CAPITAL PUNISHMENT IN THE UNITED STATES:

SUPREME COURT PRECEDENT AND THE DETERMINATION OF DEATH PENALTY ELIGIBILITY

By

MICHELLE JACQUELINE GOODMAN

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ABSTRACT

The Eighth Amendment reads, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Due to the ambiguous meaning of what it means to be “cruel and unusual, the Supreme Court of the United States has dealt with nearly 50 capital punishment cases. Although the Court has been tasked with deciding on a wide range of death penalty related topics, this thesis focuses specifically on eligibility for the death penalty. It explores landmark Supreme Court cases, analyzes the ways in which the Court comes to it’s decisions regarding eligibility, how it determines public opinion, and what the future of the death penalty may look like.

In 1608, Captain George Kendall was executed for treason. This was the first recorded execution in America, and from that moment on, capital punishment has continued to be one of the most greatly disputed topics in the United States because of its debatable constitutionality and the ethical issues surrounding it (Bedau, 1998, p. 3). The death penalty in the United States was originally conceived as an attempt to discourage severe crime by punishing the offender in the most heinous way possible in hopes that others would not follow suit. Though, because of the permanency of invoking the death penalty, it is surrounded by controversy relating to the Eighth Amendment. The problem with the Eighth Amendment, which prohibits cruel and unusual punishment (Eighth Amendment, 2010), is that it does not define what cruel and unusual means. Thus, the amendment is open to interpretation. Throughout history, the Supreme Court has had to intervene numerous times to define this amendment more explicitly, but over 48 death penalty Supreme Court cases later, and unanimity has not been reached. Although the Court has "ruled that the death penalty is not a *per se* violation of the Eighth Amendment's ban on cruel and unusual punishment, they have ruled that it does shape certain procedural aspects regarding when a jury may use the death penalty and how it must be carried out" (Death penalty, 2007). Further, the Supreme Court has revoked, amended, and put policies in place that it believes best complies with the amendment. Yet, despite its attempts to mitigate the issues brought about by the death penalty, the punishment remains swarmed with controversy, as public opinion on what constitutes cruel and unusual punishment evolves.

Eligibility for capital punishment is an issue that has frequently come before the Supreme Court. Although the Court appears to keep pulse of public opinion on the issue, public opinion has changed significantly throughout the decades. Also undecided is how the Court should assess public opinion. These types of issues are seen in a wide variety of cases.

In 1986, for instance, the Court considered whether it was constitutional to impose the death penalty on the mentally insane. This case, *Ford v. Wainwright,* took place in 1974 when Alvin Ford was sentenced to death in Florida after being convicted of first-degree murder. During the trial, at no point was his competency in question, but while on Death Row, he began to exhibit signs of a mental disease (*Ford v. Wainwright*, n.d., para. 1). In response, the defense's counsel had two psychiatrists evaluate Ford. One doctor, after evaluating him over a 14-month period, found that he was suffering from Paranoid Schizophrenia with Suicide Potential, and the other doctor concluded that Ford had no understanding of why he was to receive the death penalty. Following this, the lawyers then arranged for three additional psychiatrists, appointed by the Governor, to examine Ford according to a Florida statutory procedure. Although they came to separate conclusions regarding what kind of mental disorder Ford had, all three agreed that Ford was competent enough to understand his execution, despite being insane, as defined by state law. Based on these findings, the Florida Governor signed Ford's death warrant.

The Supreme Court reached its decision on June 26, 1896, in favor of Ford. Justice Marshall delivered the opinion of the Court, with Justice Brennan, Justice Blackmun, and Justice Stevens joining. He described how the last time the Court reviewed a case dealing with the question of executing the mentally insane in *Solesbee v. Balkcom* (1950), the Eighth Amendment had not yet been applied to the States, and therefore the Court did not believe there was a right to due process on the grounds of insanity. Now that the Eighth Amendment has been applied to the states, however, and "has been recognized to affect significantly both the procedural and the substantive aspects of the death penalty, the question of executing the insane takes on a wholly different complexion" (*Ford v. Wainwright*). Therefore, when determining sanity, the Court now needed to address whether the Constitution places a restriction on the execution of the mentally

insane. Marshall then addressed common law by explaining how the practice of executing a mentally insane person has historically been "savage and inhumane" because they cannot be held responsible for their own actions. When executing the insane, the death penalty not only "offends humanity" and fails its retributive purposes, due to the insane not being able to comprehend their punishment, but the punishment also does not set an example for others. Thus, the punishment defeats the death penalty's purpose of acting as a crime deterrent. This led to the Court's decision that the Eighth Amendment prohibits the execution of the mentally insane "whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance" (*Ford v. Wainwright).*

In *Ford v. Wainwright,* the Court also considered the question of whether the Federal District erred when declining to hear Ford's petition. Marshall notes that even though the prohibition of the execution of the insane is based in historical law, the judicial system that protects that right is based in contemporary law. Decided in *Townsend v. Sain* (1963), when there is a question of mental competency, a hearing *de novo* must be granted by the District Court. Additionally, although the Florida Governor followed the statutory procedure in appointing three psychiatrists to examine Ford and made his decision based on their reports, the Governor erred in refusing to review the two initial psychiatrist reports submitted by Ford's lawyer. The Court found this to be insufficient in regards to *Townsend*.

Writing a concurring opinion, Justice Powell agreed with Marshall that common law considered the execution of the insane to be cruel and unusual and that the Framers of the Constitution intended at least as much protection when writing the Eighth Amendment. Powell, however, believed that the majority opinion failed to address the meaning of insanity, and he

disagreed with the procedures set forward in order to evade a *de novo* hearing. As for what it means to be mentally insane, Powell argued that if the defendant is not able to comprehend his death sentence and why he received it, then he is barred from receiving the death penalty. As for the procedures of due process, however, Powell believes that Ford was stripped of his right to be heard when the Florida Governor declined to review the psychiatric report that his counsel filed on his behalf. Powell believes that the defendant in these cases "is entitled to an opportunity to be heard" (*Ford v. Wainwright*, Powell concur).

Both concurring and dissenting was Justice O'Connor, joined by Justice White. They first argued that Florida's procedures were not adequate to ensure Ford's due process rights. This is due in part to the Governor's refusal to express whether he would review the documents submitted by the defense's lawyer. O'Connor believed that while a whole oral argument from the defense is not necessary, the Governor must, at the very least, review the documents submitted in order to ensure due process. Therefore, O'Connor and White concurred that the defendant must be given an opportunity to be heard and that this is where the Florida Governor failed. In a partial dissent, however, Justice O'Connor wrote that she disagreed with the majority opinion in that it "created a protected expectation that no execution will be carried out" as long as the accused is found to be mentally insane (*Ford v. Wainwright)*. The Court must be cautious with this, as the prisoner's interest is always going to be avoiding the death penalty in any way possible.

