> Absent retribution and deterrence, capital punishment for juvenile offenders is "‘nothing more than the purposeless and needless imposition of pain and suffering.’"<sup>72</sup>

Thus, the Court determined that the existence of a national consensus, as evidenced by legislation, jury determinations, and other factors, as well as the disproportionality of the death penalty as a reaction to a juvenile offender's culpability, result in a constitutional prohibition against the execution of persons less than sixteen years of age at the time of the commission of a capital offense.<sup>73</sup>

#### IV. THE CONCURRENCE

##### A. EVOLVING STANDARDS OF DECENCY—NO NATIONAL CONSENSUS, YET

Justice O'Connor agreed with the plurality's contention that a certain age exists below which a child should not receive the death penalty, and that the Court must determine this age "in light of the 'evolving standards of decency that mark the progress of a maturing society.'"<sup>74</sup> However, Justice O'Connor would require more evidence before adopting the plurality's demarcation of this age at sixteen.<sup>75</sup>

Justice O'Connor first reviewed the relevant state legislation concerning capital punishment.<sup>76</sup> She maintained that the evidence weighs heavily against the death penalty for juveniles because "no legislature in this country has affirmatively and unequivocally endorsed" capital punishment for fifteen year olds,<sup>77</sup> and because those states that have banned capital punishment for juveniles have done so "unambiguously."<sup>78</sup> Nevertheless, Justice O'Connor conceded that nineteen states, as well as the federal government, theoretically permit juvenile executions as a result of the interaction between adult certification procedures and capital punishment pro-

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<sup>70</sup> *Id.* at 2700.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

<sup>73</sup> *Id.* The Court briefly considered drawing the bright line rule at age eighteen. Instead, the plurality limited its holding to the question presented by the facts of *Thompson*. *Id.*

<sup>74</sup> *Id.* at 2706 (O'Connor, J., concurring)(quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>75</sup> *Id.* (O'Connor, J., concurring).

<sup>76</sup> *Id.* (O'Connor, J., concurring).

<sup>77</sup> *Id.* (O'Connor, J., concurring).

<sup>78</sup> *Id.* (O'Connor, J., concurring).

visions.<sup>79</sup> As a result, Justice O'Connor concluded that more state legislatures will have to specifically address the issue before a national consensus can be ascertained.<sup>80</sup>

Justice O'Connor explained that a state legislature might unwittingly apply a capital punishment provision to juvenile offenders.<sup>81</sup> For example, state legislatures might provide for adult certification of juveniles for reasons other than the possibility of subjecting the juvenile to capital punishment.<sup>82</sup> In fact, Justice O'Connor speculated that those states that have lowered their minimum adult certification age in recent years have probably done so only to make available long confinement or maximum security facilities for serious juvenile offenders, rather than to make available the death penalty as a potential penalty for such offenders.<sup>83</sup> More importantly, Justice O'Connor noted that Congress,<sup>84</sup> as well as many state legislatures, probably failed to realize the possible interaction between adult certification procedures and capital punishment statutes.<sup>85</sup> To support this proposition, Justice O'Connor pointed to the absence of any legislative history that might suggest congressional deliberation over the possibility of juvenile executions under federal law,<sup>86</sup> the United States treaty agreement not to execute persons under eighteen years of age in certain circumstances related to military occupation,<sup>87</sup> and the recent Senate ratification of a bill authorizing the death penalty for persons eighteen and older who commit certain drug offenses.<sup>88</sup>

Secondly, Justice O'Connor argued that jury determinations and death penalty statistics "support the inference of a national consensus opposing the death penalty for [fifteen year olds], but they

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<sup>79</sup> *Id.* at 2708 (O'Connor, J., concurring).

<sup>80</sup> *Id.* at 2706 (O'Connor, J., concurring).

<sup>81</sup> *Id.* at 2707 (O'Connor, J., concurring).

<sup>82</sup> *Id.* (O'Connor, J., concurring).

<sup>83</sup> *Id.* (O'Connor, J., concurring). For example, New York permits thirteen year olds to be tried as adults but prohibits the death penalty as a punishment for persons of any age. Similarly, New Jersey permits some fourteen year olds to be tried as adults, but prohibits capital punishment for any individual under eighteen years of age at the time of the commission of the offense. *Id.* (O'Connor, J., concurring).

<sup>84</sup> See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2149 (1984)(permitting the prosecution of juvenile offenders as adults if offenders are fifteen years or older at the time of the commission of certain offenses).

<sup>85</sup> *Thompson*, 108 S. Ct. at 2707 (O'Connor, J., concurring).

<sup>86</sup> *Id.* (O'Connor, J., concurring).

<sup>87</sup> *Id.* (O'Connor, J., concurring)(citing Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365).

<sup>88</sup> *Id.* at 2708 (O'Connor, J., concurring)(citing S. 2455, 100th Cong., 2d Sess., 134 CONG. REC. 7579-80 (1988)).

are not dispositive.”<sup>89</sup> Finding fault with a blind application of raw statistical data, Justice O'Connor postulated that such data do not reveal, for example, how many juries considered the death penalty for juvenile offenders or how many prosecutors refrained from seeking the death penalty for juvenile offenders.<sup>90</sup>

Finally, Justice O'Connor disagreed with the plurality's disproportionality derivation.<sup>91</sup> Justice O'Connor argued that, though greater culpability generally attaches to adults than to juveniles with regard to similar crimes, “it does not necessarily follow that all [fifteen year olds] are incapable of the moral culpability that would justify the imposition of capital punishment.”<sup>92</sup> Moreover, Justice O'Connor claimed that, absent proof to the contrary, capital punishment might deter juvenile offenders as a class.<sup>93</sup> After citing a number of cases in which the Court permitted age-based treatment in state legislation, Justice O'Connor reasoned that state legislatures, rather than a “subjective” Court, can more appropriately gauge a particular legislative provision's application to various age groups and to the widely varying characteristics among persons of the same chronological age.<sup>94</sup>

In concluding its criticism of the plurality's reasoning, the concurrence warned of the danger of relying on rote statistics to ascertain societal consensus.<sup>95</sup> To substantiate this claim, Justice O'Connor observed that an apparent trend toward abolition of the death penalty, which began in 1846 and continued through the 1960s, unexpectedly reversed following the Court's *Furman*<sup>96</sup> decision in 1972.<sup>97</sup> As Justice O'Connor stated, “any inference of a so-

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<sup>89</sup> *Id.* (O'Connor, J., concurring). Justice O'Connor reiterated two of the plurality's statistical arguments: 1) a juvenile offender under the age of sixteen at the time of the commission of the offense has not been executed in four decades, and 2) only five of 1,393 death row inmates in a recent five year period were younger than sixteen at the time each committed his offense. *Id.* (O'Connor, J., concurring).

<sup>90</sup> *Id.* (O'Connor, J., concurring).

<sup>91</sup> *Id.* (O'Connor, J., concurring).

<sup>92</sup> *Id.* (O'Connor, J., concurring).

<sup>93</sup> *Id.* at 2708-09 (O'Connor, J., concurring).

<sup>94</sup> *Id.* at 2709 (O'Connor, J., concurring)(citing *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988); *Schall v. Martin*, 467 U.S. 253 (1984); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *Ginsberg v. New York*, 390 U.S. 629 (1968)).

