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Susan M. Simmons

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***Thompson v. Oklahoma*: Debating the Constitutionality of Juvenile Executions**

I. INTRODUCTION

In what was heralded as the "most important capital punishment decision of the year,"¹ the Supreme Court in *Thompson v. Oklahoma*² failed to muster the number of votes necessary to determine whether the execution of a fifteen-year-old killer constitutes "cruel and unusual punishment." Without the possible "swing" vote of a ninth Justice, the Court, in a 4-1-3 split, merely agreed that it could not agree, thus making the decision of one Justice the deciding opinion of the Court.

In her concurring opinion, Justice O'Connor rejected both the plurality's conclusion that capital punishment of persons who committed capital crimes while under the age of sixteen is per se unconstitutional, and the dissent's conclusion that such punishment is clearly constitutional. Instead, Justice O'Connor declared that because no state death penalty statute expressly permits the execution of juvenile killers under age sixteen, juveniles under that age are not presently eligible for death sentences. However, the opinion paves the way for states to re-examine their death penalty statutes and expressly amend them to include persons under the age of sixteen.³ Thus, while *Thompson* spares the lives of William Wayne Thompson and two other fifteen-year-old juveniles,⁴ it does not ensure the prohibition of such future executions.

This note seeks to accomplish three objectives. First, it briefly outlines the history of recent judicial decisions concerning capital punishment, including those involving juveniles.⁵ Second, the note carefully analyzes the *Thompson* plurality, concurring, and dissenting

1. L.A. Times, June 19, 1988, at 2, col. 1.

2. 108 S. Ct. 2687 (1988) (Stevens, J., plurality). Justice Stevens, who was joined by Justices Brennan, Marshall, and Blackmun, delivered the plurality opinion. Justice O'Connor delivered the only concurring opinion. Justice Scalia, joined by Chief Justice Rehnquist and Justice White, delivered the dissenting opinion. Justice Kennedy, who joined the Court after the oral arguments in *Thompson*, took no part in the consideration of the case.

3. See *infra* notes 107-09 and accompanying text.

4. See *infra* note 111 and accompanying text.

5. See *infra* notes 8-46 and accompanying text.

opinions.⁶ Finally, it examines the present and future impact of *Thompson* on juvenile executions, particularly in light of two pending Supreme Court cases concerning juvenile killers over the age of fifteen and the addition of a new ninth Justice to the Supreme Court.⁷

II. DEVELOPMENT OF JUDICIAL RESTRAINTS ON CAPITAL PUNISHMENT

When the eighth amendment⁸ of the United States Constitution was adopted, death by hanging was a common form of punishment for many crimes.⁹ Nevertheless, in the 1960s, many people began to question not only the purpose of capital punishment, but also whether it violated the "cruel and unusual punishment" clause of the eighth amendment.¹⁰ This sentiment prompted a line of Supreme Court cases in the 1970s, first rejecting capital punishment,¹¹ then reauthorizing it,¹² and finally limiting its application to certain situations and crimes.¹³

In the landmark case of *Furman v. Georgia*,¹⁴ a sharply divided Court held that the state death penalty statutes in effect at the time violated the eighth and fourteenth amendments.¹⁵ Because the states imposed capital punishment in an arbitrary, "wanton," and "freakish" manner,¹⁶ focusing primarily on "outcasts of society" or "unpopular groups,"¹⁷ the Court found that its imposition served no

6. See *infra* notes 47-130 and accompanying text.

7. See *infra* notes 131-85 and accompanying text.

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

9. H. BEDAU, *THE DEATH PENALTY IN AMERICA* 247 (3d ed. 1982) (referring to Granucci, "Nor Cruel and Unusual Punishments Inflicted": *The Original Meaning*, 57 CALIF. L. REV. 839 (1969)).

10. *Id.* at 247-53.

11. See *infra* notes 14-20 and accompanying text.

12. See *infra* notes 22-24 and accompanying text.

13. See *infra* notes 25-41 and accompanying text.

14. 408 U.S. 238 (1972) (per curiam). *Furman* constituted a 5-4 decision, in which the majority concurred only in the judgment. Each of the Justices, whether concurring or dissenting, wrote separate opinions.

15. *Id.* at 239-40. The eighth amendment is applied to the states through the incorporation doctrine of the fourteenth amendment. U.S. CONST. amend. XIV, § 1; see, e.g., *Robinson v. California*, 370 U.S. 660 (1962). But see generally R. BERGER, *DEATH PENALTIES* (1982) (theorizing that administration of the death penalty was reserved by the Constitution to the states).

16. *Furman*, 408 U.S. at 310 (Stewart, J., concurring); see H. BEDAU, *supra* note 9, at 249.

17. *Furman*, 408 U.S. at 245 (Douglas, J., concurring). Although the Court did not find conclusively that the *Furman* defendants were sentenced to death just because they were black, it noted that the unfettered discretion given courts and juries in selecting the death penalty could "feed" prejudices against minorities, the poor, or persons lacking social status. *Id.* at 255 (Douglas, J., concurring). In fact, the statistics

legitimate social purpose¹⁸ and was therefore cruel and unusual punishment.¹⁹ However, the Court suggested that "evenhanded, non-selective, and nonarbitrary" death penalty statutes would be upheld.²⁰

In the wake of *Furman*, thirty-five states rushed to enact new, hopefully constitutional, death penalty legislation.²¹ After examining one of these new statutes in *Gregg v. Georgia*,²² the Supreme Court held that the imposition of the death penalty for murder is not a per se violation of the eighth and fourteenth amendments.²³ The *Gregg* Court found that the Georgia statute adequately addressed *Furman*'s concerns by requiring the jury, among other things, to "find and identify at least one statutory aggravating factor before impos[ing] a penalty of death," and thus declared it constitutional.²⁴

However, after some states, such as North Carolina, attempted to limit arbitrariness through mandatory death penalty statutes,²⁵ the Court, citing the finality and uniqueness of capital punishment, struck them down as unconstitutional in *Woodson v. North Carolina*.²⁶ The *Woodson* Court found that the "fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the

both before and after *Furman* reveal "that among equally guilty murderers, the death penalty is more likely to be given to blacks than to whites, and to poor defendants than to well-off ones." J. REIMAN, CHALLENGING CAPITAL PUNISHMENT 38-39 (K. Haas & J. Inciardi ed. 1988).

18. The Court was specifically referring to the death penalty's failure to promote the societal goals of retribution and deterrence. *Furman*, 408 U.S. at 311-12 (White, J., concurring); see also *infra* notes 94-99 and accompanying text.

19. *Furman*, 408 U.S. at 311-12 (White, J., concurring).

20. *Id.* at 256 (Douglas, J., concurring).

21. H. BEDAU, *supra* note 9, at 250. In fact, 500 persons were once again on death row by 1976. *Id.*

22. 428 U.S. 153 (1976).

23. *Id.* at 206-07.

24. *Id.* at 206. On the same date the *Gregg* decision was issued, the Court also upheld the Texas death penalty statute in *Jurek v. Texas*, 428 U.S. 262, 276 (1976), as well as the Florida statute in *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976). The rulings indicated the Court's willingness to uphold statutes which provide for:

(1) opportunity to put before the court information about the defendant to assist it in reaching the sentencing decision, (2) special emphasis on any mitigating factors that affect the defendant's blameworthiness, (3) common standards to guide trial courts in their sentencing decisions, and (4) review of every death sentence by a state appellate court.

H. BEDAU, *supra* note 9, at 251.

25. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

26. *Id.* at 305; see *Roberts v. Louisiana*, 431 U.S. 633, 636-37 (1977) (holding that it is unconstitutional to limit the death penalty to certain types of victims, such as police officers).

circumstances of the particular offense."²⁷ In *Coker v. Georgia*,²⁸ the Court held that the death penalty is prohibited in rape cases because it is grossly disproportionate to the crime.²⁹ Once again, the Court noted that because the death penalty "is unique in its severity and irrevocability," it must be treated differently than other types of punishment.³⁰

The Supreme Court in *Enmund v. Florida*³¹ ruled that the focus in death penalty cases should be on the individual offenders and their culpability for the crimes committed, not on the acts themselves or their subsequent consequences.³² Thus, the Court refused to uphold the death penalty in felony-murder cases wherein a defendant does not kill, attempt to kill, or intend to kill the victim. Specifically, the offender must be "as culpable as others receiving the same punishment for a similar crime."³³

In the 1978 companion cases of *Lockett v. Ohio*³⁴ and *Bell v. Ohio*,³⁵ the Supreme Court held that sentencing juries and judges must consider all mitigating factors offered by the defendant, including the defendant's age.³⁶ In *Bell*, the defendant was not allowed to present his youth as a mitigating factor and was thereafter sentenced to death for a crime he committed at the age of sixteen. Because the Ohio statute narrowly limited the introduction of mitigating circumstances, the Court reversed the defendant's death sentence.³⁷

In 1982, the Supreme Court, in *Eddings v. Oklahoma*,³⁸ finally agreed to consider the constitutionality of the death penalty as applied to a sixteen-year-old offender.³⁹ However, the Court ultimately

27. *Woodson*, 428 U.S. at 304.