Justice Rehnquist dissented and was joined by Chief Justice Burger. They contended that the Court made its decision on two incorrect grounds. First, the majority opinion claims that it stays consistent with common law by disallowing the execution of the mentally insane. Rehnquist, citing *Solesbee*, declared that this was incorrect because with common law, it had

always been an executive authority that determines sanity and clemency. With the Court's decision, however, sanity was left to be decided by the courts. In alignment with the dissenting opinion, the Florida Governor was therefore actually following common law more closely by handing down Ford's death sentence. Additionally, the dissenters noted that by creating a constitutional right for the question of sanity to be decided by a jury, rather than an executive, the majority only created more complications in the process. Defendants sentenced to death have already had a trial finding guilt, a subsequent trial in which they received the death penalty, and so with a third stage to determine sanity, the Court was leaving room for any defendant, seeing his last opportunity, to claim insanity. Therefore, the dissenters concluded that the majority opinion unfairly used common law practice in order to outlaw the execution of the mentally insane (*Ford v. Wainwright*).

Similar to the question of whether it is acceptable to execute the mentally insane is the question of whether it is appropriate to allow the execution of the intellectually disabled. The first case dealing with this question is *Penry v. Lynaugh* (1989). Penry was an intellectually disabled man with the mental capacity of a 6-and-a-half-year-old and was charged with capital murder in Texas. He was found guilty during the first phase of the trial, despite his lawyer raising an insanity defense citing his intellectual disability and abuse suffered as a child. His counsel felt intellectual disability was a mitigating factor because it causes poor impulse control and prevents him from learning from his actions and past experiences (*Penry v. Lynaugh*). At the second phase of the trial, the penalty phase, the jury was instructed to answer three questions. Answering yes to all three questions would result in the death penalty, while answering no to one or more questions would automatically result in life in prison. The jury answered yes to all three questions including, "whether the petitioner's conduct was committed deliberately and with the

reasonable expectation that death would result; whether there was a probability that he would be a continuing threat to society; and whether the killing was unreasonable in response to any provocation by the victim" (*Penry. Lynaugh*). Therefore, Penry was sentenced to death. The jury, however, was not made aware or instructed that it could take into account mitigating factors, such as the defendant's intellectual disability. The case was appealed on these grounds and also because it is cruel and unusual punishment to execute someone suffering from an intellectual disability.

On June 26, 1989, in a 5-4 decision, the Supreme Court partially affirmed, but partially rejected the rulings made by the previous, lower courts. The Court ruled that the jury was not informed correctly on how to consider the mitigating factors, such as Penry's mental state, but that the Constitution and the Eighth Amendment do not prohibit the execution of the intellectually disabled. Justice O'Connor wrote the majority opinion. She wrote that following the decision in *Jurek v. Texas* (1976), individualized assessments regarding the death penalty were mandatory. All mitigating factors, including any aspect of the defendant's character or circumstances surrounding the crime, should be considered when deciding on the death penalty. Further, in *Eddings v. Oklahoma* (1982), the Court found that all mitigating factors must be included, and the Court cannot refuse to take them into consideration. Additionally, in *California v. Brown* (1987), the Court decided that the sentence in court must consider all mitigating evidence to show it viewed the defendant as a distinctive individual. "The sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime" (*Penry v. Lynaugh*). Therefore, in Penry's case, the jury should have been made aware that it could consider his intellectual disability.

O'Connor discusses how there is "the principle that punishment should be directly related

to the personal culpability of the criminal defendant" (*Penry v. Lynaugh*). This is relevant in the case of Penry because decisions on the death penalty are to be made by individual assessments, and it has long been the opinion of society that individuals found guilty of crimes may be less deserving of blame if they possess mental deficiencies. The jury, however, was instructed only to answer the three questions and was not aware that it could take into account the mitigating evidence of Penry's mental state. In fact, Penry's counsel had asked for the jury to be informed that it could take his intellectual disability into account as a mitigating factor for reduced culpability, but the request was denied. Therefore, the Court concluded that "the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision" (*Penry v. Lynaugh*).

In the second part of Penry's appeal, he claimed that it is cruel and unusual punishment to execute someone suffering from an intellectual disability. With the mental age of six-and-a-half-years-old, Penry argues that he could not possibly possess the same level of culpability as a non-intellectually disabled person and also that the public opinion of society is changing to a desire to protect the intellectually disabled from the death penalty. Addressing these claims, O'Connor wrote that historically with common law, "idiots" and "lunatics" were grouped together and not culpable for crimes they committed while suffering from their mental illness. The term "idiot" was meant to describe a person "who had a total lack of reason or understanding, or an inability to distinguish between good and evil…a man that is totally deprived of his understanding and memory, and [does] not know what he is doing, more than an infant...such a one is never the object of punishment" (*Penry v. Lynaugh*). The American Law Institute gives a similar, more modern definition, and it also believes that a person suffering from an intellectual disability should not be held responsible if he cannot understand the law or appreciate the nature of his

crime. *Ford v. Wainwright* afforded these rights to people who qualify as mentally insane. The Court, however, believed that Penry does not qualify as someone who did not understand his wrongdoings. He was found to be competent enough to stand trial, to discuss the case with his lawyer, and to comprehend why he was facing capital charges and the death penalty. In short, Penry knew his criminal actions were wrong.

As for Penry's claim that society condemns the execution of the intellectually disabled, he pointed to evolving standards of decency. While the federal Anti-Drug Abuse Act of 1988 banned the execution of intellectually disabled persons, only one state specifically banned this. O'Connor then compares this to the Court's decision in *Ford v. Wainwright* where no state allowed the mentally insane to be given the death penalty and 26 states specifically had statutes preventing it. Penry then also put forward statistics from a Texas poll, a Florida poll, and a Georgia poll, all citing 73 percent, 71 percent, and 66 percent of the populations opposing the execution of the mentally insane, respectively. Though, in order to determine what the evolving standards of decency look like today, the Court looks for objective evidence that is put forward in jury decisions or legislation. Penry did not offer this type of evidence (*Penry v. Lynaugh*).

Additionally, the Court looked toward the purposes of capital punishment: retribution and the deterrence of crimes by other offenders. For the purpose of retribution, the defendant's sentence must be equal to their culpability. Penry claimed that as an intellectually disabled person, his culpability was not high enough to warrant the death penalty. O'Connor, however, writes that the Court cannot group together all people suffering from an intellectual disability into the same category of culpability, as the degree of intellectual disabilities vary from person to person. Penry also asked the Court to make this determination based on mental age and to not execute anyone under the mental age of 17. In response, the Court decided that it cannot rely on

mental age to determine death penalty eligibility because a defendant's social maturity could be older, it underestimates the life experience that intellectually disabled people may or may not have, and is overall an unreliable measurement. Moreover, if the Court made the decision that intellectually disabled people with the mental age of 7 or lower cannot be executed, this concept may then be used to leave such people out of other facets of life, such as marriage. Therefore, although in *Penry v. Lynaugh*, the Court did agree with Penry's claim that suffering from an intellectual disability counts as a mitigating factor that must be taken into consideration during sentencing, the execution of the intellectually disabled is not considered cruel and unusual punishment (*Penry v. Lynaugh*).