Justice O'Connor recognized the limitation to this argument by citing the Court's decisions involving the unconstitutionality of legislation that restricts a minor from making an informed consent to abortion. *Id.* (O'Connor, J., concurring)(citing *Bellotti v. Baird*, 443 U.S. 622 (1979)(plurality opinion); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)).

<sup>95</sup> *Id.* (O'Connor, J., concurring).

<sup>96</sup> *Furman v. Georgia*, 408 U.S. 238 (1972). See *supra* note 43 and accompanying text for a brief discussion of the *Furman* holding.

<sup>97</sup> *Thompson*, 108 S. Ct. at 2709 (O'Connor, J., concurring). In 1846, Michigan abol-

cietal consensus rejecting the death penalty would have been mistaken [in *Furman*]."<sup>98</sup> Furthermore, "the mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject."<sup>99</sup>

#### B. MINIMUM AGE REQUIREMENT IN CAPITAL PUNISHMENT STATUTES

In agreeing to vacate Thompson's death sentence despite the plurality's reasoning, Justice O'Connor focused upon the Court's traditional treatment of capital punishment.<sup>100</sup> Justice O'Connor observed that the Court consistently requires "special care and deliberation" in proceedings that might lead to the imposition of capital punishment.<sup>101</sup> Accordingly, Justice O'Connor continued, substantive and procedural restrictions must attend each decision to impose the death penalty, thereby insuring "the serious and calm reflection that ought to precede any decision of such gravity and finality."<sup>102</sup>

Justice O'Connor determined that the State of Oklahoma failed to meet the Court's standard of careful consideration and deliberate review in sentencing Thompson to death for the murder of his brother-in-law.<sup>103</sup> The concurrence noted that the Oklahoma legislature enacted both a death penalty statute and an adult certification provision that together rendered fifteen year olds death eligible "without the earmarks of careful consideration that [the Court has]

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ished capital punishment for all crimes but treason, beginning a trend that would continue for over a century. By 1968, "executions ceased completely for several years." *Id.* (O'Connor, J., concurring)(citing F. ZIMRING & G. HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 28-29 (1986); W. BOWERS, LEGAL HOMICIDE 26-28 (1984); H. BEDAU, THE DEATH PENALTY IN AMERICA 23, 25 (3d ed. 1982)).

<sup>98</sup> *Id.* (O'Connor, J., concurring).

<sup>99</sup> *Id.* (O'Connor, J., concurring).

<sup>100</sup> *Id.* at 2710 (O'Connor, J., concurring).

<sup>101</sup> *Id.* (O'Connor, J., concurring).

<sup>102</sup> *Id.* (O'Connor, J., concurring). To support this point, Justice O'Connor reviewed the Court's substantive and procedural restrictions to date regarding capital punishment, including: 1) the unconstitutionality of automatic death sentences and of unguided judge and jury sentencing discretion; 2) the rejection of legislative restrictions on mitigating circumstances and of imprecise legislative restrictions on aggravating circumstances; 3) the virtual requirement of separate trial-like sentencing proceedings, and; 4) the unconstitutionality of death sentences for certain crimes. *Id.* (O'Connor, J., concurring)(citing *Ford v. Wainwright*, 477 U.S. 399 (1986); *Enmund v. Florida*, 458 U.S. 782 (1982); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Estelle v. Smith*, 451 U.S. 454 (1981); *Bullington v. Missouri*, 451 U.S. 430 (1981); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Gardner v. Florida*, 430 U.S. 349 (1977); *Coker v. Georgia*, 433 U.S. 584 (1977); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Gregg v. Georgia*, 428 U.S. 153, 188-89 (1976)(Stewart, J., plurality opinion)).

<sup>103</sup> *Id.* at 2710-11 (O'Connor, J., concurring).

required for other kinds of decisions leading to the death penalty.”<sup>104</sup> Justice O'Connor concluded that persons under sixteen years of age may not be executed “under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender’s execution.”<sup>105</sup> The Oklahoma state legislature and the eighteen state legislatures with similar provisions<sup>106</sup> should therefore determine “the ultimate moral issue at stake” in the first instance by specifying a minimum age for capital punishment.<sup>107</sup>

## V. THE DISSENT

### A. EVOLVING STANDARDS OF DECENCY—NO NATIONAL CONSENSUS

The issue in *Thompson*, as framed by Justice Scalia in his dissenting opinion,<sup>108</sup> was whether there existed a national consensus that “no criminal so much as one day under [sixteen], 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>109</sup> The dissent could find “no plausible basis” for answering the question in the affirmative.<sup>110</sup>

To underscore its message, the dissent detailed the facts and procedural history that led to the imposition of the death sentence for Thompson.<sup>111</sup> The dissent hoped to show that Thompson was not “a juvenile caught up in a legislative scheme that unthinkingly lumped him together with adults.”<sup>112</sup> Justice Scalia argued, to the contrary, that Thompson qualified for both adult certification and the death penalty as determined, respectively, by a court that considered whether he should be subjected to the criminal justice system at all and a jury that considered whether, despite his age and maturity, he should be subjected to the state’s most severe punish-

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<sup>104</sup> *Id.* (O'Connor, J., concurring).

<sup>105</sup> *Id.* at 2711 (O'Connor, J., concurring). Justice O'Connor did not intend that this result extend to every human characteristic, such as intelligence and old age, not receiving particularized attention in capital punishment statutes. Rather, it is limited to those characteristics, like minimum age, about which a national consensus arguably exists. *Id.* (O'Connor, J., concurring).

<sup>106</sup> See *supra* note 42 for a list of those states that do not specify a minimum age in their death penalty statutes.

<sup>107</sup> *Thompson*, 108 S. Ct. at 2711 (O'Connor, J., concurring).

<sup>108</sup> Chief Justice Rehnquist and Justice White joined in Justice Scalia's dissent.

<sup>109</sup> *Thompson*, 108 S. Ct. at 2712 (Scalia, J., dissenting).

<sup>110</sup> *Id.* (Scalia, J., dissenting).

<sup>111</sup> *Id.* at 2712-14 (Scalia, J., dissenting). See *supra* notes 4-22 and accompanying text for a complete discussion of the facts and procedural history of *Thompson*.

<sup>112</sup> *Thompson*, 108 S. Ct. at 2714 (Scalia, J., dissenting).

ment.<sup>113</sup> The dissent next questioned the plurality's failure to discuss the original meaning of the eighth amendment's "cruel and unusual" clause.<sup>114</sup> Justice Scalia attributed this omission to the weight of evidence supporting the inference that the execution of fifteen year olds, both theoretically and practically, is not violative of the Constitution's original intent.<sup>115</sup> After establishing the basis for its opinion, the dissent attacked the plurality's determination of "the evolving standards of decency."<sup>116</sup>

First, Justice Scalia agreed with the plurality that legislatures are the most objective and reliable indicators of societal views, but the dissent's interpretation of contemporary legislation differed markedly from that of the plurality.<sup>117</sup> For example, the dissent focused on the Comprehensive Crime Control Act of 1984, congressional legislation that lowers the eligibility age from sixteen to fifteen for trial and punishment as an adult in federal courts.<sup>118</sup> Justice Scalia acknowledged that there was no indication that Congress deliberated over the legislation's possible interaction with existing federal death penalty statutes, but insisted that, "on its face," the legislation renders a fifteen year old eligible for death in federal courts.<sup>119</sup> Furthermore, the dissent maintained that the majority of

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<sup>113</sup> *Id.* (Scalia, J., dissenting).