28. 433 U.S. 584 (1977).

29. *Id.* at 592.

30. *Id.* at 598 (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)); see *Eberheart v. Georgia*, 232 Ga. 247, 206 S.E.2d 12, *vacated mem.*, 433 U.S. 917 (1977) (Supreme Court vacated judgment applying the death penalty to a kidnapping case). In *Woodson*, the Court emphasized the gravity of the death penalty: "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." 428 U.S. at 305; see also H. BEDAU, *supra* note 9, at 251-52.

31. 458 U.S. 782 (1982).

32. *Id.* at 798 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)); see Note, *The Dignity of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 IND. L.J. 757, 764 n.40 (1986).

33. *Id.* at 764; see *Enmund*, 458 U.S. at 798. *Enmund*'s only role in the crime was as driver of the get-away car. He was not present at the scene of the murders and did not intend for anyone to get hurt. *Id.* at 788.

34. 438 U.S. 586 (1978).

35. 438 U.S. 637 (1978).

36. *Lockett*, 438 U.S. at 608; *Bell*, 438 U.S. at 642-43; see V. STREIB, DEATH PENALTY FOR JUVENILES 21-22 (1987).

37. *Bell*, 438 U.S. at 642-43.

38. 455 U.S. 104 (1982).

39. Prior to *Eddings*, many states considered whether certain punishments violate the Constitution when applied to juveniles. For example, in *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968), the court held that sentencing a 14-year-old to

chose not to address the constitutional issue,⁴⁰ voting instead to remand the case for resentencing in accordance with the standards previously announced in *Lockett* and *Bell*.⁴¹

Unfortunately, subsequent state court decisions failed to take a consistent view of the *Eddings* decision. Some states interpreted *Eddings* as holding that the death penalty for juveniles is not per se cruel and unusual punishment.⁴² Others, after recognizing that *Eddings* did not address the constitutionality of the death penalty for juveniles, proceeded to decide the issue themselves.⁴³ Another group of states chose to leave the constitutional issue undecided,⁴⁴ while yet a fourth group interpreted *Eddings* as giving a defendant's youth compelling mitigating weight in death penalty cases.⁴⁵ Amidst this confusion, the Supreme Court granted certiorari in *Thompson* to consider the constitutionality of juvenile executions.⁴⁶

life imprisonment constituted cruel and unusual punishment. See V. STREIB, *supra* note 36, at 47-48.

40. *Eddings*, 455 U.S. at 116-17. However, the four dissenting Justices—Chief Justice Burger and Justices Blackmun, Rehnquist, and White—found that no constitutional bar exists to the application of the death penalty to 16-year-olds and would have upheld *Eddings*' death sentence on constitutional grounds. *Eddings*, 455 U.S. at 128 (Burger, C.J., dissenting).

41. *Id.* at 117. Although *Eddings*' youth was considered as a mitigating factor, the trial court refused to consider, as a matter of law, *Eddings*' troubled background, including the fact that he was a victim of child abuse. *Id.* at 115-16.

42. See, e.g., *High v. Zant*, 250 Ga. 693, 300 S.E.2d 654 (1983), *cert. granted*, 108 S. Ct. 2896 (1988). The decisions in *High* and similar cases, however, directly contravene Justice O'Connor's own view of *Eddings*: "I, however, do not read the Court's opinion . . . as deciding the issue of whether the Constitution permits imposition of the death penalty on an individual who committed a murder at age 16." *Eddings*, 455 U.S. at 119 (O'Connor, J., concurring).

43. See *Thompson v. State*, 724 P.2d 780, 784 (Okla. Crim. App. 1986) (adopting the court's pre-*Eddings* determination that the execution of a minor certified to be tried as an adult does not constitute cruel and unusual punishment); see also *Prejean v. Blackburn*, 570 F. Supp. 985 (W.D. La. 1983), *aff'd*, 743 F.2d 1091 (5th Cir. 1984) (holding that the 17-year-old defendant's constitutional claim is "without merit"); *Trimble v. State*, 300 Md. 387, 478 A.2d 1143 (1984) (noting that although the death penalty for a 17-year-old is not prohibited by the eighth amendment, cases involving juveniles should be considered on an individual basis).

44. See, e.g., *Cannaday v. State*, 455 So. 2d 713 (Miss. 1984) (finding that the determination of the constitutionality of a juvenile's death sentence should be expressly avoided).

45. See, e.g., *State v. Valencia*, 132 Ariz. 248, 645 P.2d 239 (1982). Although the *Valencia* court did not rule out the death penalty for juveniles, it found that age was "a substantial and relevant factor which must be given great weight." *Id.* at 250, 645 P.2d at 241.

46. See *Thompson v. State*, 724 P.2d 780 (Okla. Crim. App. 1986), *cert. granted*, 479 U.S. 1084 (1987) (certiorari was granted on February 23, 1987).

III. STATEMENT OF THE CASE

Just six weeks before his sixteenth birthday,⁴⁷ William Wayne Thompson and three older individuals brutally killed Thompson's former brother-in-law, Charles Keene. Apparently provoked by Keene's physical abuse of Thompson's sister, Thompson told his girlfriend on January 22, 1983, that he and his friends were "going to kill Charles."⁴⁸ A few hours later, on January 23, Malcolm "Possum" Brown, Thompson's neighbor, heard a gunshot outside his house and someone knocking on his door. He then heard someone yell, "Possum, open the door, let me in. They're going to kill me."⁴⁹ After calling the authorities, Brown looked outside his door and saw five men on his porch. Three of the men were attacking a kneeling man, while the other man, who was carrying a gun, looked on. When Brown returned to the telephone to answer a call from the police, the men departed with the victim.⁵⁰

In the ensuing days, Thompson admitted to several people, including his girlfriend and his mother, that he and the others had killed Charles Keene. On February 18, 1983, almost a month after the murder, Oklahoma officials discovered Keene's body in a nearby river. The medical evidence revealed that Keene had been "beaten, shot twice, and that his throat, chest, and abdomen had been cut."⁵¹

After Thompson was charged with Keene's murder, the state prosecutor sought to have him tried as an adult,⁵² even though Thompson was considered a "child" under Oklahoma law.⁵³ In granting the prosecutor's request, the trial court noted "that there [were] virtually no *reasonable* prospects for rehabilitation of [Thompson] within the juvenile system and that [he] should be held accountable for his acts as if he were an adult and should be certified to stand trial as an adult."⁵⁴ Subsequently, Thompson was convicted of first-degree mur-

47. Reidinger, *Fate of the Teenage Killers*, A.B.A. J., Oct. 1, 1987, at 89.

48. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2712 (1988) (Scalia, J., dissenting). Justice Scalia significantly elaborated on the facts in his dissenting opinion in order to aid in further understanding the case.

49. *Id.* (Scalia, J., dissenting).

50. *Id.* (Scalia, J., dissenting).

51. *Id.* at 2712-13 (Scalia, J., dissenting).

52. OKLA. STAT. ANN. tit. 10, § 1112(b) (West 1987 & Supp. 1989). Under this statute, the court may permit a child to be tried for a felony as an adult if the case has prosecutive merit, and there appears to be no "prospects for reasonable rehabilitation of the child" within the juvenile courts. *Id.*; see *Thompson*, 108 S. Ct. at 2713 (Scalia, J., dissenting).

53. OKLA. STAT. ANN. tit. 10, § 1101(1) (West 1987 & Supp. 1989). A child is "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." *Id.*; see *Thompson*, 108 S. Ct. at 2690 n.2 (Stevens, J., plurality).