Several justices both concurred in part and dissented in part. Justice Brennan, with Justice Marshall joining, wrote that while he concurs with Penry's first appeal that the jury was not properly instructed on considering mitigating factors, he believed that it is cruel and unusual punishment, prohibited by the Eighth Amendment, to allow the execution of any intellectually disabled person. Justice Brennan argued that the intellectually disabled should be treated as a homogenous group because they all fit into the singular clinical definition of intellectually disabled. While there are ranges such as a moderate or mild intellectually disability, "every individual who has an intellectual disability—irrespective of his or her precise capacities or experiences—has a substantial disability in cognitive ability and adaptive behavior" (*Penry v. Lynaugh*, Brennan concur). Therefore, no matter the level of impairment, being intellectually disabled reduces the level of culpability large enough to make the death penalty a disproportionate punishment. Justice Brennan ends his opinion stating how executing the intellectually disabled also fails to serve the retributive and deterrent purposes of the death penalty (*Penry v. Lynaugh*).

In two separate opinions, Justice Stevens and Justice Blackmun write that while they concur with the Court's decision on Penry's first appeal, they would reverse the decision made by the Texas Court of Appeals entirely, as they agree with the amicus curiae brief from the American Association on Intellectual and Developmental Disabilities that such executions are unconstitutional. Justice Scalia, for his part, partially dissented from the majority's holding in favor of Penry's first claim that the Texas jury not being instructed properly to consider mitigating evidence is unconstitutional. He believes that this will cause arbitrary sentencing, just as in *Furman v. Georgia* (1972).

A second landmark case surrounding the issue of executing the intellectually disabled is *Atkins v. Virginia* (2002). Daryl Atkins was charged with capital murder after armed kidnapping, robbing, and fatally shooting an Air Force serviceman several times, leaving him to die. The details in Atkin's defense story matched his accomplice's story, except for each man claiming that the other had actually done the killing. Atkin's accomplice's story was deemed the more credible one and at the sentencing phase of the trial, Atkins was sentenced to death, despite his defense presenting evidence from a psychologist that he suffered from a mild intellectual disability with the extremely low IQ of 59. But, because of procedural error, this sentence was overturned. At the next trial, a second psychologist testified that Atkins had average intelligence, but was a continuing risk to society because of the aggravating factors of having a violent criminal record and the barbarity of the offense. After two trials at the Supreme Court of Virginia, Atkin's case reached the United States Supreme Court, once again presenting the question of if it is cruel and unusual punishment to execute the intellectually disabled (*Atkins v. Virginia*).

On June 20, 2002, in a 6-3 decision, the Court declared the execution of the intellectually

disabled to be prohibited by the Eighth Amendment. Justice Stevens delivered the opinion of the Court. He explained the importance of proportionality of the punishment to the crime. In deciding what is an excessive punishment, the Court must look at today's standards of decency and not the ones present when the Bill of Rights was written. Using objective evidence, such as recent legislation, the Court decided that the execution of the intellectually disabled is excessive and not proportionate. In order to come to this conclusion, the Court first looked to the judgement of the state legislatures on this topic. There had not been a public issue surrounding this before 1986, when an intellectually disabled murderer was executed in Georgia. This led to the first state law banning the death penalty for the intellectually disabled. Maryland followed suit three years later in 1989, the same year that *Penry v. Lynaugh* was decided.

Since then, however, state legislatures have begun to address this issue. In the years since *Penry v. Lynaugh*, at least 17 states have adopted laws prohibiting the execution of the intellectually disabled. The Court recognized that although this is not the majority of states, the consistency of direction suggests a change in moral climate. Additionally, the decisions passed in legislatures have been enormously in favor of protecting the intellectually disabled. The Court then explained how even in the states that still allow such executions, so few have been carried out, that explicitly banning the process is unnecessary. Disagreement exists over how to determine which offenders are actually intellectually disabled, as opposed to which just have a low IQ. In order to do this, as made precedent in *Ford v. Wainwright*, the Court "leaves to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences" (*Atkins v. Virginia*). In other words, it is left up to the States to decide how to best distinguish which defendants are in fact intellectually disabled.

Clinically speaking, although intellectually disabled people can often distinguish between

right and wrong, their disability drastically reduces their ability to learn from past experiences and control their impulses, among others. It is common for the intellectually disabled to act impulsively rather than to think through their actions logically (*Atkins v. Virginia*). Thus, although they can still be held accountable for their actions, their level of accountability is reduced. Additionally, an intellectually disabled offender is not as able to defend himself properly during trial, such as being of less assistance to his lawyer or his demeanor may come across as a lack of remorse. This type of execution also does not fit the retribution or deterrent purposes and therefore makes the execution of the intellectually disabled "nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment" (*Enmund v. Florida*), prohibited by the Eighth Amendment.

In a dissenting opinion written by Chief Justice Rehnquist, joined by Justices Scalia and Thomas, he writes that he feels the majority of the Court came to its conclusion by creating rationalizations for its preferred result instead of objectively looking at the evolving standards of decency. Since *Penry v. Lynaugh*, 18 states had changed their laws to prohibit the execution of the intellectually disabled and the Court used this to make its decision. This is not a majority, and thus, does not show a national consensus of changed standards of decency. Nineteen states, including Virginia, still allow the execution of intellectually disabled people to be left up to the jury's discretion. Perhaps more importantly than this, Rehnquist wrote how absurd it is for the Court to look to foreign law, religious organizations, and public opinion polls to aid the Court in making its decision. There is little to no precedent, he argued, for this type of decision making, and laws from the European Union have no relevance to the Constitution. The opinion polls are also unreliable because there is no assurance they were conducted properly (*Atkins v. Virginia*). Instead, the Court has historically relied on jury decisions and legislation, as it is "the clearest

and most reliable objective evidence of contemporary values" *(Penry v. Lynaugh*, Rehnquist dissent). Rehnquist asserts that it is the legislatures, not the court system, that responds to the will of the people and here, the Court stepped beyond its bounds.