<sup>114</sup> *Id.* (Scalia, J., dissenting).

<sup>115</sup> *Id.* (Scalia, J., dissenting). Justice Scalia referred to Blackstone's *Commentaries*, a reputed representation of common law in the eighteenth century, as well as other authorities which provided that any person above fourteen years of age could legally receive the death penalty. *Id.* (Scalia, J., dissenting)(citing 4 W. BLACKSTONE, COMMENTARIES 23-24 (1769); M. HALE, PLEAS OF THE CROWN 22 (1736); Kean, *The History of the Criminal Liability of Children*, 53 L.Q. REV. 364, 369-70 (1937)). Justice Scalia also noted that twenty-two juveniles were executed between 1642 and 1899 for crimes committed while under the age of sixteen. *Id.* (Scalia, J., dissenting)(citing Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While under Age Eighteen*, 36 OKLA. L. REV. 613, 614-15 (1983)).

<sup>116</sup> *Thompson*, 108 S. Ct. at 2714 (Scalia, J., dissenting)(quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>117</sup> *Id.* at 2715 (Scalia, J., dissenting).

<sup>118</sup> *Id.* (Scalia, J., dissenting)(citing Comprehensive Crime Control Act of 1984, 18 U.S.C. § 5032 (Supp. IV 1982)). Justice Scalia noted that this legislation was a reaction to Justice Department testimony that many juvenile offenders are "cynical, street-wise, repeat offenders, indistinguishable, except for their age, from their adult criminal counterparts." *Id.* (Scalia, J., dissenting)(quoting *Hearings on S. 829 Before the Subcomm. on the Judiciary*, 98th Cong., 1st Sess. 551 (1983)).

<sup>119</sup> *Id.* (Scalia, J., dissenting). Justice O'Connor attempted to diminish the importance of the Comprehensive Crime Control Act with a reference to the recently passed Senate bill making certain drug-related offenses capital crimes for persons eighteen and older. See *supra* note 88 and accompanying text. Justice Scalia dismissed this argument because the bill has not yet become law; moreover, if it eventually does become law, "[i]t would simply reflect a judgment by Congress that the death penalty is inappropriate for juvenile narcotics offenders." *Thompson*, 108 S. Ct. at 2715-16 n.2 (Scalia, J., dissenting). The dissent responded in like manner to the United States' narrow treaty agreements.



states with capital punishment provisions, including Oklahoma, provide that juvenile offenders can theoretically receive a death sentence for certain crimes.<sup>120</sup> With the federal government and nearly forty percent of state governments supporting its position, the dissent questioned the plurality's reliance on capital punishment legislation as dispositive of the existence of a national consensus.<sup>121</sup>

Second, Justice Scalia found fault with the plurality's examination of jury behavior, an examination which the dissent claimed resulted merely in an inexact statistical exercise.<sup>122</sup> Responding to the plurality's observations that no juvenile under sixteen years of age has been executed for forty years and that juveniles have only rarely received the death penalty in recent years,<sup>123</sup> the dissent stated, "we are not discussing whether the Constitution requires such procedures as will continue to cause [the death penalty for juveniles] to be rare, but whether the Constitution prohibits [the death penalty for juveniles] entirely."<sup>124</sup> Rather than attribute the rarity of juvenile executions to a marked societal consensus, the dissent suggested that several factors have combined to reduce the number of executions for persons of all ages. These factors include the exercise of executive clemency,<sup>125</sup> a general reduction in public support for capital punishment,<sup>126</sup> and a trend toward individualized sentencing determinations.<sup>127</sup> "In sum, the statistics of executions demonstrate nothing except the fact that our society has always agreed that executions of [fifteen year old] criminals should be rare, and in more modern times has agreed that they (like all other executions) should

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*Supra* note 48 and accompanying text. *Thompson*, 108 S. Ct. at 2715-16 n.2 (Scalia, J., dissenting).

<sup>120</sup> *Thompson*, 108 S. Ct. at 2716 (Scalia, J., dissenting). The dissent has merely compared the nineteen states that have no minimum age for capital punishment, see *supra* note 42, to the eighteen states that have specified a minimum age, see *supra* note 44.

<sup>121</sup> *Thompson*, 108 S. Ct. at 2716 (Scalia, J., dissenting). The dissent also criticized the plurality's reliance on the status of capital punishment in other nations, stating that "where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution." *Id.* at 2716-17 n.4 (Scalia, J., dissenting).

<sup>122</sup> *Id.* at 2716-17 (Scalia, J., dissenting).

<sup>123</sup> See *supra* notes 51-52 and accompanying text.

<sup>124</sup> *Thompson*, 108 S. Ct. at 2717 (Scalia, J., dissenting).

<sup>125</sup> *Id.* (Scalia, J., dissenting)(citing Streib, *supra* note 115, at 619).

<sup>126</sup> *Id.* (Scalia, J., dissenting)(citing V. STREIB, *supra* note 51, at 42 Table 3-1).

<sup>127</sup> *Id.* (Scalia, J., dissenting)(citing *Lockett v. Ohio*, 438 U.S. 586 (1978); V. STREIB, *supra* note 51, at 56 Table 4-1). To underscore the danger of overreliance upon statistical data, Justice Scalia noted that for approximately seventeen years ending in 1927 there were no executions of juvenile offenders under age fifteen; whereas, for approximately seventeen years beginning in 1927 there were ten such executions. *Id.* (Scalia, J., dissenting)(citing V. STREIB, *supra* note 51, at 191-208).

be even rarer still."<sup>128</sup>

Third, Justice Scalia disagreed with the plurality's implicit assertion that the individual members of the Court sit as the ultimate arbiters of eighth amendment interpretation.<sup>129</sup> The dissent maintained that the Court should examine the original understanding of "cruel and unusual" as well as consider society's current understanding of "cruel and unusual," rather than focus on the Justices' personal understandings of "cruel and unusual."<sup>130</sup> Accordingly, Justice Scalia reiterated the dissent's position that the original understanding of "cruel and unusual" did not include the imposition of the death penalty on a juvenile offender, nor does society's current understanding compel a contrary conclusion.<sup>131</sup>

#### B. REACTION TO THE CONCURRENCE

Justice Scalia disputed Justice O'Connor's conclusion that the Oklahoma legislature must explicitly determine whether a person under sixteen years of age can receive the death penalty.<sup>132</sup> The dissent stated that the concurrence failed to limit its decision to the constitutional question presented after doubting the absence of a national consensus.<sup>133</sup> As stated by Justice Scalia, "I do not see how . . . the problem of doubt about whether what the Oklahoma laws permit is contrary to a firm national consensus and therefore unconstitutional is solved by making *absolutely sure* that the citizens of Oklahoma really want to take this unconstitutional action."<sup>134</sup> Moreover, the dissent reiterated that Thompson's death sentence

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<sup>128</sup> *Id.* at 2718 (Scalia, J., dissenting). Justice Scalia warned that the plurality's individualized consideration might lead, for example, to an inference that the infrequent execution of women, seventeen year olds, and eighteen year olds in the past several decades should warrant a similar constitutional ban against the imposition of the death penalty. *Id.* (Scalia, J., dissenting).