54. *Thompson*, 108 S. Ct. at 2690 (Stevens, J., plurality) (emphasis in original). The trial court partially based this finding on the testimony of a clinical psychologist, who explained that "Thompson understood the difference between right and wrong

der and sentenced to death. All three of his accomplices, who were tried separately, met the same fate.⁵⁵

During the guilt phase of Thompson's trial, the prosecutor proffered three color photographs depicting the condition of Keene's body as it was pulled from the water. On appeal, the court found that the admission of two of the photographs was improper, but held that the error was "harmless" in light of the strong case against Thompson. However, the court did not rule on whether the prosecutor's use of the photographs during closing argument was erroneous.⁵⁶

During the sentencing phase, the jury found one of the two aggravating circumstances requested by the prosecution—that the murder was "especially heinous, atrocious, or cruel."⁵⁷ Although the court allowed Thompson to submit his youth as a mitigating factor,⁵⁸ the jury sentenced Thompson to death.⁵⁹ The criminal court of appeals subsequently upheld Thompson's death sentence, noting that once a juvenile is "certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult."⁶⁰ Thompson then appealed his conviction and sentence to the United States Supreme Court, which granted certiorari.⁶¹

but had an antisocial personality that could not be modified by the juvenile justice system." *Id.* at 2713 (Scalia, J., dissenting). The psychologist further testified that "Thompson believed that because of his age he was beyond any severe penalty of the law . . . and [that] there would be [no] severe repercussions from his behavior." *Id.* (Scalia, J., dissenting). The court also considered the testimony of an Oklahoma juvenile justice system employee who recommended that Thompson be held accountable for Keene's murder as an adult. *Id.* (Scalia, J., dissenting). After describing her contacts with Thompson concerning his prior arrests for assault and battery in 1980, 1981, and 1982, attempted burglary in 1982, and assault with a deadly weapon in 1983, the employee testified that Thompson had been given "all the counseling the State's Department of Human Services had available," but that none had "seemed to improve his behavior." *Id.* (Scalia, J., dissenting).

55. *Id.* at 2690 (Stevens, J., plurality).

56. *Id.* (Stevens, J., plurality).

57. *Id.* (Stevens, J., plurality). The jury did not find the requested second aggravating circumstance: "that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* (Stevens, J., plurality). This finding suggests that Thompson could be successfully rehabilitated. See Brief for Petitioner, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86-6169).

58. *Thompson*, 108 S. Ct. at 2713 (Scalia, J., dissenting); see *Eddings v. Oklahoma*, 455 U.S. 104, 115-17 (1982) (noting that state courts must permit all relevant mitigating evidence in death penalty cases).

59. *Thompson*, 108 S. Ct. at 2690 (Stevens, J., plurality).

60. *Id.* at 2690-91 (Stevens, J., plurality) (quoting *Thompson v. State*, 724 P.2d 780, 784 (Okla. Crim. App. 1986)).

61. See *supra* note 46.

IV. THE PLURALITY OPINION

The Supreme Court certified two issues for decision: first, whether the execution of a fifteen-year-old individual constitutes cruel and unusual punishment, in violation of the eighth and fourteenth amendments;⁶² and second, whether the jury's consideration of the inflammatory photographs of Keene's body during the sentencing phase of Thompson's trial violated his constitutional rights.⁶³ Because the plurality⁶⁴ decided the former issue in favor of Thompson, it did not reach the merits of the latter.⁶⁵

The plurality first noted that in order to determine whether a punishment is cruel and unusual,⁶⁶ a court must consider the "evolving standards of decency that mark the progress of a maturing society."⁶⁷ The definition of cruel and unusual is meant to be flexible, conforming to society's present opinions of decency. Due to this need for flexibility, the plurality reviewed relevant state statutes,⁶⁸ recent jury determinations,⁶⁹ and present sociological views concerning the culpability of minors⁷⁰ to determine the nation's attitude toward executing fifteen-year-old offenders.⁷¹ Based upon the extensive data it gathered, the plurality found that such executions are abhorrent to today's society and therefore unconstitutional.⁷²

A. State Statutory Authority

In examining state statutory authority, the plurality found overwhelming evidence that states are not willing to treat minors as adults. For example, no state, nor the District of Columbia, allows a person under the age of eighteen to vote or to sit on a jury.⁷³ Only one state permits a fifteen-year-old to drive without parental consent,⁷⁴ and only four states allow a fifteen-year-old to marry without

62. *Thompson*, 108 S. Ct. at 2691 (Stevens, J., plurality); see *supra* notes 8, 15.

63. *Thompson*, 108 S. Ct. at 2691 (Stevens, J., plurality).

64. Justice Stevens wrote the plurality opinion, which was joined by Justices Brennan, Marshall, and Blackmun.

65. *Id.* at 2700 n.48 (Stevens, J., plurality).

66. See *supra* note 8.

67. *Thompson*, 108 S. Ct. at 2691 (Stevens, J., plurality) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). Factors to be considered in determining "evolving standards of decency" are the history of the punishment, current statutory law, jury verdicts, and international opinion. *Enmund v. Florida*, 458 U.S. 782, 788 (1982).

68. See *infra* notes 73-88 and accompanying text.

69. See *infra* notes 89-93 and accompanying text.

70. See *infra* notes 94-99 and accompanying text.

71. *Thompson*, 108 S. Ct. at 2691-92 (Stevens, J., plurality).

72. *Id.* at 2700 (Stevens, J., plurality).

73. *Id.* at 2693 app. at 2701-02 (Stevens, J., plurality).

74. *Id.* at 2693 app. at 2702-03 (Stevens, J., plurality). In Montana, a 15-year-old may operate a motor vehicle without parental consent upon the successful completion of a driver's education class. MONT. CODE ANN. § 61-5-105 (1987).

parental consent.⁷⁵ Similarly, all states, except one, prohibit fifteen-year-olds from purchasing pornographic items,⁷⁶ and among the forty-two states allowing legalized forms of gambling, only six lack any age limit restrictions.⁷⁷ Furthermore, in Oklahoma, where Thompson's trial took place, a minor is prohibited from: purchasing alcohol⁷⁸ or cigarettes;⁷⁹ attending a bingo parlor or pool hall without an adult;⁸⁰ pawning property;⁸¹ obtaining medical services, unless married, emancipated, or suffering from a life threatening injury;⁸² and from working at a shooting gallery.⁸³ The plurality further found that such statutes strongly suggest the states' consensus that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions."⁸⁴

More importantly, the plurality noted that of the thirty-seven states authorizing capital punishment, eighteen states expressly limit such punishment to persons age sixteen or older at the time they committed their crime.⁸⁵ The plurality also expressed its concern

75. *Thompson*, 108 S. Ct. at 2693 app. at 2703-04 (Stevens, J., plurality). Four states authorize the waiver of parental consent to marry in some instances: Alaska, Louisiana, Maryland, and Mississippi. See ALASKA STAT. § 25.05.171 (1983); LA. REV. STAT. ANN. § 9:211 (West Supp. 1988) (suggesting that although minors may marry, sanctions may be imposed against officials); MD. FAM. LAW CODE ANN. § 2-301 (1984) (woman must either be pregnant or have had a child to obviate parental consent); MISS. CODE ANN. § 93-1-5(d) (Supp. 1987) (applies only to females).

76. *Thompson*, 108 S. Ct. at 2693 app. at 2704-05 (Stevens, J., plurality). Alaska is the only state having no legislation concerning the rights of minors to purchase pornographic materials.

77. *Id.* at 2693 app. at 2705-06. The six states having no statutory age restrictions on gambling are Kentucky, Maryland, Minnesota, New Mexico, North Carolina, and Virginia. In addition, the following states only permit such gambling with parental consent: Oklahoma, Pennsylvania, and Texas. See OKLA. STAT. ANN. tit. 21, § 995.13 (West 1983); PA. STAT. ANN. tit. 10 § 305 (Purdon Supp. 1987); TEX. REV. CIV. STAT. ANN. art. 179d, § 17 (Vernon Supp. 1988).

Citing the Nevada law prohibiting gambling by persons under the age of 21, NEV. REV. STAT. § 463.350 (1986), a Nevada casino recently refused to pay out a \$1,061,812 jackpot won by a 19-year-old who was playing the slot machines in the company of his parents. Shearer, *Intelligence Report*, PARADE, Oct. 30, 1988, at 16. Ironically, Nevada law expressly permits persons 16 or older to be executed. NEV. REV. STAT. § 176.025 (1986).

78. OKLA. STAT. ANN. tit. 21, § 1215 (West 1983).

79. *Id.* § 1241 (Supp. 1988).

80. *Id.* §§ 995.13, 1103 (1983).

81. OKLA. STAT. ANN. tit. 59, § 1511(C)(1) (West Supp. 1988).

82. OKLA. STAT. ANN. tit. 63, §§ 2601(a), 2602 (West 1984 & Supp. 1988).

83. *Id.* § 703 (1984).

84. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2693 n.23 (1988) (Stevens, J., plurality) (quoting *Parham v. J.R.*, 442 U.S. 584, 603 (1979)).