In a second dissent written by Justice Scalia, in which Chief Justice Rehnquist and Justice Thomas also joined, he wrote that the Court made rationalizations for its preferred decision, rather than having to look to objective evidence. He also cited common law, stating that the term "idiot" was used to refer to someone that had absolutely zero lack of reasoning or ability to tell the difference between good and bad. It was these "idiots" that were exempted from capital punishment, as their culpability was significantly lessened. In the opinion of Scalia, Atkins, however, did not fall into this category. His intellectual disability was so minor that there was disagreement on if he actually qualified as intellectually disabled or not. Common law would have labeled him as an "imbecile," which were not exempt from capital punishment (*Atkins v. Virginia*). Scalia then discussed how in order to prove that national standards of decency have evolved enough to include imbeciles in the same category as "idiots," the Court must look toward objective evidence and not to the opinion of its members. He criticized the Court for many of the same reasons as Chief Justice Rehnquist did. In the past, the Court looked for an extremely high consensus when determining evolving standards of decency. For example, in *Coker v. Georgia*, the Court looked for a 78 percent consensus, but with Atkins, it settled for 47 percent. Additionally, the Court cites the consistency of direction change, but Scalia argues that this is an irrelevant point because there is no other direction for which the law to change in. He further disputes the Court's argument that the intellectually disabled require constitutional protection because "they face a special risk of wrongful execution." Scalia then ends his dissent declaring that this is a preposterous claim because "ugly people" are also at greater risk of being

wrongfully executed. They, however, are not protected and discretion is still given to the jury (*Atkins v. Virginia*), just as it should be with the intellectually disabled.

In addition to mental impairments, the Court has had to decide whether minor age exempts a criminal offender from the death penalty. There have been three prominent Supreme Court cases that have had to do with the execution of minors. The first was *Thompson v. Oklahoma* (1988). When he was just 15 years old, Thompson participated in an extremely brutal murder. Normally, as Oklahoma law states, since Thompson was only 15 years old, he would have been tried as a child. Though, because of the violent nature of the crime, the District Attorney wanted to try him as an adult and petitioned to do so. Thompson was then tried as an adult, convicted, and at sentencing, he was given the death penalty (*Thompson v. Oklahoma*).

In a 5-3 decision, the Supreme Court decided that it was prohibited by the Eighth Amendment and therefore cruel and unusual punishment to execute someone under the age of 16. Justice Stevens delivered the opinion of the Court in 1988, which was joined by Justice Brennan, Justice Blackmun, and Justice Marshall. He wrote that in making this decision, it was important to look toward "the evolving standards of decency that mark the progress of a maturing society" (*Thompson v. Oklahoma*). In order to do this, the Court must look at new legislation and jury determinations. As for new legislation, 18 states have questioned the constitutionality of not having a minimum age for capital punishment, and all 18 had come to the conclusion that defendants must be at least 16 years old at the time the crime was committed. As for jury determinations, only 5 teenagers out of the 1,393 tried for homicide in between 1982 and 1986 have been given the death penalty, but there have been no actual executions of someone under the age of 16 since 1948. This evidence shows that standards of decency have evolved to where society believes that it is inhumane to give a teenager under 16 the death penalty

(*Thompson v. Oklahoma*). Additionally, there is "near unanimity among all 50 States and the District of Columbia in treating a person under 16 as a minor for several important purposes" (*Thompson v. Oklahoma*). No one under the age of 16 is legally able to serve on a jury, drive a car, get married, but most importantly, at 16 years of age and younger, juvenile court has jurisdiction. All this acts as objective evidence as to why no child under the age of 16 should be considered an adult under any circumstance, especially capital punishment. Stevens also addressed that the Court's opinion is consistent with the beliefs of organizations such as the American Bar Association and the American Law Institute. None of the other civilized Western countries that still permit the death penalty allow for the execution of juveniles.

Lastly, Justice Stevens discussed the purposes of capital punishment, retribution, and deterrence. He first mentions retribution and culpability. As mentioned in prior cases, when a defendant has less culpability, he is less likely to get the death penalty. As a teenager under 16, a defendant is less culpable because of lack of experience, less education, less intelligence, less able to truly assess the consequences of their actions, and a greater chance of being overcome by their emotions and peer pressure. Deterrence is equally irrelevant in the case of the execution of a minor. Statistics from the Department of Justice (DOJ) have shown that 98 percent of arrests for homicide are by offenders over the age of 16, so there is little to no deterrent value (*Thompson v. Oklahoma*). Therefore, because of the lessened culpability and statistics from the DOJ, the execution of someone under the age of 16 would undermine both the retributive and deterrent purposes of capital punishment. Based on all this evidence, the Court concluded that the execution of any minor under the age of 16 is cruel and unusual punishment and is prohibited by the Eighth Amendment.

Justice O'Connor filed a concurring opinion stating that although she does agree that

there is an age which exempts a juvenile from the death penalty and that the Court should look to evolving standards of decency to decide what that age should be, she did not think the Court had enough evidence to make such a decision. She agreed with the dissent that there should be a greater national consensus in order to make this age limit a constitutional law, but overall agreed with the age limit determined by the plurality. O'Connor specifically cited the statistic which explained that only five death sentences to juveniles under 16 had been given out of 1,393 homicides. To O'Connor, while this "supports the inference of a national consensus opposing the death penalty for 15-year-olds, [it] is not dispositive" (*Thompson v. Oklahoma*, O'Connor concur). This is because the data does not show other reasons, besides for age, as to why juries or prosecutors might not have sought the death penalty.

O'Connor then discussed proportionality and culpability. She stated that she does believe that the punishment must be proportional to the crime and offender's culpability and that juveniles are often less culpable than adults. She cannot believe, though, that all 15-years-olds, as a demographic group, are incapable of possessing the same level of moral culpability as an adult. Even if they were equally inculpable, the national consensus that the plurality used to make its decision still is not enough evidence to actually declare a consensus. For example, in *Furman v. Georgia (*1972), the Court was urged to declare the death penalty unconstitutional based on the appearance of a national consensus opposing it. The Court did not listen though, and many years later, the Court now sees that it was right in not accepting the seemingly national consensus presented to them in *Furman*. After making this clear, however, O'Connor did conclude that despite the evidence not being as conclusive as she would have liked, it does point to the majority of the states opposing the execution of juveniles under the age of 15 and therefore concurred with the plurality.

Justice Scalia dissented, joined by Chief Justice Rehnquist and Justice White. They argued that Thompson was not tried as an adult by accident. It was after careful consideration by the prosecution and the State of Oklahoma that he was tried as an adult and given the death penalty. Scalia then discussed how in order to understand evolving standards of decency, legislation is the best course of action. He wrote that just 4 years earlier, Congress reduced the age at which juveniles can be tried and punished as an adult in Federal District Court from 16 to 15. Congress may not have specifically meant for this to apply to the death penalty, but constitutionally, at face value, this is what that law meant. Additionally, he also discussed possible reasons why the number of executions of 15-year-olds has decreased so significantly over time. He cited reasons such as the overall reduction in support for the death penalty and more individualized sentencing (*Thompson v. Oklahoma*). Thus, because there is not any explicit reason produced along with the data as to why these numbers are down, it cannot be assumed that anyone under the age of 16 is not mature or morally culpable for their crimes to ever warrant capital punishment. Scalia also explained that creating this individualized rule for juveniles because of these statistics leaves room for other demographics with similar statistics to be exempt as well, like women.