Justice Scalia further criticized the plurality's reliance on state and federal laws that limit a juvenile's rights, such as, the right to vote. According to Justice Scalia, the Court's cases "suggest that constitutional rules relating to the maturity of minors must be drawn with an eye to the decision for which the maturity is relevant." *Id.* at 2718 n.5 (Scalia, J., dissenting)(citing *Fare v. Michael C.*, 442 U.S. 707, 725-27 (1979)).

<sup>129</sup> *Id.* at 2718-19 (Scalia, J., dissenting).

<sup>130</sup> *Id.* at 2719 (Scalia, J., dissenting).

<sup>131</sup> *Id.* (Scalia, J., dissenting). Justice Scalia relied on the following passage to illustrate the view opposite to that of the plurality: "'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.* (Scalia, J., dissenting)(quoting *Fare*, 442 U.S. at 734 n.4 (Powell, J., dissenting)).

<sup>132</sup> *Id.* at 2720 (Scalia, J., dissenting).

<sup>133</sup> *Id.* (Scalia, J., dissenting).

<sup>134</sup> *Id.* (Scalia, J., dissenting)(emphasis in original).

was not "a fluke," and that even if it was, the Governor of Oklahoma could use his pardon power to lift the sentence should Oklahoma citizens so demand.<sup>135</sup> Finally, the dissent criticized both the concurrence's usurpation of the legislature's right to specify the form state legislation shall take,<sup>136</sup> and the concurrence's subversion of the principle that only a valid, rather than a hypothetical, existence of a national consensus justifies judicially imposed constitutional restraints.<sup>137</sup> "The concurrence's approach is a solomonic solution to the problem of how to prevent execution in the present case while at the same time not holding that the execution of those under [sixteen] when they commit murder is categorically unconstitutional."<sup>138</sup>

## VI. ANALYSIS

*Thompson* does not simply involve a plebeian capital punishment issue that demands an examination of the nation's pulse. The case also raises some questions about the juvenile justice system's interaction with the adult criminal justice system. The Court has spent approximately the last twenty years granting juvenile offenders like Thompson the due process rights and privileges that adult offenders enjoy. During that same twenty year period of time, the Court has refined and limited death penalty statutes to include the very class of criminals to which Thompson belongs. As a result, the Court pushed itself into a corner with regard to juvenile executions by making it possible for a state like Oklahoma to constitutionally provide for the execution of convicted juvenile murderers who have been certified to stand trial as adults. The Court's choice in *Thomp-*

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<sup>135</sup> *Id.* at 2720-21 (Scalia, J., dissenting). The relevant Oklahoma statute provides in pertinent part that "no judge, court or officer, other than the Governor, can reprieve or suspend the execution of the judgment of death. . . ." OKLA. STAT. ANN. tit. 22, § 1004 (West 1986). The warden of the state prison, as an exception to the Governor's power, can suspend execution in the case of a prisoner who has gone insane or in the case of a prisoner who has become pregnant. OKLA. STAT. ANN. tit. 22, §§ 1005-1013 (West 1986).

<sup>136</sup> *Thompson*, 108 S. Ct. at 2721 (Scalia, J., dissenting). Justice Scalia claimed that the concurrence's proposal will make it difficult to pass capital punishment legislation for juveniles, just as it would be difficult to pass capital punishment legislation for "blind people," "white-haired grandmothers," and "mothers of two-year-olds." *Id.* (Scalia, J., dissenting).

<sup>137</sup> *Id.* (Scalia, J., dissenting). Justice Scalia argued that the concurrence "hoists on the deck of our [e]ighth [a]mendment jurisprudence the loose cannon of a brand new principle," which requires explicit mention of fifteen year olds in capital punishment statutes. *Id.* (Scalia, J., dissenting). Justice Scalia asked whether this means that any appealing group deserves mention, such as "those of extremely low intelligence" or "those over 75." *Id.* (Scalia, J., dissenting).

<sup>138</sup> *Id.* (Scalia, J., dissenting).

son was quite clear, either: 1) continue to equate the juvenile justice system to the adult criminal justice system and thereby support the death penalty for fifteen year old convicted murderers; or 2) recognize that executions do not completely belong in the adult/juvenile equation. Capital punishment and the juvenile justice system clashed in *Thompson*, and youth emerged the victor.

To resolve the complex issues in *Thompson*, the Court determined that the eighth amendment question concerning cruel and unusual punishment was the most compelling. Although the eighth amendment issue is arguably the Court's most important concern, the case unfortunately illustrates that the search for a national consensus to determine "the evolving standards of decency" can delude even the most objective querist. Notwithstanding the absence of a clear national consensus, the *Thompson* plurality insisted that recourse to a bright line rule satisfied the eighth amendment prohibition against cruel and unusual punishment. Considering the alternative analyses the Court could have employed in reaching this decision, its "Gallup poll" type survey of state law and jury statistics seems especially dubious.

Upon discovering that no national consensus had clearly evolved concerning the death penalty for juveniles, the Court should have examined whether Oklahoma's laws afforded Thompson the constitutional protections, both in the adult certification proceeding and in the sentencing proceeding, that the Court has mandated during its past three decades of jurisprudence. If Oklahoma's legal system failed to adequately protect Thompson's rights, the Court could have reversed or vacated the lower court's decision.<sup>139</sup> Had the Court discovered that Oklahoma courts had indeed instituted constitutionally sound proceedings which nevertheless resulted in the imposition of the death penalty, the Court should have then examined in greater detail the extent to which juvenile executions deviate from traditional juvenile justice theory.

The plurality failed to recognize that the Supreme Court has only rarely attempted to base so much of its decision upon a determination of the "evolving standards of decency." Justices Brennan and Marshall accepted the petitioner's proposition in *Furman* that society no longer tolerated capital punishment for just any crime, but the Justices' separate analyses attached great weight to several

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<sup>139</sup> This was the type of analysis employed by the Court in *Eddings v. Oklahoma*, in which the Court refused to consider the eighth amendment issue and focused instead on the failure of the lower court to consider all mitigating circumstances in the sentencing proceeding. *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

factors.<sup>140</sup> Justice Brennan considered that a severe punishment must not be degrading to the dignity of human beings, arbitrarily inflicted, excessive, or unacceptable to contemporary society.<sup>141</sup> Similarly, Justice Marshall determined that a punishment must not be intolerably painful and sufferable, unusual, excessive, or offensive to society's contemporary values.<sup>142</sup>

The Court subsequently treated contemporary standards as but one factor in determining the constitutionality of a particular punishment. In *Gregg v. Georgia*, Justice Stewart stated, "the [e]ighth [a]mendment demands more than that a challenged punishment be acceptable to contemporary society."<sup>143</sup> In *Woodson v. North Carolina*, Justice Stewart considered the contemporary standards, as manifested by history and tradition, legislative enactments, and jury determinations, in addition to jury discretion and individualized consideration, to determine whether mandatory death sentence provisions were unconstitutional.<sup>144</sup> In *Coker v. Georgia*, Justice White observed that a national consensus against capital punishment for rape very clearly existed because at that time only three states authorized the death penalty for the crime of rape and juries only

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<sup>140</sup> *Furman v. Georgia*, 408 U.S. 238, 257, 314 (1972)(Brennan, J., concurring and Marshall, J., concurring).