85. *Id.* at 2695-96 (Stevens, J., plurality). The 18 states that set age limits on executions are California (age 18), Colorado (age 18), Connecticut (age 18), Georgia (age

that nineteen states have not established any age limit, thus suggesting that "current standards of decency would still tolerate the execution of 10-year-old children."⁸⁶ It also found that the nineteen pertinent statutes were not accurate indicators of the states' position on capital punishment since they do not "focus on the question of where the chronological age line should be drawn."⁸⁷ Instead, the plurality found that the eighteen state statutes establishing minimum death penalty age limits at sixteen, combined with the positions of various organizations and foreign countries against the death penalty for juveniles, logically lead to the conclusion that executing a fifteen-year-old would "offend civilized standards of decency."⁸⁸

B. Jury Behavior

After examining jury behavior throughout this century, the plurality concluded that the general lack of executions of fifteen-year-olds "unambiguously" evidences the nation's attitude against such executions.⁸⁹ In support of this conclusion, the plurality noted that only eighteen to twenty persons who committed capital crimes under the age of sixteen have ever been executed, with the last such execution

17), Illinois (age 18), Indiana (age 16), Kentucky (age 16), Maryland (age 18), Nebraska (age 18), Nevada (age 16), New Hampshire (age 18), New Jersey (age 18), New Mexico (age 18), North Carolina (age 17), Ohio (age 18), Oregon (age 18), Tennessee (age 18), and Texas (age 17). *Id.* at 2696 n.30 (Stevens, J., plurality).

86. The following states have not established an express minimum age for death eligibility: Alabama, Arizona, Arkansas, Delaware, Florida, Idaho, Louisiana, Mississippi, Missouri, Montana, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, and Wyoming. However, neither Vermont nor South Dakota has issued a post-*Furman* death sentence. *Id.* at 2695 n.26 (Stevens, J., plurality). Additionally, the Vermont statute is considered to be invalid. H. BEDAU, *supra* note 9, at 34 comment g. The federal government also has no minimum age limit for imposing the death penalty. *Thompson*, 108 S. Ct. at 2707-08 (O'Connor, J., concurring).

87. *Id.* at 2695 (Stevens, J., plurality).

88. *Id.* at 2696 (Stevens, J., plurality). The plurality noted that both the American Bar Association and the American Law Institute oppose the execution of juveniles and that most foreign countries have either abolished capital punishment or allow it only in exceptional circumstances. *Id.* (Stevens, J., plurality). Amnesty International reported that, in addition to the United States, only Pakistan, Bangladesh, Barbados, Rwanda, and possibly Iran permit juvenile executions. Brief of Amicus Curiae Amnesty International in Support of Petitioner at 23-24, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86-6169). Furthermore, of the 11,000 documented executions throughout the world since 1979, only eight were for crimes committed by persons under the age of 18. Brief of Petitioner at 27, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86-6169). However, the dissent found that the plurality's reliance on the practices of foreign governments was "totally inappropriate as a means of establishing the fundamental beliefs of this nation." *Thompson*, 108 S. Ct. at 2716 n.4 (Scalia, J., dissenting).

89. *Thompson*, 108 S. Ct. at 2697 (Stevens, J., plurality); see *Furman v. Georgia*, 408 U.S. 238, 249 (1972) (noting that the rarity of a penalty may signify its arbitrary nature).

occurring in 1948.⁹⁰ Furthermore, of the 1861 persons convicted of criminal homicide between 1982 and 1986 for murders committed while under the age of sixteen, only five (or 0.3%), including Thompson, received death sentences.⁹¹ Contrasting this data with the fact that of 82,094 offenders over the age of sixteen, 1388 (or 1.7%) received the death penalty,⁹² the plurality concluded that the five young offenders received "sentences that [were] 'cruel and unusual in the same way that being struck by lightning is cruel and unusual.'" ⁹³

C. Present Sociological Views Concerning the Culpability of Minors

Recognizing the social purposes behind the death penalty as retribution and "deterrence of capital crimes by prospective offenders,"⁹⁴ the plurality considered whether the execution of fifteen-year-old offenders would promote these goals. First, the plurality noted that the Supreme Court has repeatedly recognized that children's acts are less culpable than those of adults because children generally are "less mature and responsible than adults,"⁹⁵ and have "less capacity to

90. *Thompson*, 108 S. Ct. at 2697 (Stevens, J., plurality); see V. STREIB, *supra* note 36, at 190-208 (1987). However, since 1985, three men who committed capital crimes at age 17 have been executed. *Id.* at 121-29. For a discussion of two of these executions, see *infra* notes 152-53, 160-62 and accompanying text.

91. *Thompson*, 108 S. Ct. at 2697 nn.38-39 (Stevens, J., plurality). Even before *Furman*, in 1972, the number of juvenile executions in the United States had experienced a marked decline. Of the estimated 230 juvenile executions since 1880, all but six occurred before 1960. R. REIMAN, *supra* note 17, at 257-63. Of those six, three occurred in the 1960s (pre-*Furman*) and three in the 1980s (more than ten years after *Furman*). *Id.*

Furthermore, although approximately 88 juvenile offenders were sentenced to death between 1972 and March 31, 1987, only 33 remained on death row as of March 31, 1987. *Id.* State courts only imposed eleven such sentences in 1982, nine in 1983, six in 1984, four in 1985, seven in 1986, and one in early 1987. *Id.* Of these 38 sentences, all but 5 involved 16- or 17-year-old offenders and only 2 involved females. *Id.*

92. *Thompson*, 108 S. Ct. at 2697 nn.38-39 (Stevens, J., plurality).

93. *Id.* at 2697-98 (Stevens, J., plurality) (quoting *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring)). In *Furman*, Justice Stewart analogized the random application of capital punishment to the likelihood of being "struck by lightning." 408 U.S. at 309-10 (Stewart, J., concurring). Apparently, Justice Stewart was concerned that persons receiving death sentences could not be distinguished from those persons committing similar crimes, but receiving lighter punishments. E. BLOCK, *WHEN MEN PLAY GOD* 15 (1983).

94. *Thompson*, 108 S. Ct. at 2699 (Stevens, J., plurality) (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)).

95. *Id.* at 2698 (Stevens, J., plurality); see, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982). The plurality specifically noted that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct . . . [and that] he or she is much more apt to be motivated by mere emotion or

control their conduct and to think in long-range terms.”⁹⁶ Accordingly, given the juvenile’s reduced culpability and capacity for growth, combined with society’s recognized fiduciary duties toward minors, the plurality found the retributive value in executing fifteen-year-old criminals to be almost nonexistent.⁹⁷

Second, the plurality found capital punishment’s goal of deterrence similarly lacking when applied to fifteen-year-old offenders. Even assuming that the death penalty serves as a deterrent to older offenders, the plurality noted that “[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”⁹⁸ The plurality also noted that because executions of minors are so rare, a minor is unlikely, in any event, to consider such a consequence.⁹⁹

After finding that the purposes behind capital punishment are defeated when applied to persons fifteen years of age or younger, the plurality held that such punishment is “nothing more than the purposeless and needless imposition of pain and suffering,” and thus prohibited by the eighth and fourteenth amendments.¹⁰⁰

V. JUSTICE O’CONNOR’S CONCURRING OPINION

Justice O’Connor’s concurring opinion agreed with both the plurality and the dissent that capital punishment should be accorded a minimum age limit and that the Court in determining such an age, must be governed by “evolving standards of decency that mark the progress of a maturing society.”¹⁰¹ However, the concurrence did not believe that the empirical evidence available to the Court conclusively established a national consensus prohibiting the execution of persons committing capital crimes while under the age of sixteen.¹⁰² Nevertheless, because it could find no basis for executing a person under

peer pressure than is an adult.” *Thompson*, 108 S. Ct. at 2699 (Stevens, J., plurality). Also, the plurality reiterated the general agreement “that punishment should be directly related to the personal culpability of the criminal defendant.” *Id.* at 2698 (Stevens, J., plurality) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring)).

96. *Thompson*, 108 S. Ct. at 2699 (Stevens, J., plurality) (quoting *Eddings*, 455 U.S. at 115).

97. *Id.* at 2699 (Stevens, J., plurality).

98. *Id.* at 2700 (Stevens, J., plurality); see V. STREIB, *supra* note 36, at 36-37 (recognizing that minors live “primarily for today” without much thought for the future).

99. *Thompson*, 108 S. Ct. at 2700 (Stevens, J., plurality).

100. *Id.* (Stevens, J., plurality) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)). Although the Court was asked to “draw a line” at age 18, the plurality refused to decide any issue beyond the one presented. *Id.* (Stevens, J., plurality).