One year later, the Court faced a similar question with *Stanford v. Kentucky* (1989). A 17-year-old, Kevin Stanford, was charged as an adult with murder, sodomy, robbery, and receiving stolen property. After being found guilty and sentenced to death, he appealed on the grounds that "he had a constitutional right to treatment in the juvenile justice system" (*Stanford v. Kentucky*) because his age and potential for rehabilitation should have been considered mitigating factors. When brought before the Supreme Court, this case was also consolidated with a similar case, *Wilkins v. Missouri*, in which a 16-year-old was sentenced to death for murder.

Justice Scalia wrote the opinion of the court, joined by Chief Justice Rehnquist, Justice White, and Justice Kennedy. The opinion begins with a description of the crime and an explanation of how there was first a hearing in order to decide whether or not Stanford should be charged as an adult. The juvenile court came to the conclusion that there was no rehabilitation for him in the juvenile system and thus, he was tried as an adult. Once convicted and given the death penalty, Stanford's appeals were based on the idea that the execution of juveniles under 18 is cruel and unusual punishment because of the evolving standards of decency (*Stanford v. Kentucky*).

In order to discover what these standards of decency were, the Court looked to the ideas of modern American society. Scalia is very clear here that the Justices did not make their decision based on their personal views, but objective evidence. First among the Court's objective evidence is legislation. At the time of this case, of the 37 states that allowed for the death penalty, 15 did not condone the death penalty for 16-year-olds and of these states, 12 did not condone it for any minor under the age of 18. This is not a national consensus and thus, the Court could not say that it was the will of the nation. This type of decision making procedure was true in *Coker v. Georgia* (1977), in which the Court outlawed the death penalty as punishment for rape, and *Enmund v. Florida* (1982), in which it outlawed it for robbery that results in the death of a person. With this said, Stanford then argued that even if there was not a clear national consensus created by law, there is one when looking at the way the law has been applied. "That contemporary society views capital punishment of 16 and 17-year-old offenders as inappropriate is demonstrated, they say, by the reluctance of juries to impose, and prosecutors to seek, such sentences" (*Stanford v. Kentucky*). Although the defendant was right about this, Scalia disputed their argument by saying the statistics supporting this are irrelevant because there is such a large discrepancy between the number of minors and adults that commit capital crimes punishable by

death. The petitioners then argued that 18 is the legal age distinguishing minors from adults and lets them partake in a wide range of activities, such as voting or drinking. Scalia argued, however, that it is ludicrous to assume that one has to be sensible and old enough to vote or drink to also be able to comprehend the immoral nature and severity of murdering another human. Further, while many juveniles are responsible enough to partake in voting, drinking, etc. before the age of 18, the majority of juveniles are not and the laws surrounding such activities are set at an age that judges the vast majority of the public. The criminal justice system is different from this in that it utilizes individualized testing. Each offender's situation is looked at individually in order for a decision to be made and is specifically required in cases of capital punishment. A majority of the states even include age as a mitigating factor. Therefore, because of this individualized testing, the age limit can be set younger (*Stanford v. Kentucky*).

The petitioners, having not been able to convince the Court of the immorality of executing a minor under the age of 18, then attempted to showcase a national consensus through opinion polls and the perspectives of interest groups and associations. The Court, however, refused to acknowledge this evidence for its lack of objectivity (*Stanford v. Kentucky*). The Court also refused the argument that the execution of minors does not meet the retributive or deterrent purposes of the death penalty on the grounds that their evidence is not conclusive. Scalia went as far as stating that it is not the Court's job to analyze the proportionality between the crime and the punishment. Therefore, because the petitioners failed to prove a historical or modern national consensus against the execution of minors, the Court ruled that the execution of anyone under the age of 18 is not cruel and unusual punishment and is in fact constitutional.

Justice O'Connor wrote a concurring opinion stating that she came to the same conclusion as the majority, but with the same standards she used for *Thompson v. Oklahoma*.

With *Thompson*, every state legislature had set 16 years of age or older as the minimum age for the death penalty, but there was no such consensus in *Stanford v. Kentucky*. She said that while a national consensus may emerge one day, there was no valid evidence of a consensus presented to the Court in this case. However, O'Connor did dissent with the plurality's statement on the Court rejecting to conduct its own proportionality analysis. She believed that the Court has the responsibility of conducting such an analysis, just as she stated in Thompson. Despite this disagreement, O'Connor did concur with the opinion of the Court that the Eighth Amendment did not prohibit the execution of those ages 17 and up (*Stanford v. Kentucky*).

Justice Brennan dissented and was joined by Justice Marshall, Justice Blackmun, and Justice Stevens. Brennan began by very bluntly stating that he believed executing a minor under the age of 18 is cruel and unusual punishment, prohibited by the Eighth Amendment. He believed that the first step was to review legislation and sentences given by juries, but did not believe that Scalia's analysis was conclusive enough, nor did it have "ethicoscientifific" evidence. Brennan went on to describe how 12 states had currently banned the execution of minors under 18 years old and when adding this to the 15 states that prohibit capital punishment altogether, there is a majority. He also acknowledged that juries did occasionally sentence minors to death, which showed that the public is okay with it. Though, this happened so seldom that the Court could not use such a small number of death sentences as grounds for keeping a punishment that is cruel and unusual. The mere fact that the punishment is handed down so rarely means that it is unusual. For a third major point, Brennan wrote about how the opinions of respected organizations and associations should have been taken into account. In past cases, like in *Thompson*, such viewpoints were taken into consideration and used by the Court. Many of these organizations, for example, the American Bar Association, believed that the execution of a

minor under the age of 18 was unconstitutional (*Stanford v. Kentucky*).

Brennan then dissected Scalia's plurality opinion. One major point Justice Brennan made clear is that a proportionality analysis between the punishment and the crime are extremely important and he believed that minors did not have the same level of responsibility as adults do. Further, minors are classified as minors for a reason, many of which have the purpose of protecting those younger than 18 from the law. Capital punishment should be no different. Lastly, as for the goals of the death penalty, Justice Brennan did not believe the execution of minors serves the retributive purpose, as this was related to culpability. It also did not serve the deterrent purpose because allowing for such executions would have had no effect on possible offenders over the age of 18. Justice Brennan ended his argument stating that all these indicators together signify that the execution of minors under the age of 18 was cruel and unusual and should be prohibited by the Eighth Amendment (*Stanford v. Kentucky*).

Sixteen years later in 2004, the court faced the same question once again in *Roper v. Simmons*. Simmons, at 17 years old, confessed to the planning and committing of a brutal murder. He broke into a woman's home, tied her up and blindfolded her, threw her off of a bridge into the river below, and was heard bragging about it at school the next day. He had even told his accomplices that they would get away with the murder because they were minors in the eyes of the law. During the sentencing phase of the trial, despite a strong defense and statements from family about his personality and age, the jury found the aggravating factors presented by the State to overweigh the mitigating ones, and he was sentenced to death. Simmons appealed his case several times until the Missouri Supreme Court finally decided that his execution was not constitutional. This court made its decision on the grounds that although there was not a consensus 16 years ago in *Stanford v. Kentucky* regarding the execution of minors, there is now.