<sup>141</sup> *Id.* at 270-282 (Brennan, J., concurring). To support the principle that a severe punishment must be acceptable to contemporary society, Justice Brennan stated that "[t]he progressive decline in, and the current rarity of, the infliction of death demonstrate that our society seriously questions the appropriateness of this punishment today." *Id.* at 299 (Brennan, J., concurring). Justice Brennan, unlike the *Thompson* plurality, did not infer that a national consensus thereby existed. *Id.* at 296-300 (Brennan, J., concurring).

<sup>142</sup> *Id.* at 329-333 (Marshall, J., concurring). After examining the historical application of capital punishment, Justice Marshall concluded that "the death penalty is an excessive and unnecessary punishment that violates the [e]ighth [a]mendment." *Id.* at 358-59 (Marshall, J., concurring). Justice Marshall further held that capital punishment violates the eighth amendment "because it is morally unacceptable to the people of the United States at this time in their history." Justice Marshall did not base this decision on the existence of a national consensus, but on factors such as the superiority of life imprisonment to death as a form of punishment and the discriminatory nature of capital punishment. *Id.* at 362-64 (Marshall, J., concurring). The Court's attempt in *Thompson* to reduce its decision to a national consensus formula is certainly not supported by earlier decisions regarding the death penalty, as Justice Marshall's *Furman* opinion illustrates.

<sup>143</sup> 428 U.S. 153, 182 (1976)(Stewart, J., plurality opinion). Justice Stewart then examined the purposes of capital punishment, retribution and deterrence, as well as the disproportionality of the punishment to the crime. *Id.* at 183-87 (Stewart, J., plurality opinion).

<sup>144</sup> 428 U.S. 280, 288-305 (1976)(Stewart, J., plurality opinion). Justice Stewart did not rest his entire opinion on the existence of a national consensus because, at that time, ten states had enacted mandatory death penalty provisions. *Id.* at 313 (Rehnquist, J., dissenting).

rarely imposed the death sentence upon a convicted rapist.<sup>145</sup> Even given such clear societal evidence, Justice White further examined the disproportionality of the death penalty as a response to the crime of rape.<sup>146</sup>

Only recently has the Court relied exclusively on the "evolving standards of decency" test in deciding the constitutionality of a death penalty provision absent a clear national consensus. In *Enmund v. Florida*, Justice White held that imposition of the death penalty where a defendant is involved in a robbery in the course of which a murder is committed by a co-felon was barred by the contemporary standards of decency because only eight states authorized capital punishment in such circumstances and because juries overwhelmingly and consistently rejected capital punishment in such cases.<sup>147</sup> According to the *Enmund* dissent, however, twenty-three states at that time permitted the imposition of the death penalty where the defendant neither intended to kill nor actually killed the victims.<sup>148</sup> Like the instant case, the decision in *Enmund* became a battle of the interpretation of legislation and statistics, neither side of which could easily claim victory.

In *Thompson*, the plurality and the dissent each distorted the relevance of existing state and federal legislation. The *Thompson* plurality argued that, practically speaking, the number of states that prohibit the execution of a fifteen year old offender total thirty-four, while only seventeen states theoretically allow such executions, thus resulting in a 2:1 ratio.<sup>149</sup> The *Thompson* dissent claimed that nearly forty percent of the states as well as the federal government permit juvenile executions.<sup>150</sup> It is difficult to believe that both opinions

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<sup>145</sup> 433 U.S. 584, 595-97 (1977)(White, J., plurality opinion).

<sup>146</sup> *Id.* at 597-99 (White, J., plurality opinion).

<sup>147</sup> 458 U.S. 782, 789-96 (1982)(White, J., plurality opinion). According to the Court, the death penalty could only be imposed on a participant in a felony murder if the defendant killed, attempted to kill, or intended to kill. *Id.* at 801. Since *Enmund*, the Court has held that a showing of reckless indifference to human life is sufficient to satisfy the culpability requirement for capital punishment as applied to a major participant in a felony murder. *Tison v. Arizona*, 481 U.S. 137 (1987). Therefore, the *Tison* decision somewhat redeems the *Enmund* Court's misplaced emphasis on a nonexistent national consensus by recognizing that many states permit the execution of major participants in felony murders even absent a showing of specific intent.

<sup>148</sup> *Enmund*, 458 U.S. at 823 (O'Connor, J., dissenting). Both the plurality and the dissent agreed that the sentencing hearing failed to consider as a mitigating circumstance the defendant's minor role in the felony murders. *Id.* at 798-800 (White, J., plurality opinion); *id.* at 830 (O'Connor, J., dissenting).

<sup>149</sup> See *supra* notes 39-44 and accompanying text for the plurality's discussion of state legislation.

<sup>150</sup> See *supra* notes 117-121 and accompanying text for the dissent's discussion of state legislation.

were talking about the same legislation. Justice O'Connor, recognizing the Court's impasse, acknowledged that the evidence weighs heavily against juvenile executions, but concluded that this alone is not indicative of a national consensus.<sup>151</sup> As further evidence of the distortions created by this national survey, not one Justice recognized that the states that still permit juvenile executions are generally concentrated in two large regions of the country, the South and the West.<sup>152</sup> The plurality's claim that a "national" consensus exists is therefore untenable.

Furthermore, the plurality and the dissent contorted jury statistics in *Thompson* as if magnifying a nearly horizontal curve such that it appears to be vertical. The plurality cited the rare imposition of the death penalty for persons under sixteen years of age at the time of the crime.<sup>153</sup> The dissent rebuked this argument by stating that juvenile executions should be rare; moreover, the dissent pointed to the rare, yet constitutional, execution of women.<sup>154</sup> Justice O'Connor again recognized the folly in trying to second guess jury determinations through an examination of statistics, especially given

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<sup>151</sup> See *supra* notes 76-80 and accompanying text for the concurrence's discussion of state legislation.

<sup>152</sup> A regional examination of the country illustrates the absence of a national consensus concerning the execution of fifteen year olds and of teenagers in general.

States in the South that permit juvenile executions are Alabama, Arkansas, Florida, Louisiana, Mississippi, Oklahoma, South Carolina, and Virginia. In addition, North Carolina permits the execution of sixteen year old offenders under limited circumstances, as well as the execution of seventeen and eighteen year old offenders. See *supra* note 44. Kentucky permits the execution of persons sixteen years of age and older. Georgia and Texas permit the execution of seventeen and eighteen year old offenders. Finally, Tennessee permits the execution of eighteen year old offenders. In other words, every Southern State permits the execution of teenagers.

States in the western half of the country that permit juvenile executions are Arizona, Idaho, Montana, South Dakota, Utah, Washington, and Wyoming. In addition, Nevada permits the execution of persons sixteen years of age and older, and California, Colorado, New Mexico, Nebraska, and Oregon permit the execution of eighteen year old offenders. Only Alaska, Hawaii, Kansas, and North Dakota prohibit the execution of teenagers in the western regions of the country.

Many Midwestern States permit the execution of teenagers, as well, including Illinois (18), Indiana (16), Missouri (no minimum age), and Ohio (18). Eastern States that permit the execution of teenagers include Connecticut (18), Delaware (no minimum age), Maryland (18), New Hampshire (17), New Jersey (18), Pennsylvania (no minimum age), and Vermont (no minimum age). Indeed, the only geographic region that prohibits the execution of juveniles is the North Central region, including Iowa, Michigan, Minnesota, and Wisconsin.

See *supra* notes 39-44 and accompanying text for the plurality's complete categorization of state capital punishment statutes.

<sup>153</sup> See *supra* notes 49-56 and accompanying text for the plurality's discussion of jury determinations.