101. *Id.* at 2706 (O’Connor, J., concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

102. *Id.* (O’Connor, J., concurring).

age sixteen without the express authorization of state law, the concurrence ultimately agreed with the judgment of the plurality reversing Thompson's death sentence.¹⁰³

The concurrence primarily relied on two factors. First, it noted that every state legislature establishing a minimum age for death eligibility has set that age at sixteen or older. In fact, the concurrence pointed out that almost two-thirds of the states have "definitely concluded that no 15-year-old should be exposed to the threat of execution."¹⁰⁴ Second, the concurrence emphasized the fact that no evidence exists showing that the Oklahoma Legislature, or any other legislature for that matter, carefully considered the potential conflict between its statute authorizing capital punishment and its statute permitting juveniles to be prosecuted as adults. Without such evidence, the concurrence was unwilling to find that the Oklahoma Legislature had provided for the execution of persons under sixteen.¹⁰⁵

Despite this evidence, the concurrence stopped short of finding a national consensus. Instead, Justice O'Connor noted that because nineteen states and the federal government have adopted statutes which, without an express minimum age, theoretically allow for executions of persons under sixteen, a real obstacle stands in the way of concluding that society completely rejects such a practice.¹⁰⁶ In fact, the concurrence commented, with the benefit of hindsight, that if the Supreme Court had accepted similar evidence as the national consensus when considering the constitutionality of capital punishment in *Furman*, the Court clearly would have been wrong.¹⁰⁷

Because the concurrence was unwilling "to substitute [the Court's] inevitably subjective judgment about the best age at which to draw a line in the capital punishment context for the judgments of the nation's legislatures,"¹⁰⁸ it found both that the matter should be left to the individual states to determine and that the Court should avoid making a broader, unnecessary constitutional decision at this time.¹⁰⁹ The concurrence also held that since the evidence *suggests* that age

103. *Id.* (O'Connor, J., concurring).

104. *Id.* (O'Connor, J., concurring); see *supra* notes 85-87 and accompanying text.

105. The lack of evidence supporting the legislature's consideration of this conflict suggests the lack of "special care and deliberation" required by the Supreme Court in death penalty cases. *Thompson*, 108 S. Ct. at 2707-10 (O'Connor, J., concurring).

106. *Id.* at 2708 (O'Connor, J., concurring); see *supra* note 86 and accompanying text.

107. *Thompson*, 108 S. Ct. at 2709 (O'Connor, J., concurring).

108. *Id.* (O'Connor, J., concurring).

109. *Id.* at 2711 (O'Connor, J., concurring).

sixteen is an appropriate line, any death penalty statute not affording a minimum age shall be presumed to have drawn that line at a minimum age of sixteen.¹¹⁰ Accordingly, because Oklahoma law established no minimum age for death penalty eligibility, the decision of the concurrence, combined with the judgment of the plurality, vacated Thompson's sentence and removed him from death row.¹¹¹

VI. THE DISSENTING OPINION

While recognizing that the eighth amendment does establish a minimum age for death eligibility, the dissent¹¹² found no plausible basis for establishing sixteen as that age. The dissent noted that Oklahoma and eighteen other states which provide no minimum age for executions carefully consider the facts of the case, the seriousness of the crime, and the juvenile's prospect for rehabilitation within the juvenile system before holding a minor eligible to be tried as an adult.¹¹³ The dissent, after stressing the heinousness of Keene's murder, emphatically rejected the judgment of the plurality and the concurrence and held that Thompson's death sentence should stand.¹¹⁴

The dissent first cautioned that the Court should refrain from imposing its own views when examining the evolving standards of decency which define the present interpretation of cruel and unusual punishment.¹¹⁵ Further, it suggested the Court should be guided solely by objective factors, such as legislation enacted by the states' elected representatives.¹¹⁶ Notwithstanding the plurality's examination of a number of state statutes,¹¹⁷ the dissent concluded that the

110. *Id.* (O'Connor, J., concurring). Interestingly, the concurrence does not mention that 19 states filed an amicus curiae brief on behalf of the State of Oklahoma. The 19 states consisted of 13 states which have not established a minimum age for death eligibility (Alabama, Arizona, Delaware, Florida, Idaho, Mississippi, Missouri, Montana, Pennsylvania, South Carolina, Utah, Virginia, and Wyoming); 5 states which have established a minimum between ages 16 and 18 (Connecticut, Kentucky, Nevada, New Mexico, and North Carolina); and one state which has no statute authorizing the death penalty (Kansas). See *supra* notes 85-87 and accompanying text. In their brief, the states urged that they should be allowed to determine the appropriate punishment on an "individualized, case-by-case basis" and to "punish capital offenders consistently, according to the defendants' relative degree of culpability rather than simply by their birthdate." Brief of Amici Curiae for Respondent Oklahoma at 1-2, *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988) (No. 86-6169). This brief strongly suggests that several states may respond to the concurrence's decision and establish minimum age limits under the age of 16.

111. This decision reportedly removes from death row two other individuals who were under 16 at the time of their crimes. *N.Y. Times*, June 30, 1988, at 17, col. 1.

112. The dissenting opinion was written by Justice Scalia and joined by Chief Justice Rehnquist and Justice White.

113. *Thompson*, 108 S. Ct. at 2712 (Scalia, J., dissenting).

114. *Id.* at 2711-21 (Scalia, J., dissenting).

115. *Id.* at 2714-15 (Scalia, J., dissenting).

116. *Id.* at 2715 (Scalia, J., dissenting).

117. See *supra* notes 73-88 and accompanying text.

plurality's skewed analysis of those statutes suggests that it improperly abandoned its judicial role in favor of a more legislative one.¹¹⁸

As did the concurrence,¹¹⁹ the dissent also pointed out that a national consensus against the imposition of death sentences for persons under sixteen is obviously impossible when nearly forty percent of the states and the federal government clearly authorize such a practice.¹²⁰ Furthermore, the dissent theorized that the comparative rarity of these sentences is nothing more than a reflection of society's general unwillingness to impose the death penalty without "individualized consideration."¹²¹ Since the number of adult executions have dwindled considerably in the last several decades, the substantial reduction in executions of minors, including those aged sixteen and seventeen, is neither surprising, nor an indication of a "modern consensus that such [executions] should never occur."¹²² Because Thompson received the individualized consideration required by the Supreme Court, including the opportunity to present his youth to the jury as a mitigating factor, the dissent found that his death sentence, although uncommon, was constitutionally permissible.¹²³

After accusing the plurality of being improperly swayed by its own "personal conscience,"¹²⁴ the dissent expressed even less tolerance for the views presented in the concurring opinion. First, it questioned the concurrence's logic in finding: (1) that a national consensus is necessary to hold capital punishment unconstitutional as to

118. *Thompson*, 108 S. Ct. at 2718 (Scalia, J., dissenting).

119. See *supra* note 107 and accompanying text.

120. *Thompson*, 108 S. Ct. at 2716 (Scalia, J., dissenting). The dissent also discussed state legislatures' recent trend toward lowering, instead of raising, the age of criminal responsibility. Specifically, the dissent noted that Congress, in considering the Comprehensive Crime Control Act of 1984, lowered the age at which a juvenile can be prosecuted as an adult in federal court from age 16 to 15. 18 U.S.C. § 5032 (Supp. V 1986). In passing the legislation, Congress relied on Department of Justice testimony stating that many juvenile delinquents are "cynical, street-wise, repeat offenders, indistinguishable, except for their age, from their adult criminal counterparts." *Thompson*, 108 S. Ct. at 2715 (Scalia, J., dissenting) (citing *Hearings on S. 829 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 551 (1983)).

121. *Id.* at 2718 (Scalia, J., dissenting).

122. *Id.* at 2717 (Scalia, J., dissenting). The dissent noted that executions of women have experienced as impressive a drop as those of juveniles. Citing the fact that only 30 women were executed between 1930 and 1955, and only three between 1955 and 1986, the dissent commented that acceptance of the plurality's assertion that rarity of executions is an accurate indicator of the national consensus would lead to the constitutional prohibition of female executions—a conclusion the plurality surely is not urging. *Id.* at 2718 (Scalia, J., dissenting).

123. *Id.* at 2713-14 (Scalia, J., dissenting).

124. *Id.* at 2719 (Scalia, J., dissenting).

individuals under sixteen; and (2) that no such consensus exists, and then concluding that a death penalty statute without a minimum age limit is presumed to have a limit of sixteen.¹²⁵ Second, while recognizing the Court's historical protectiveness of a state's rights, the dissent found that the concurrence does nothing more than tell states such as Oklahoma: "We cannot really say that what you are doing is contrary to national consensus and therefore unconstitutional, but since we are not entirely sure you must in the future legislate in the manner that we say."¹²⁶

Finally, the dissent noted the concurrence's narrow conclusion actually leaves the door wide open for persons to challenge capital punishment statutes which do not *expressly* include their societal group, such as "those of extremely low intelligence, or those over 75."¹²⁷ The dissent reasoned that the concurring opinion is actually no more than a means of avoiding Thompson's death sentence without deciding the real constitutional issue at hand, and stated that it "would prefer . . . even the misdescription of what constitutes a national consensus favored by the plurality."¹²⁸

Having thus rejected Thompson's assertion that his sentence was unconstitutional, the dissent addressed the merits of his second claim—that the jury's consideration of two photographs of Keene's body during the penalty phase denied Thompson his due process rights. In dismissing this claim, the dissent first noted that the photographs were clearly probative of the aggravating circumstance that the killing was "especially heinous, atrocious, or cruel."¹²⁹ The dissenting opinion then noted that, even if the pictures were inflammatory, the Court has never before ruled that the prejudicial nature of "concededly relevant evidence" is unconstitutional.¹³⁰

VII. IMPACT OF THE COURT'S DECISION

A. *Present Impact on Juvenile Executions*

"The morality of the death penalty is one of those recurring ques-

125. *Id.* at 2720 (Scalia, J., dissenting).