The government, however, then appealed to the United States Supreme Court, arguing that a state court could not overturn a decision made by the Supreme Court (*Roper v. Simmons)*.

Justice Kennedy delivered the majority opinion for the Court. He began by citing a series of cases surrounding the issue of capital punishment eligibility. He first cited *Weems v. United States* (1910), where the Court declared that there is the "precept of justice that punishment for crime should be graduated and proportioned to the offense" (*Weems v. United States)*. He then discussed how in *Stanford,* the defense failed to show a national consensus like the one present in *Thompson* or *Atkins*. Kennedy wrote that in re-reviewing this issue, 30 states now prohibited the death penalty for anyone under 18 years of age. This included 12 states that disallow the punishment altogether, and 18 states that do use capital punishment but have the minimum age set at 18 years old. Additionally, in the 12 remaining states that do not have this age requirement, only 3 executions have occurred in the past 10 years. The life of Stanford was even spared by the Kentucky governor (*Roper v. Simmons)*. Kennedy then described the consistency of the direction of change. All states that had made changes to their age requirement statues had increased the minimum age, and no state that had previously disallowed for the execution of minors reinstated the punishment. It is this consistency of direction that enforced to the Court the idea of an emerging national consensus, despite the number of States in agreement being smaller than in *Penry v Lynaugh*.

Justice Kennedy continued on to describe how because of the severity and irreversibility of the death penalty, it is "limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution'" (*Roper v. Simmons)*. In order to be sure that the offender is deserving of the death penalty, the State must introduce relevant and convincing aggravating factors and the jury must consider any

and all mitigating factors presented by the defense. Mitigating factors may reduce the culpability of the defendant to a large enough degree that would make them ineligible for capital punishment. The Court had already declared age a mitigating factor in *Thompson v. Oklahoma*. However, having seen a national consensus for raising the age to 18, the Court laid down 3 reasons as to why minors under the age of 18 are less culpable than adults. First, minors lack both the level of maturity and level of responsibility that most adults possess. This disadvantages them in the sense that it "often results in impetuous and ill-considered actions and decisions" (*Roper v. Simmons)*. Second, minors are more impressionable, causing them to become more vulnerable to peer pressure. Kennedy explained that juveniles have less control over their decisions and surroundings and less knowledge on how to withdraw themselves from potentially "criminogenic settings." Third, was that minors are not yet fixed in their ways as adults are. They have the potential to transform their character as they transition into adulthood. The Court went as far as to say that "it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed" (*Roper v. Simmons)*. Therefore, because of these differences, minors are found to be less culpable and cannot be classified as the worst offenders.

Following the discussion of mitigating factors, Kennedy explained the Court's analysis on why the execution of minors does not meet either purpose of the death penalty. He began by discussing retribution and how the crime must be proportional to the punishment. The execution of someone under 18 years of age, however, cannot be proportional to the crime because a minor lacks the culpability that would classify him as the worst offender. As for deterrence, while it has not been made clear if capital punishment has a deterrent effect on minors, using the same logic as before, the characteristics that make a minor less to blame for their crime, also makes them

less responsive to deterrence (*Roper v. Simmons)*.

Kennedy concluded the opinion by explaining how the national consensus that was not yet evident in *Stanford v. Kentucky*, had finally emerged and could be seen through objective evidence. In addition to such evidence, the Court cited that the United States is the only country that still used the death penalty as a punishment for minors. Of the seven countries that had executed a minor in the last 15 years, each country had now discontinued the method.

Justice Stevens wrote a concurring opinion, joined by Justice Ginsburg. He explained how more important to him than the decision made, was how in coming to the decision, the Court reasserted an incredibly vital principle regarding how the Supreme Court interprets the Eighth Amendment and the Constitution as a whole. If the Constitution was understood today exactly as it had been written at its inception, it would allow for the execution of young children. Stevens, therefore, wrote about the importance of understanding that the meaning of the Constitution changes as standards of decency evolve. Having said this, he concurred with the plurality (*Roper v. Simmons)*.

Justice O'Connor dissented from the majority opinion. She stated that although she does generally agree with the principles that help guide the Court's Eighth Amendment decisions, the plurality supported their decision by acknowledging that a slim majority of the states now disallow the execution of an offender under 18. This, according to O'Connor is not a national consensus, but is the plurality reaching for evidence to support their moral judgments. She agreed that as a whole, juveniles are less culpable, but disagrees in that many 17-year-old murderers are mature, and also violent, brutal, and deliberate enough to warrant receiving the death penalty. Juries have also proven to be capable enough to make such an assessment by weighing aggravating factors against mitigating factors (*Roper v. Simmons)*.

O'Connor then discussed her past judgements in *Thompson* and *Stanford*. In *Thompson v. Oklahoma*, O'Connor concurred with the plurality that there most likely was a national consensus, seen by 32 states having definitively banned the execution of a 15-year-old. However, her judgement was a concurrence on the basis that she rejected to create constitutional law without clearer, more objective evidence that there was a consensus. In *Stanford v. Kentucky,* O'Connor also concurred due to a lack of evidence and her belief that a proportionality analysis did not constitute enough reason to ban the execution of criminals under 18 years of age. Additionally, one large difference in the evidence between *Thompson* and *Roper v. Simmons* is that in *Thompson*, as well as *Atkins*, there was no support for the execution of 15-year-olds or the intellectually disabled, respectively. In Simmon's case, however, there were many states that specifically had set, many of which in the last few years, the minimum age for the death penalty at 16 or 17. In other words, these states believed that the execution of 16 and 17-year-olds was acceptable. Additionally, O'Connor cited the rather slow pace of change in legislation as hesitation on the State's part to raise the minimum age to 18 years old (*Roper v. Simmons)*. This further undermines the idea of a national consensus.

The dissent then went on to describe how the plurality came to the agreement that 17-year-olds as a whole are less culpable because of the three reasons laid out in the majority opinion. O'Connor wrote that she found it difficult to believe that there was a discernable difference in moral culpability between 17 and 18 years old. She did also address the Court's point that although there may be the rare 17-year-old that commits murder and is culpable enough to receive the death penalty, juveniles are less susceptible to deterrence and it would be too hard for the jury to discern the difference in culpability between juveniles and adults. O'Connor disputed this by pointing out the lack of evidence supporting such statements. Further,

O'Connor noted that Simmons was in fact knowledgeable enough to take the punishment into consideration because he believed he could murder and be exempt from serious punishment due to his age. This shows careful consideration went into the premeditation of the crime and to O'Connor, this was all the reason more to rely on individualized sentencing in order to determine who is insufficiently culpable (*Roper v. Simmons)*.

Lastly, O'Connor ended her dissent by disagreeing with the Court's assertion that there was an international consensus large enough to warrant creating constitutional law. Although she did recognize that the United States was one of the only countries left that did allow for the execution of 16 and 17-year olds, because she did not see a national consensus, nor did she buy the Court's proportionality argument, O'Connor refused to acknowledge such a consensus.