<sup>154</sup> See *supra* notes 122-128 and accompanying text for the dissent's discussion of jury determinations.

the cyclical and often unpredictable nature of society's position on capital punishment.<sup>155</sup> Had the Court considered its historical use of contemporary standards as but one factor in determining the constitutionality of a particular death penalty provision, it would have recognized, as did Justice O'Connor, that legislation and jury determinations merely lend support to the plurality's conclusion and are not dispositive of the eighth amendment question confronting the Court.

Given the divided Court and the nonparticipation of newly appointed Justice Kennedy, Justice O'Connor's concurrence might provide the actual holding in *Thompson*.<sup>156</sup> The concurring opinion does not escape criticism, however. A careful examination of the proceedings that culminated in the imposition of the death penalty as punishment for Thompson's crime disproves Justice O'Connor's argument that Oklahoma's legislature and courts failed to meet the Court's traditional standard of careful deliberation and review.<sup>157</sup> Furthermore, Justice O'Connor's opinion legislates more than it adjudicates. Indeed, the concurring opinion serves as a case study of the impropriety of such judicial activism.

The Court has continuously instituted procedural safeguards to protect a criminal defendant from the imposition of an arbitrary, excessive, or disproportionate punishment. More specifically, the Court has on occasion addressed the disposition of juvenile offenders. In *Kent v. United States*, the Supreme Court recognized the juvenile court's right to certify a juvenile offender to stand trial as an adult and thereby transfer the offender to criminal court jurisdiction.<sup>158</sup> To satisfy the constitutional requirements of due process and fair treatment, the Court decreed that a juvenile facing adult certification is entitled to a hearing, representation by counsel, access to records and reports considered by the juvenile court, and a statement of reasons for the juvenile court's ultimate decision.<sup>159</sup> The Court in *Kent* recognized that the decision to transfer a juvenile to the jurisdiction of the adult criminal courts "was potentially as

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<sup>155</sup> See *supra* notes 89-90 and accompanying text for the concurrence's discussion of jury determinations.

<sup>156</sup> The *Thompson* decision was certainly not a consensus. If more states such as Oklahoma specify an age of sixteen years or older in their capital punishment statutes, and if Justice Kennedy adopts the dissent's position, the Court might affirm by a five to four vote the next juvenile death sentence case it considers.

<sup>157</sup> See *supra* notes 81-88 and accompanying text for a review of Justice O'Connor's discussion of Oklahoma's failure to specify a minimum age in its capital punishment statute.

<sup>158</sup> 383 U.S. 541 (1966). The sixteen year old defendant in *Kent* raped and robbed a woman in the District of Columbia. *Id.* at 543.

<sup>159</sup> *Id.* at 553, 557.



important to petitioner as the difference between five years' confinement and a death sentence."<sup>160</sup> The Court recommended a list of factors that a juvenile court should consider before certifying a juvenile offender to stand trial as an adult,<sup>161</sup> factors which Oklahoma's statute largely incorporates.<sup>162</sup>

In compliance with *Kent*, the Oklahoma district court certified Thompson to stand trial as an adult.<sup>163</sup> After two separate hearings in which it received fourteen exhibits and the testimony of fourteen witnesses into evidence, the district court considered whether the prospect of reasonable rehabilitation existed for Thompson and ultimately answered the question in the negative.<sup>164</sup> The court found substantial evidence that: 1) the wounds and injuries to the body, concealment of the victim's body, and instrumentalities used to effectuate death all demonstrated the serious, aggressive, violent, premeditated and willful nature of the crime; 2) the offense was intentionally committed against a person; 3) Thompson did not suffer from any mental illness or immaturity, and understood the difference between right and wrong at the time of the crime's commission; 4) Thompson had a long and very antisocial history of previous contacts with law enforcement; 5) neither counseling nor institutionalization had had positive effects on Thompson, and the prospects for rehabilitation were low; and 6) Thompson was not at the time of the crime's commission escaping from an institution for delinquent children.<sup>165</sup> The Oklahoma Court of Criminal Appeals subsequently affirmed Thompson's certification to stand trial as an adult.<sup>166</sup>

The Court has gone beyond adult certification proceedings to protect juvenile offenders and others from the death penalty. The Court in *Gregg* instituted a bifurcated proceeding<sup>167</sup> to ensure that the sentencing authority receives adequate information and guidance and thereby avoids the imposition of arbitrary and capricious sentences.<sup>168</sup> Furthermore, the Court has on several occasions ad-

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<sup>160</sup> *Id.* at 557 (emphasis added).

<sup>161</sup> *Id.* at 565-68.

<sup>162</sup> See *supra* note 13 for a listing of the factors enumerated in Oklahoma's adult certification statute.

<sup>163</sup> Certification Order, District Court of Grady County, State of Oklahoma, Oteka L. Alford, Associate District Judge (April 21, 1983).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *In re W.W.T. v. Oklahoma*, No. J-83-362 (Okla. Crim. App. 1984).

<sup>167</sup> A bifurcated proceeding is one in which the guilt phase and the sentencing phase of the trial are two separate proceedings which often involve the same judge and jury.

<sup>168</sup> *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (Stewart, J., plurality opinion). As Justice Stewart stated:

addressed the issue of individualized consideration in the sentencing procedure. In *Woodson*, the Court held that in order to "guide, regularize, and make rationally reviewable the process for imposing a sentence of death," the sentencing authority must consider objective standards as well as the character and record of the offender and the circumstances of the offense before imposing its sentence.<sup>169</sup> In *Lockett v. Ohio*, the Court stated that "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors."<sup>170</sup> Perhaps most importantly in the context of *Thompson*, the Court in *Eddings v. Oklahoma* held that no limitations should be placed on the mitigating circumstances considered by the sentencing authority.<sup>171</sup> Moreover, relevant mitigating circumstances often include the age as well as the mental and emotional development of the offender.<sup>172</sup>

Thompson's sentencing procedures satisfied the Court's requirements as outlined above. First, Thompson's trial involved a bifurcated proceeding as mandated by Oklahoma law in which the jury first considered the guilt of the defendant and then, in a separate proceeding, considered the appropriate punishment.<sup>173</sup> Second, Oklahoma law provided that the sentencing authority consider several objective standards as possible aggravating circumstances potentially leading to the imposition of a death sentence.<sup>174</sup> Third, Oklahoma law did not preclude the consideration of any mitigating

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When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.

*Id.* at 191-92 (Stewart, J., plurality opinion).

<sup>169</sup> *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976)(Stewart, J., plurality opinion). Justice Rehnquist disagreed, stating that "for a court to attempt to catalogue the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete." *Id.* at 320-21 (Rehnquist, J., dissenting).

<sup>170</sup> *Lockett v. Ohio*, 438 U.S. 586, 608 (1978)(Stewart, J., plurality opinion).

<sup>171</sup> *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982)(Powell, J., plurality opinion).

<sup>172</sup> *Id.* at 116 (Powell, J., plurality opinion).

<sup>173</sup> The relevant Oklahoma statute provides in pertinent part:

Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death, life imprisonment without parole or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. . . . The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

OKLA. STAT. ANN. tit. 21, § 701.10 (West 1988)(amended in 1987 to include the "life imprisonment without parole" penalty option).