126. *Id.* at 2721 (Scalia, J., dissenting).

127. *Id.* (Scalia, J., dissenting). However, the concurrence rebutted this criticism by stating that no particular societal group would be able to successfully challenge a death penalty statute without substantial evidence showing the existence of a national consensus forbidding the execution of persons within that group; this fact being shown in the present case concerning persons under the age of 16. *Id.* at 2711 (O'Connor, J., concurring).

128. *Id.* at 2721 (Scalia, J., dissenting).

129. *Id.* at 2722 (Scalia, J., dissenting).

130. *Id.* (Scalia, J., dissenting); *see Lisenba v. California*, 314 U.S. 219, 227-28 (1941) (holding that the fourteenth amendment does not require the Supreme Court to review the propriety of a trial court's admission of evidence).

tions that seems to have a life of its own."¹³¹ Because the death penalty leaves no room for compromise, most people naturally develop definite opinions concerning its propriety. Proponents argue that capital punishment is necessary to save lives,¹³² while its opponents assert that it needlessly takes lives.¹³³ However, the debate loses much of its luster when the lives of juveniles are involved, causing even some of the death penalty's staunchest supporters to reconsider their positions.¹³⁴

In *Thompson*, the Supreme Court seized the opportunity to determine, once and for all, the constitutionality of the death penalty for juvenile offenders under the age of sixteen. Unfortunately, because the debate concerning capital punishment divides the Justices as much as the public, the Court had to settle for Justice O'Connor's *Furman*-like compromise.¹³⁵ While declaring executions of persons under sixteen presently unconstitutional, Justice O'Connor paves the way for states to amend their death penalty statutes to provide for such executions.

Despite the Court's division on the constitutionality of juvenile executions, the Justices essentially agreed on three key legal factors. First, they all agreed that an age limit does exist at which juvenile executions are per se cruel and unusual punishment.¹³⁶ Second, the Justices agreed that the Court must be guided by the "evolving [objective] standards of decency that mark the progress of a maturing society" in determining whether a particular punishment is cruel and unusual in violation of the eighth amendment.¹³⁷ Lastly, the Justices agreed that to uphold the death penalty, the legitimate social purposes behind capital punishment—retribution and deterrence—must be served,¹³⁸ and that "proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness."¹³⁹

However, after deciding the applicable law, the Justices agreed on

131. S. NATHANSON, AN EYE FOR AN EYE? 131 (1987).

132. E. BLOCK, *supra* note 93, at 39-40.

133. *Id.*

134. V. STREIB, *supra* note 36, at 30-34. Recent polls have shown that Americans generally disfavor capital punishment for juveniles who commit crimes while under the age of 18. In 1986, for example, a poll of 509 persons in Connecticut revealed that while 68% favored capital punishment, only 31% would uphold it for juveniles. *Id.*

135. For a discussion of *Furman*, see *supra* notes 14-20 and accompanying text.

136. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2706 (1988) (O'Connor, J., concurring).

137. *Id.* (O'Connor, J., concurring) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

138. *Id.* at 2699-2700 (Stevens, J., plurality), 2708-09 (O'Connor, J., concurring), 2719 (Scalia, J., dissenting).

139. *Id.* at 2708 (O'Connor, J., concurring).

little else, especially upon the interpretation of the presumably objective standards establishing the national consensus concerning juvenile executions. Although they reviewed essentially the same empirical data on juveniles, including state statutes and the practices of foreign countries,¹⁴⁰ the Justices came to three separate, and reasonable, conclusions. For example, in support of its opinion that society rejects the execution of persons under the age sixteen, the plurality cited the fact that no state has established a minimum death-eligible age below sixteen.¹⁴¹ Conversely, the dissent asserted that because nineteen states with no minimum age limit theoretically allow for executions of persons under age sixteen, no such consensus exists.¹⁴² However, the concurrence's interpretation of the same data led to the conclusion that although a consensus *likely* does exist, the states should be permitted to resolve the ambiguities and decide the issue themselves.¹⁴³

Given the inconsistencies in the states' views on capital punishment for juveniles, the Court's difficulty in finding a national consensus is understandable. However, both the concurrence and the dissent suggest that even if only one state decides to execute just one fifteen-year-old offender, a national consensus could still exist, as long as "individualized consideration" is given to the particular juvenile's case.¹⁴⁴

Even accepting this dubious view of a national consensus, both the concurrence and the dissent neglected to consider its effect on the goals of capital punishment—deterrence and retribution. As suggested by the plurality, the occasional execution of a fifteen-year-old is unlikely to deter other youths of similar age from committing capital crimes.¹⁴⁵ In fact, the deterrence value in any case, whether adult or juvenile, is greatly diminished by the fact that while those who are put to death generally "deserve to die," not all those who "deserve to die are executed."¹⁴⁶ As long as society as a whole continues the ad-

140. See *supra* notes 73-88 and accompanying text.

141. See *supra* notes 85-88 and accompanying text.

142. See *supra* notes 120-21 and accompanying text.

143. See *supra* notes 108-09 and accompanying text.

144. *Thompson*, 108 S. Ct. at 2706-07 (O'Connor, J., concurring), 2717 (Scalia, J., dissenting). The dissent specifically noted that the rareness of juvenile executions contributes nothing "to a modern consensus that such an execution should never occur" *Id.* at 2717 (Scalia, J., dissenting).

145. *Id.* at 2700 (Stevens, J., plurality); see *supra* notes 94-99 and accompanying text.

146. S. NATHANSON, *supra* note 131, at 60. The following analogy suggests why the arbitrariness of the death penalty undermines its purpose as a deterrent:

I tell the students in my class that anyone who plagiarizes will fail the course. Three students plagiarize papers, but I give only one a failing grade. The other two, in describing their motivation, win my sympathy, and I give them passing grades.

Id. Not only will future students not be deterred from plagiarism in the future, but

mirable practice of giving juveniles lighter sentences because they are juveniles, the occasional death sentence will not serve as a deterrent. Furthermore, substantial evidence demonstrates that the prospect of death is unlikely to deter teens in any event.¹⁴⁷

"Most social scientists [agree] that juveniles live primarily for today with little thought of the future consequences of their actions."¹⁴⁸ Furthermore, most children lack the "ability to engage in mature moral judgments" until they leave school or reach adulthood.¹⁴⁹ The Supreme Court has even recognized that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them."¹⁵⁰ Therefore, most juveniles are unlikely to conduct a "cost-benefit analysis"¹⁵¹ before committing crimes.

Case studies effectively illustrate this point. For example, shortly before Charles F. Rumbaugh¹⁵² was executed in 1985, he was asked if he considered the death penalty prior to committing murder. He responded, "I was 17 years old when I committed the offense for which I was sentenced to die, and I didn't even start thinking and caring

they will have an incentive to develop adequate motivations for the plagiarism. *Id.* at 60-62. In fact, Justice White appropriately noted in *Furman* that "seldom enforced laws [are such] ineffective measures for controlling human conduct that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted." *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring).

147. V. STREIB, *supra* note 36, at 36-37. The death penalty is alleged to serve as a deterrent because it capitalizes on an individual's fear of death. However, for many people, the risk of death does not equal certainty of death, as evidenced by mountain climbers, race car drivers, and even cigarette smokers. For most juveniles, a fear of death is almost nonexistent because their lives have only just begun. S. NATHANSON, *supra* note 131, at 17-20. Furthermore, studies show that ages 12 to 15 are the critical years for juvenile experimentation with "forbidden behavior," and that most youths feel that nothing will happen to them for crimes which they commit while under the age of 16. C. CARPENTER, B. GLASSNER, B. JOHNSON & J. LOUGHLIN, KIDS, DRUGS, AND CRIME 211-16 (1988) [hereinafter C. CARPENTER]; see also K. MAGID & C. MCKELVEY, HIGH RISK 27-35 (containing a profile on "kids who kill").