Justice Scalia wrote an additional dissent, joined by Chief Justice Rehnquist and Justice Thomas. He explained how he believed the Court is gravely mistaken in their decision. The Court looked for a national consensus and claimed it found one based on only 18 states, equal to 47 percent, having prohibited the execution of minors under 18 and a mere 4 states having changed their legislation to match since the decision in *Stanford* (*Roper v. Simmons)*. In Scalia's opinion, the states that prohibited capital punishment altogether should not have been included, as they would still prohibit it even above the age of 18 and thus, are irrelevant. Additionally, with past cases, the Court had always looked for a much stronger consensus and "relying on such narrow margins is especially inappropriate in light of the fact that a number of legislatures and voters have expressly affirmed their support for capital punishment of 16 and 17-year-old offenders since *Stanford*" (*Roper v. Simmons*, Scalia dissent*)*.

Further angering Scalia is how he believed that the Court came to their decision by using its own moral judgement. He wrote that rather than identify what the standards of decency had

evolved to, the Court determined what the standards should be. This is dangerous, Scalia wrote, because it is the legislative system, not the court system, that is to adhere to the will of the people. He also described how in past cases, the Court had looked to respected organizations, such as the American Psychological Association. While they claimed in this case that minors under 18 lack the moral culpability required to be eligible for the death penalty, in other cases they had testified that "by middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, and reasoning about interpersonal relationships and interpersonal problems" (*Roper v. Simmons*, Scalia dissent*)*. Because of this inconsistency in science, Scalia believed that the Court is not equipped to handle such decisions and it should be the judgement of the legislatures instead.

Regarding the culpability of 17-year-olds, Scalia pointed out that Simmon's brutal and exceedingly violent murder was premeditated and shared proudly with his accomplices. Simmons was also only a few months away from his eighteenth birthday. There is much doubt surrounding whether those few months would have played any difference in the defendant's level of moral culpability. Several other states, in submitting their amici briefs, shared stories of other excessively brutal murders committed by 17-year-olds. Scalia did mention that although these types of barbaric cases generally are the exception, there should be no "constitutional imperative that prevents legislatures and juries from treating exceptional cases in an exceptional way-by determining that some murders are…heinous crimes deserving of death" (*Roper v. Simmons*, Scalia dissent*)*.

Scalia's dissent then went on to dispute the Court's opinion that juries cannot handle the task of individualized sentencing when it comes to juvenile offenders. The criminal justice system has long relied on individualized testing, and in cases of capital punishment, the Court

has declared it to be of the utmost importance for juries to weigh aggravating factors against the mitigating ones. The court system has also consistently relied on juries to make these determinations and is the foundation of the country's criminal sentencing system. Scalia did not see the difference in why this should be any different in the context of capital punishment. He also disagreed with the Court's assertion that the execution of anyone under the age of 18 does not fit the retributive or deterrent purposes of the death penalty. Scalia claimed that the Court could not corroborate its evidence supporting the idea that minors could not conduct a sufficient cost-benefit analysis. This was exemplified by Simmon's encouraging his friends to join him because they were minors and could get away with the murder. Lastly, Scalia challenged the Court's judgement in turning to international law for guidance. He wrote that the laws and opinions of other countries are irrelevant in the discussion of the Constitution, as it is uniquely American (*Roper v. Simmons)*.

After examining these cases, a pattern emerges in the way the Supreme Court has handled appeals pertaining to capital punishment. The Court must look to "the evolving standards of decency that mark the progress of a maturing society" (*Thompson v. Oklahoma)* in order to discern if such standards warrant change in death penalty law. In other words, often times the Court faced the question of whether something that was once generally accepted by society still stands or if standards of decency have changed so that it is no longer accepted. The Court agrees that in order to identify current standards of decency, it must look to objective evidence, which in *Thompson v. Oklahoma*, it described as "relevant legislative enactments and jury determinations" (*Thompson v. Oklahoma)*.

Legislative enactments give the Court a good sense of what standards have evolved to because state legislatures are meant to represent the will of the people it serves. Justice Stevens

goes as far as to describe legislative enactments to be the "clearest and most reliable objective evidence of contemporary values" (*Atkins v. Virginia)*. For example, in *Thompson*, 18 states had enacted laws that imposed a minimum age requirement for the death penalty. Although this was not a majority, this signified to the Court that executing a criminal offender under the age limit would offend society. In *Ford v. Wainwright,* 26 states had statutes preventing the execution of the mentally insane, which showed the Court that the execution of the mentally insane also offended society. This is then compared to *Penry v. Lynaugh*, where the Court found that only one state explicitly prohibited the execution of the intellectually disabled. So, due to the lack of objective evidence, the Court denied the petitioners appeal.

Penry, however, because he could not establish legislative evidence, attempted to use public opinion polls from several states across the country. Although each of these polls were highly in Penry's favor, the Court discarded this evidence because it was not objective. Justice Scalia explained the reasoning behind this in *Stanford v. Kentucky,* where Stanford put forward the same type of evidence. He wrote that the Court "declines the invitation to rest constitutional law upon such uncertain foundations" (*Stanford v. Kentucky)*, meaning that the Court cannot base its opinion off evidence that is subjective or prone to inaccuracy. In *Atkins v. Virginia* and cited in *Roper v. Simmons*, Chief Justice Rehnquist also wrote about how opinion polls cannot be relied on because of methodological errors and the inability to know if they were conducted properly. Thus, while the court does look to public opinion, they do so through concrete, objective evidence.

Apart from legislative enactments, a second source of objective evidence comes from jury determinations. In order to see how public opinion has evolved regarding a specific topic, the Court looks to see how past juries have both historically and modernly sentenced offenders in

similar contexts. For example, in *Thompson v. Oklahoma*, the Court looked to jury determinations to see how it had sentenced past offenders under the age of 16. In the first 48 years of the 20th century, around 20 juveniles under the age of 16 were executed. Though, since 1948, there had not been one execution, even though there were thousands of murders committed by juveniles in this age cohort. This sudden and dramatic change in the unwillingness to sentence 15-year-olds to death, illustrated to the Court very clearly that the standards of decency surrounding this issue had evolved and that this was "now generally abhorrent to the conscience of the community" (*Thompson v. Oklahoma).*

Along with needing objective evidence, in deciding who is eligible for the death penalty, the Court also conducts a proportionality analysis of whether or not the crime is equal to the punishment. One way the Court does this is through analyzing the cases to see if allowing an execution in a specific context would fulfill the retributive and deterrent goals of the death penalty. Justice Marshall defined retribution as "the need to offset a criminal act by a punishment of equivalent 'moral quality'" (*Ford v. Wainwright)* and the deterrence purpose of the death penalty works to discourage other potential offenders from following suit in fear of the consequences. Therefore, unless executing a criminal offender "measurably contributes to one or both of these goals, [capital punishment] is nothing more than the purposeless and needless imposition of pain and suffering" (*Atkins v. Virginia).*