<sup>174</sup> The relevant Oklahoma statute provides in part that "[a]ggravating circumstances shall be: . . . 4. The murder was especially heinous, atrocious, or cruel; . . . 7. The existence of a probability that the defendant would commit criminal acts of violence that

circumstances.<sup>175</sup> Indeed, the court's instructions to the jury in the sentencing phase of Thompson's trial stated that "[m]itigating circumstances are those which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case."<sup>176</sup> Although Oklahoma law did not require the jury to reduce the mitigating circumstances found to writing,<sup>177</sup> it is highly probable that the jury considered Thompson's youth given the circumstances of the case.<sup>178</sup> Finally, the jury's decision was automatically reviewed by the Oklahoma Court of Criminal Appeals.<sup>179</sup>

The relative frequency of the imposition of the death sentence for juvenile offenders in Oklahoma is further evidence of the state legislature's probable deliberation over the matter of juvenile executions. The defendant in *Eddings* was merely sixteen years old when he shot and killed a law enforcement officer, and yet he received the death penalty for this crime in 1978.<sup>180</sup> The Oklahoma Court of Criminal Appeals affirmed Eddings' sentence, stating, "the Legislature must have anticipated that such a youth could be given

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would constitute a continuing threat to society. . . ." OKLA. STAT. ANN. tit. 21, § 701.12 (West 1983).

<sup>175</sup> The relevant Oklahoma statute provides in part that "[i]n the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. . . ." OKLA. STAT. ANN. tit. 21, § 701.10 (West 1988).

<sup>176</sup> Sentencing Proceeding: Jury Instructions, District Court of Grady County, State of Oklahoma, James R. Winchester, Judge (December 9, 1983).

<sup>177</sup> The relevant Oklahoma statute provides in part:

In the sentencing proceeding, the statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict be a unanimous recommendation of death, shall designate in writing . . . the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. . . . Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. . . .

OKLA. STAT. ANN. tit. 21, § 701.11 (West 1988).

<sup>178</sup> Indeed, the Court has previously stated, "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel." Woodson v. North Carolina, 428 U.S. 280, 320 (1976) (Rehnquist, J., dissenting) (quoting McGautha v. California, 402 U.S. 183, 207-08 (1971)).

<sup>179</sup> See OKLA. STAT. ANN. tit. 21, § 701.13 (West 1988) (providing for automatic review of death sentences).

<sup>180</sup> Eddings v. State, 616 P.2d 1159 (Okla. Crim. App. 1980), cert. granted, Eddings v. Oklahoma, 450 U.S. 1040 (1981), rev'd in part, 455 U.S. 104 (1982).

the death penalty.”<sup>181</sup> If the Oklahoma legislature had not anticipated such a result, it would certainly have revised the capital punishment statute in the years between Eddings’ death sentence and Thompson’s death sentence. As further proof of the Oklahoma legislature’s intention to resist any revision of its capital punishment statute, another sixteen year old was sentenced to death in 1986, two years after Thompson received his death sentence.<sup>182</sup> Given the widespread publicity of Thompson’s trial and its broad public exposure,<sup>183</sup> the legislature would have modified its capital punishment statute had the citizens of Oklahoma so demanded. In short, the Oklahoma legislature has been on notice for nearly ten years that its capital punishment statute and adult certification procedures can lead to the execution of a juvenile offender.

Thus, Justice O’Connor’s assumption that Oklahoma failed to deliberate is simply unfounded. By the time Thompson would have received a lethal drug injection, the following Oklahoma entities would have considered the judgment: legislators, the Governor, prosecuting attorneys, the juvenile court, the district court, the appellate courts, the jury, and of course, the public. More importantly, Oklahoma followed the Supreme Court’s own guidelines and decisions in creating and defining both its death penalty statute and its adult certification proceedings. As the dissent stated, Thompson’s death sentence was not “a fluke.”<sup>184</sup> Rather, one can argue that the Court had, through its prior decisions, placed its stamp of approval on the execution of William Wayne Thompson and others like him.

Because the Court’s analysis can be easily refuted, the Court must have misplaced its emphasis. First, there is no clear national consensus. Second, the laws and procedures in Oklahoma are constitutionally sound. Yet, Thompson’s death sentence was vacated. The Court is clearly sending a jurisprudential message that pertains to neither a popular opinion poll nor judicial activism. Rather, the relevance of *Thompson* is buried in the plurality’s analysis of the disproportionality of the death sentence as a response to a juvenile offender’s culpability.<sup>185</sup> The dissent called this portion of the

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<sup>181</sup> *Eddings*, 616 P.2d at 1166.

<sup>182</sup> See V. STREIB, *supra* note 51, at 233 n.36 (provides sources of information relating to imposition of death sentence for crimes committed by sixteen year old Oklahoman Sean Richard Sellers).

<sup>183</sup> See V. STREIB, *supra* note 51, at 215 n.118 (Thompson was interviewed in 1985 for a television news special on a major network).

<sup>184</sup> See *supra* note 135 and accompanying text.

<sup>185</sup> See *supra* notes 57-73 and accompanying text for the plurality’s discussion of the disproportionality of the death penalty as a response to a juvenile’s culpability.

plurality's argument "irrelevant,"<sup>186</sup> while the concurrence maintained that some fifteen year olds harbor the kind of moral culpability that justifies the imposition of a death sentence.<sup>187</sup> Unfortunately, the real issue at stake escaped extensive consideration in all three opinions.

Thompson's death sentence challenged whether the juvenile justice system or the adult criminal justice system serves as the most appropriate forum for streetwise, hardened, repeat juvenile offenders. Because adult certification proceedings are capable of making that determination, the question confronting the Court was whether the adult criminal justice system may sentence a child to die.

For a period in this country's history, a young offender was treated no differently than an adult; a murderer was a murderer, regardless of age. Then in 1899, the juvenile justice system was born.<sup>188</sup> As the Supreme Court has recognized, the objectives of the juvenile system "are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment."<sup>189</sup> As a result, "[t]he State is *parens patriae* rather than prosecuting attorney and judge."<sup>190</sup> For the first half of the twentieth century, the juvenile justice system was kept separate and distinct from the adult criminal justice system.<sup>191</sup> However, the execution of certain juvenile offenders as well as some incarceration of juveniles in adult penal facilities continued.<sup>192</sup> Nevertheless, a child convicted in criminal court generally received a

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<sup>186</sup> *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2719 (1988) (Scalia, J., dissenting).

<sup>187</sup> *Id.* at 2708 (O'Connor, J., concurring).

<sup>188</sup> *In re Gault*, 387 U.S. 1, 14-15 (1967). The juvenile court movement began in Illinois and has since spread to every state and the District of Columbia. *Id.* This discussion is not meant to be a complete historical survey of the juvenile justice system, but rather an overview of its goals and objectives.

<sup>189</sup> *Kent v. United States*, 383 U.S. 541, 554 (1966). The Court in *In re Gault* stated:

The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. . . . The idea of crime and punishment was to be abandoned.

*In re Gault*, 387 U.S. at 15-16 (citing Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167; Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909)).

<sup>190</sup> *Kent*, 383 U.S. at 554-55. The term *parens patriae* has come to mean that the state assumes the role of the child's parent in providing guidance and rehabilitation for the child. *Schall v. Martin*, 467 U.S. 253, 265-66 (1984).

<sup>191</sup> The period between 1899 and 1967 is commonly known as "the era of the socialized juvenile justice system." V. STREIB, *supra* note 51, at 4.