148. V. STREIB, *supra* note 36, at 36 (citing Kastenbaum, *Time and Death in Adolescence*, in *THE MEANING OF DEATH* 99 (1959)).

149. *Id.*; see C. CARPENTER, *supra* note 147, at 217 (noting that sophisticated moral thinking is low in preadolescents and does not develop until the "end of adolescence").

150. V. STREIB, *supra* note 36, at 37 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

151. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2700 (1988) (Stevens, J., plurality).

152. On April 7, 1976, Rumbaugh was convicted and sentenced to death for a murder he committed in Texas at age 17. He was executed 10-1/2 years later at age 28. V. STREIB, *supra* note 36, at 121-25.

about my life until I was at least 20.”¹⁵³ Similarly, William Wayne Thompson, the defendant in this case, stated that he also did not consider the death penalty before his crime and “that his only thoughts then were of playing ball or just hanging around with his friends.”¹⁵⁴

Not only is the goal of deterrence doubtful in juvenile executions, but such executions appear to have little or no retributive value, particularly for persons under the age of sixteen.¹⁵⁵ In *Enmund*, the Supreme Court determined that executions are dependent upon the defendant’s culpability, and that “a defendant’s intention—and therefore his moral guilt—[are] critical ‘to the degree of [his] criminal culpability.’”¹⁵⁶ Because juveniles lack the ability to consider the long-term effects of their actions, they should be, and usually are, held less culpable for their actions than adults committing the same crimes.¹⁵⁷ As a result of this reduced culpability, children should receive “pity and treatment”¹⁵⁸ for their capital crimes, rather than the electric chair. In fact, most Americans favoring capital punishment see little societal value in executing juveniles.¹⁵⁹

The execution of James Terry Roach¹⁶⁰ vividly illustrates this point. While suffering from mental retardation and a personality disorder, the seventeen-year-old Roach and another individual brutally murdered a young couple. Despite the fact that he had a mental age of twelve at the time of his crime, Roach received the death penalty and was executed nine years later.¹⁶¹ However, because of his impaired mental health, Roach barely understood the day before his execution that he was about to die for his crime.¹⁶²

153. *Id.* at 125 (quoting Nat’l Cath. Rep., Nov. 8, 1985, at 16, col. 1).

154. *Id.* at 215 n.118.

155. In *Furman*, Justice White remarked that “when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied.” *Furman v. Georgia*, 408 U.S. 238, 311 (1972) (White, J., concurring).

156. *Enmund v. Florida*, 458 U.S. 782, 800 (1982) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)).

157. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2698-99 (1988) (Stevens, J., plurality). The Court noted that juvenile courts operate on the premise that “criminal responsibility is absent in . . . misbehaving children” and that children are less culpable for their acts because they lack “the basis for adult criminal accountability—the exercise of an unfettered free will.” *Id.* at 2698-99 n.41 (Stevens, J., plurality) (quoting S. FOX, *THE JUVENILE COURT: ITS CONTEXT, PROBLEMS & OPPORTUNITIES* 11-12 (1967)).

158. V. STREIB, *supra* note 36, at 35.

159. See *supra* note 134 and accompanying text.

160. V. STREIB, *supra* note 36, at 125-27.

161. Roach’s execution went forward despite numerous court appeals, and requests for clemency by Mother Theresa of India, former President Carter, and the Secretary-General of the United Nations. *Id.* at 126.

162. Roach’s attorney stated that “Terry lacked the capacity to think more than a few hours ahead, let alone to the possibility of arrest and execution.” *Id.* at 127. However, the *Thompson* decision leaves open the question of whether Roach’s execution would be constitutional if carried out today. See, e.g., *Jones v. Mississippi*, 517 So. 2d 1295 (Miss. 1987), *vacated and remanded*, 108 S. Ct. 2891 (1988). In *Jones*, the defend-

In *Furman*, Justice White—a *Thompson* dissenter—stated that when capital punishment ceases to further the purposes it serves, it becomes “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.”¹⁶³ As shown by the plurality, the capital punishment of juveniles under the age of sixteen serves neither as an effective deterrent nor as a tool for retribution, and is thus a “patently excessive and cruel and unusual punishment violative of the Eighth Amendment.”¹⁶⁴ However, despite the decision of the four plurality Justices declaring executions of persons under age sixteen per se unconstitutional, the concurring opinion of one Justice is unmistakably the present state of the law.

Justice O'Connor's concurring opinion prohibits the execution of juvenile offenders who committed their crimes while under the age of sixteen and were sentenced under presently existing death penalty statutes. This affords states the opportunity to expressly amend those statutes to include such offenders. Because some states will likely take advantage of this opportunity,¹⁶⁵ *Thompson*, in retrospect, will probably serve a *Furman*-type role, guiding the states in creating constitutional death penalty statutes for persons under age sixteen. Most likely, the Court will have the opportunity, within a few years, to hear the appeal of a fifteen-year-old¹⁶⁶ juvenile offender receiving a post-*Thompson* death sentence. However, until such time, no juvenile offender who commits a capital crime under the age of sixteen can be lawfully executed in the United States.

ant, having a mental age of approximately 7 or 8, was sentenced to death for a murder he committed at age 24. In remanding the case, the Supreme Court directed the Supreme Court of Mississippi to reconsider Jones' death sentence in light of the *Thompson* decision. *Id.*

163. *Furman v. Georgia*, 408 U.S. 238, 311-12 (1972) (White, J., concurring).

164. *Id.* (White, J., concurring).

165. See *supra* text accompanying notes 108-09.

166. Although *Thompson* theoretically allows for states to amend death penalty statutes to include persons under the age of 15, the last person under 15 to be executed was a 14-year-old boy in 1944. V. STREIB, *supra* note 36, at 107. Because no person under age 15 has received a death sentence since then, it seems unlikely that states will go much lower than 15. However, Edwin Meese, President Reagan's former attorney general, once commented that “it would depend on the circumstances whether someone as young as fourteen should be executed.” H. BEDAU, *DEATH IS DIFFERENT* 152 (1987); see also Stewart & Nelson, *Hip Deep in the Death Penalty*, A.B.A. J., Nov. 1, 1988, at 42.

B. The Future Impact on Juvenile Executions

1. The Changing Ideology of the Court

Thompson is not the first time the Court has been deeply divided on capital punishment issues. Ever since the *Furman* decision,¹⁶⁷ the Supreme Court Justices have developed particular ideologies concerning the death penalty, resulting in certain predictable trends. For example, Chief Justice Rehnquist has *never* voted against the death penalty in any Supreme Court opinion.¹⁶⁸ Predictably, he joined the *Thompson* dissent. On the opposite pole, Justices Marshall and Brennan have *never* voted in favor of the death penalty and often are the only dissenters in cases upholding the death penalty for adults.¹⁶⁹ They, of course, supported the plurality decisions in *Thompson*.

The opinions of the other plurality Justices—Justices Blackmun and Stevens—are not so easily categorized. Although Justice Stevens appears to disfavor capital punishment,¹⁷⁰ Justice Blackmun dissented in *Furman*, along with Justice Rehnquist, and generally votes in favor of the death penalty.¹⁷¹ However, the *Thompson* decision leaves little doubt that the four plurality Justices firmly believe, and will continue to hold, that the execution of persons committing capital crimes while under the age of sixteen is cruel and unusual.¹⁷²

Since the three dissenting Justices—Justice Scalia, Justice White, and the Chief Justice—appear equally committed to the opposing view,¹⁷³ Justices O'Connor and Kennedy ostensibly will be deciding the issue in the future, assuming states react to the concurring opinion and expressly make persons under sixteen death eligible. However, since Justice O'Connor suggests that she will accept the states'

167. See *supra* notes 14-20 and accompanying text.

168. H. BEDAU, *supra* note 9, at 253.

169. *Id.* at 252-53. Justices Brennan and Marshall, the Court's most liberal members, generally vote together on key issues. Taylor, *Rehnquist's Court: Tuning out the White House*, N.Y. Times, Sept. 11, 1988, at 38, col. 1.

170. For example, Justice Stevens voted against a mandatory death penalty in *Woodson v. North Carolina*, 428 U.S. 280 (1976), and the death penalty for rape in *Coker v. Georgia*, 433 U.S. 584 (1977). See *supra* notes 25-30 and accompanying text. However, his ideology is difficult to classify since he often joins the more liberal Justices on some key issues, such as abortion and affirmative action, yet joins the conservatives on others.

171. Justice Blackmun dissented in *Woodson*, although he voted against the death penalty for rape in *Coker*. See *supra* notes 25-30 and accompanying text. Although Justice Blackmun professes to oppose the death penalty, he hesitates to overturn death sentences because state legislatures have the authority to abolish capital punishment. Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. Times, Feb. 20, 1983, at 20, col. 1; see M. MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 197-98* (1973) (noting that Justice Blackmun questions whether capital punishment is "an effective deterrent").