In *Ford v. Wainwright,* the Court denied that there was any retributive value in executing the mentally insane when the defendant was not able to comprehend why he was being executed. There was no deterrent value found either, because it does not set an example for others. More simply, other potential offenders suffering from insanity would not be able to understand that they too would be subjected to the same punishment (*Ford v. Wainwright).* Therefore, the

execution of the mentally insane was declared unconstitutional. In *Penry v. Lynaugh,* when the Court was first confronted with the question of if it was constitutional to execute the intellectually disabled, although the plurality agreed that intellectual disabilities may reduce the culpability of an offender, the Court could not speak for all persons suffering from intellectual disabilities due to varying degrees in cognitive ability (*Penry v. Lynaugh)*. The level of cognitive ability also affects whether there is a deterrent effect on other potential intellectually disabled offenders. Thus, the Court could not conclude that there was no retributive or deterrent value in executing the intellectually disabled in *Penry*. However, 13 years later, when the Court was presented with this same question in *Atkins v. Virginia*, regarding retribution, Justice Stevens wrote, "If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the [intellectually disabled] surely does not merit that form of retribution" (*Atkins v. Virginia)*. As for the goal of deterrence, Stevens explained how a decreased cognitive ability prevents persons suffering from intellectual disabilities to learn from experience. Therefore, the execution of the intellectually disabled does not serve either goal of the death penalty and was found to be unconstitutional.

In *Thompson v. Oklahoma*, when faced with determining the constitutionality of using the death penalty on offenders under the age of 16, Justice Stevens declared that it was unconstitutional because it did not meet either purpose of capital punishment. As a 15-year-old, a defendant is less culpable because his lack of life experience and lower level of intelligence prevents him from being able to assess the consequences of his actions. Therefore, retribution has no purpose. Further, the Court stated that the deterrent value of the death penalty is irrelevant here as well because there are so few murders committed by teenagers (*Thompson v. Oklahoma)*. When presented with the same question, but for 17-year-olds in *Stanford v. Kentucky*, the Court,

however, took the opposite stance and denied the petitioners appeal that there was no retributive or deterrent value. Scalia, in his deliverance of the majority opinion, contended that the petitioners failed to prove any national consensus which would show that 17-year-olds lack such culpability. Lastly, when faced with this question one last time in *Roper v. Simmons*, the Court reversed their decision from *Stanford v. Kentucky*. In part, they made this decision due to the Court's new findings that at 17-years-old, defendants lack the same intellectual and moral culpability as adults do. Justice Kennedy explained, "The case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity" (*Roper v. Simmons)*. When considering deterrence, the Court concluded that it is not evident whether capital punishment had even a small effect on the deterrence of minors, which rendered the punishment purposeless.

Having studied these cases, it becomes apparent that standards of decency surrounding the death penalty appear to only be evolving in one direction. It seems extremely unlikely that states which have historically prohibited capital punishment would change their ways to now allow such acts. Further, when declaring groups of people ineligible for the death penalty, such as the mentally insane, intellectually disabled, or minors, each final decision changed the act from constitutional to unconstitutional.

The question then lies in which other demographic groups will protest their death penalty eligibility due to a possible lack of culpability. Scalia seemed to address this issue in *Roper v Simmons*, when he explained how he disagreed with the plurality's opinion that juries are not capable of properly weighing mitigating factors. He wrote, "Nor does the Court suggest a stopping point for its reasoning. If juries cannot make appropriate determinates in cases

involving murderers under 18, in what other kinds of cases will the Court find jurors deficient" (*Roper v. Simmons,* Scalia dissent*)*? Scalia then questioned whether the jury should be able to consider other mitigating factors such as childhood abuse or poverty, because these issues can affect defendants psychologically, thus, making them less culpable. If the American people want capital punishment to stay a viable punishment option, a boundary needs to be drawn somewhere. However, as the Court points out, standards of decency do evolve, which makes a boundary hard to create. According to Scalia, among other Justices, this is where individualized testing should come into play. As standards of decency evolve that create an uncertainty surrounding an execution, it is juries that should be handed the task of weighing the mitigating factors properly against the aggravating ones. The "foundation of our capital sentencing system…entrusts juries with making the difficult and uniquely human judgements that defy codification and build discretion, equity and flexibility into a legal system" (*Roper v. Simmons,* Scalia dissent*)*. Therefore, utilizing individualized sentencing, along with assigning juries the responsibility of considering mitigating factors, will help ensure the continuing progress of a maturing society.

Looking forward, the future of capital punishment is unclear. The rate of executions has declined slowly since the 1970's, but within the last several years, this drop in executions has become more dramatic. This is due to a changing moral climate surrounding the death penalty. 31 states currently have the death penalty, but the majority of these states have not conducted an actual execution in several years. In fact, 16 states have not performed any executions since the first few years of 2000 (The Marshall Project, n.d.). For example, New Mexico has not executed anyone since 2001 and California has around 750 inmates on Death Row, but has not executed anyone in over a decade. Even states like Texas, which have been notorious for its high number

of executions, has experienced a drastic drop in the number of executions it performs. In 2000, Texas had executed 40 people and this number has been declining ever since to mere 7 people in 2017 (The Marshall Project, n.d.). It is important to note, however, that this is not all in part due to a changing moral climate, but also a shortage in the drugs used to make the lethal injection. Anti-death penalty activists have been successful in stopping the drug flow from Europe to the United States, which has caused a drug shortage. This shortage has disrupted the entire capital punishment system, as many executions have gone awry as states look for substitute drugs. Inmates have taken hours to die and suffered painful deaths, causing several state governors and respected, relevant organizations to call for moratoriums and major reform.

Where the system is now, it is not sustainable. In the next 5 to 10 years, it is likely that capital punishment will slow even further until the system is amended. While states have shown reluctance to abolish the death penalty altogether, a moratorium could be likely as well. The Supreme Court is also likely to receive an increase in petitions for certiorari. Today, the more conservative Justices on the Court form the majority and have been mostly declining to grant certiorari for capital punishment cases. On the other hand, the more liberal Justices have been filing dissents from denial of certiorari, which demonstrates the desire to review and examine the death penalty. Justice Kennedy, however, who tends to be in the middle of the ideological spectrum and often acts as the swing vote, is expected to retire within the year. Therefore, the future of capital punishment would greatly rely on who fills Kennedy's spot on the bench. If the next Supreme Court Justice is more liberal, an increase in granting certiorari for capital punishment cases can be expected, along with possible reform, but if the Justice is conservative, the penalty is likely to stay as is.

After reviewing these cases, along with analyzing how the Court handles questions pertaining to the death penalty, it has been made evident that the Supreme Court has a definite way of deciding eligibility. Where they differ, however, is in their opinions on what constitutes a national consensus and what outside evidence can be brought into consideration. Due to these discrepancies, it seems unlikely that the Court will soon ever reach unanimity. In all, capital punishment seems to be an ever-evolving phenomenon and a debate that does not seem likely to be settled any time soon.

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