<sup>192</sup> V. STREIB, *supra* note 51, at 4. Justice Black stated that "state laws from the first one on contained provisions . . . for arresting and charging juveniles with violations of state criminal laws . . ." *In re Gault*, 387 U.S. at 60 (Black, J., concurring).

less severe punishment than an adult might have received for a similar crime.<sup>193</sup>

The juvenile justice system came under attack by the Court in the mid-1960s. The Court stated that "serious questions" had been raised about the juvenile courts which indicated that the juvenile offender "gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."<sup>194</sup> The Court continued its assault by stating, "[t]he constitutional and theoretical basis for this peculiar system is—to say the least—debatable."<sup>195</sup> The Court was especially concerned with a child's right to due process of law, but it did not intend to dismantle the entire juvenile justice system in pursuit of this right.<sup>196</sup> Rather, the Court merely attempted to fill in the "gray area" shared by the juvenile justice system and the adult criminal justice system. Accordingly, the Court provided that certain, but not all, due process rights apply equally to both children and adults.<sup>197</sup>

It is important to realize that the juvenile justice system today is neither wholly independent of nor wholly subsumed by the adult criminal justice system, even as the Court attempts to define the gray area.<sup>198</sup> Even so, the Court's transformation of the juvenile justice system into something different from its original 1899 form has not gone unnoticed. Justice Stewart once commented that "to

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<sup>193</sup> V. STREIB, *supra* note 51, at 4.

<sup>194</sup> *Kent*, 383 U.S. at 555-56.

<sup>195</sup> *In re Gault*, 387 U.S. at 17.

<sup>196</sup> As the Court stated in *In re Gault*, "the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process." *Id.* at 21. See also *In re Winship*, 397 U.S. 358, 367 (1970) (observance of standard of proof beyond reasonable doubt will not adversely affect administration of juvenile justice). In addition, Justice Rehnquist has recognized the importance of preserving the fundamental aims of the juvenile justice system. *Schall v. Martin*, 467 U.S. 253, 263-67 (1984). In upholding a New York statute that provided for preventative pretrial detention of juvenile offenders, Justice Rehnquist stated that "the Constitution does not mandate elimination of all differences in the treatment of juveniles." *Id.* at 263. These cases illustrate the Court's struggle in defining the gray area between the juvenile and adult justice systems.

<sup>197</sup> *Kent*, *In re Gault*, and *In re Winship* form the basis of what is commonly known as the constitutionalized era of juvenile justice. V. STREIB, *supra* note 51, at 5-6.

<sup>198</sup> The present era of juvenile justice has been described as follows:

The juvenile justice system of the mid-1980s retains the essence of these philosophical roots, but in the context of a court of law. The system's procedures have been brought into line with criminal court procedures, and the focus is somewhat more on punishment and prevention than on the treatment of errant children. More serious juvenile offenders are being shunted from juvenile court to criminal court, and very minor offenders are being handled informally outside juvenile court. The juvenile court continues, however, to process the broad midsection of juvenile offenders and to view them in a parental or clinical manner.

V. STREIB, *supra* note 51, at 7.

impose the Court's long catalog of requirements upon juvenile proceedings . . . is to invite a long step backwards into the nineteenth century."<sup>199</sup> Even though this warning has not come to pass, the Court has grown more sensitive to the original objectives of the juvenile justice system. In *McKeiver v. Pennsylvania*, the Court held that trial by jury is not required for juvenile proceedings and thereby stated that "if the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence."<sup>200</sup>

The *Thompson* holding is consistent with the trend toward more clearly defining the gray area between the juvenile justice system and the adult criminal justice system. The Court's opinion of the juvenile justice system, like the system itself, has matured over the years. It has gone from recognizing the bright promise of a new idea for juvenile justice to remedying the limitations of a system that has not always achieved its laudable purpose. Most importantly, though, the Court has not abandoned the principle that somehow children are different from adults. *Thompson* is a recognition that the juvenile justice system and the adult criminal justice system share many common objectives and results, and that the death penalty is not among these. There is no question that society should not excuse Thompson for his crime, but executing him eliminates all prospects for rehabilitation and affords no more protection for society than secured imprisonment. Moreover, juvenile executions speak more eloquently of society's failures than of the juvenile's crime. In short, the *Thompson* holding is a positive development in juvenile and adult criminal justice.

## VII. CONCLUSION

The *Thompson* plurality reduced eighth amendment analysis to a formula whose factors included state legislation and jury statistics in order to ascertain whether a societal consensus exists regarding the execution of juvenile offenders. In an effort to quantify its holding, the plurality misplaced its emphasis. Justice O'Connor, on the other hand, while recognizing that the numbers did not add up to a bright

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<sup>199</sup> *In re Gault*, 387 U.S. at 79 (Stewart, J., dissenting); accord *In re Winship*, 397 U.S. at 376 (Burger, C.J., dissenting).

<sup>200</sup> 403 U.S. 528, 551 (1971) (Blackmun, J., plurality opinion). Justice Brennan, in a separate opinion, stated that "however much the juvenile system may have failed in practice, its very existence as an ostensibly beneficent and noncriminal process for the care and guidance of young persons demonstrates the existence of the community's sympathy and concern for the young." *Id.* at 555 (Brennan, J., concurring in part, dissenting in part).

line rule, nevertheless vacated Thompson's death sentence in her new role as legislator. The dissent's "irrelevant" declaration concerning the plurality's disproportionality discussion illuminated its surrender to the plurality's recognition that youth deserve special treatment in eighth amendment analysis.

The Court could not have anticipated the tremendous challenge imposed by Thompson's death sentence. The Court has long maintained that the death penalty is a constitutional penalty under certain circumstances, and further that the juvenile justice system is itself worthy of merit. As the Court demonstrated, it is difficult even for reasonable minds to draw an appropriate line that effectively separates the child from the adult and the offender from the punishment. However, since society can protect itself from violent juvenile crime without resort to execution, the Court can safely guard the principle that children, though deserving as citizens of certain fundamental due process rights afforded adults, must nevertheless receive the special consideration and treatment embodied by the juvenile justice system.

The Court will soon consider the validity of capital punishment statutes that permit the execution of sixteen year olds,<sup>201</sup> seventeen year olds,<sup>202</sup> and the mentally retarded.<sup>203</sup> Hopefully the Court will focus less on an examination of the nation's pulse and more on capacity, proportionality and justice. The children of a decent society deserve an enlightened Court that confronts the tough issues and prominently addresses these issues in its opinions. As Thomas Jefferson once said:

I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.<sup>204</sup>

If this is the original and true expression of the "evolving standards

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<sup>201</sup> *State v. Wilkins*, 736 S.W.2d 409 (Mo. 1987), *cert. granted*, *Wilkins v. Missouri*, 108 S. Ct. 2896 (1988).

<sup>202</sup> *Stanford v. Commonwealth*, 734 S.W.2d 781 (Ky. 1987), *cert. granted*, *Stanford v. Kentucky*, 57 U.S.L.W. 3259 (1988).

<sup>203</sup> *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 2896 (1988).

<sup>204</sup> Letter from Thomas Jefferson to a Friend (one of four inscriptions engraved on the interior walls of the Jefferson Memorial, Washington, D.C.).



of decency," the *Thompson* holding has certainly facilitated the advancement of an enlightened Court and an enlightened age.

DOMINIC J. RICOTTA