172. See *supra* note 100 and accompanying text.

173. See *supra* note 123 and accompanying text.

decision in the matter,¹⁷⁴ Justice Kennedy's vote will likely serve to break the resulting 4-4 tie. How he will vote is still anyone's guess.¹⁷⁵

2. The Impact on Juvenile Offenders Age 16 and Older

A more predictable matter is how the Court will decide two upcoming cases concerning older juvenile offenders: *Stanford v. Kentucky*¹⁷⁶ and *Wilkins v. Missouri*.¹⁷⁷ Since those cases involve seventeen- and sixteen-year-old offenders, another look at the *Eddings* ruling¹⁷⁸ is quite insightful. Even though Monty Lee Eddings was just sixteen at the time of his crime, Chief Justice Rehnquist and

174. Although Justice O'Connor is considered a moderate, she generally votes to uphold states' rights. Blasi, *Praise for the Court's Unpredictability*, N.Y. Times, July 16, 1986, at 23, col. 2. However, concerning key constitutional issues, Justice O'Connor has a tendency to be less conservative and "to keep one eye on the Constitution, one eye on the real world, and an open mind to judge what she sees." Sperling, *Justice in the Middle: On the Jurisprudence of Sandra Day O'Connor, Possibly the Swing Vote on the New Supreme Court*, THE ATLANTIC, Mar. 1988, at 26. Moreover, in a recent interview, Justice Blackmun indicated that Justice O'Connor "agonized over whether [a] 15-year-old murderer could be put to death because 'the soft spots in her armor . . . are children and women.'" Taylor, *supra* note 169, at 38. This may indicate Justice O'Connor's willingness to reconsider her position on juvenile death sentences in future cases.

175. Justice Anthony Kennedy has been described as a conservative with quasi-liberal tendencies, thus making his decisions difficult to predict. Williams, *The Opinions of Anthony Kennedy: No Time for Ideology*, A.B.A.J., Mar. 1, 1988, at 59. In fact, "despite [his] having written more than 430 opinions during his 12 years on the 9th Circuit, and despite [his] having undergone questioning by the . . . Senate Judiciary Committee . . . no one knows how a Justice Kennedy would treat the most divisive issues of our day . . ." *Id.* at 56. Justice Kennedy has issued opinions both upholding and reversing death sentences in particular cases. Compare *Neuschafer v. McKay*, 807 F.2d 839 (9th Cir. 1987) (voting to remand a death sentence for consideration of whether the defendant had initiated his confession) with *Adamson v. Ricketts*, 789 F.2d 722 (9th Cir. 1986), *rev'd*, 107 S. Ct. 2680 (1987) (dissenting from an opinion finding the defendant ineligible for the death penalty due to double jeopardy).

However, since joining the Court in early 1988, Justice Kennedy has provided, through his conservative vote, "a razor-thin 5 to 4 majority in a number of key cases in the criminal justice and civil rights areas." Sitomer, *Justice Kennedy Makes Conservative Difference in Supreme Court Case*, The Christian Sci. Monitor, June 27, 1988, at 5. In fact, he joined Chief Justice Rehnquist and Justices O'Connor, Scalia, and White in eight of the nine decisions in which the Court clearly divided into conservative and liberal factions. Taylor, *supra* note 169, at 38. Despite this early conservative voting trend, Justice Kennedy is still considered "a question mark." *Id.*

176. 734 S.W.2d 781 (Ky. 1987), *cert. granted*, 109 S. Ct. 217 (1988).

177. 736 S.W.2d 409 (Mo. 1987), *cert. granted*, 108 S. Ct. 2896 (1988). The Supreme Court heard oral arguments in *Stanford* and *Wilkins* on March 27, 1989. However, as of April 17, 1989, the Court had not issued its decisions in those cases. Telephone conversation with the U.S. Supreme Court clerk (Apr. 17, 1989).

178. See *supra* notes 39-41 and accompanying text.

Justices White and Blackmun noted in their dissent that they would vote to sustain Eddings' death sentence on constitutional grounds.¹⁷⁹ This is clearly unwelcome news for defendants Stanford and Wilkins,¹⁸⁰ because it strongly suggests that Justice Blackmun, one of the *Thompson* plurality, will vote to sustain the death penalty for offenders over the age of fifteen. Thus, even assuming no further change in ideology, the present Court is unlikely to hold the death penalty unconstitutional for persons who commit crimes at age sixteen to eighteen. Given the Court's struggle to reach a consensus as to juveniles under age sixteen, this result would not be surprising.

Notwithstanding the accuracy of these predictions, the Court could experience a major change in Justices—and ideologies—in the very near future. While the more conservative Justices are relatively young,¹⁸¹ the liberal members of the Court are aging and developing significant health problems,¹⁸² sparking rumors of imminent retirement.¹⁸³ If these rumors prove true, the Court's position on many key issues, including capital punishment for both juveniles and adults, will be dictated by the future Court appointments of newly-elected President George Bush, a known moderate with conservative tendencies.¹⁸⁴

Although politics naturally plays a role in Supreme Court appointments, the Justices have expressed concern over the public's "perception that constitutionality is nothing more than the cumulative product of the political parties' power and luck at controlling new appointments."¹⁸⁵ However, as one of the most important, yet divisive,

179. *Eddings v. Oklahoma*, 455 U.S. 104, 128 (1982) (Burger, C.J., dissenting).

180. However, the defendant in *Wilkins* may not be so disappointed. Wilkins, who was 16 years old at the time of his offense, told the sentencing judge that he preferred the death penalty over life imprisonment. He explained to the judge: "One I fear, and one I don't." V. STREIB, *supra* note 36, at 182; see also Reidinger, *The Death Row Kids*, A.B.A. J., Apr. 1, 1989, at 79.

181. The Chief Justice is 63 years old; Justice Scalia, 52; Justice Kennedy, 52; Justice O'Connor, 58; and Justice White, 71. Taylor, *supra* note 169, at 38.

182. Justice Brennan is 82; Justice Marshall, 80; and Justice Blackmun, 80. *Id.*

183. *Id.* To the contrary, Justice Brennan has indicated: "If God spares me, I'll be here for a long time." *Id.* Justice Marshall has stated that "he was appointed for life and . . . will serve out his term." *Id.* These Justices' decisions are not without precedent. Several past Justices remained on the Court until their mid- to late-80s, and Justice Oliver Wendell Holmes sat on the Court until his retirement at age 90. Greenhouse, *Taking the Supreme Court's Pulse*, N.Y. Times, Jan. 28, 1984, at 8, col. 3.

184. Although President Bush professes not to have an ideology, present speculation is that he will follow President Reagan's lead. Shapiro, *The Differences That Really Matter*, TIME, Nov. 7, 1988, at 22-26. While Bush may be tempted to appoint moderates to the Supreme Court, he will receive intense lobbying from fellow Republicans to appoint conservative Justices, particularly those opposing abortion, and it is anticipated that he will succumb to such pressure. *Id.* at 25.

185. Sperling, *supra* note 174, at 26; see Taylor, *supra* note 169, at 38. For example, many Supreme Court watchers predict that the present Court, under Chief Justice Rehnquist's direction, will soon reverse its pro-abortion decision in *Roe v. Wade*, 410 U.S. 113 (1973), and that a later Court, possibly within 10 years, will vote for its rein-

constitutional issues of our day, capital punishment undoubtedly will continue to be controlled, to some extent, by political forces. Given the frequent political changes within the executive branch and the inevitable retirement or death of Court members, the Court's final word on both adult and juvenile executions may not be heard for a long time—if ever.

VIII. CONCLUSION

When all is said and done, *Thompson v. Oklahoma* may be much ado about nothing. Although William Wayne Thompson and two others successfully evaded their would-be executioners, there is little hope that other fourteen- or fifteen-year-olds will be able to do the same. The present Supreme Court has essentially stated that it will not interfere with such executions, provided the offender is sentenced under a statute expressly authorizing the death penalty for offenders under age sixteen. Although Justice O'Connor gives the impression that she hopes the states will draw the line for death eligibility at age sixteen, this probably is wishful thinking. Given the death penalty's substantial support in a few states, the future execution of a small number of juvenile offenders under the age of sixteen appears inevitable.

Ironically, only four or five other countries—Pakistan, Bangladesh, Barbados, Rwanda, and possibly Iran—authorize the death penalty for persons under age eighteen at the time they commit their crimes.¹⁸⁶ With all other western countries and the United Nations opposing such a practice, the United States is keeping dubious company indeed. Even the Soviet Union has declared the execution of juveniles within this country an "American failing."¹⁸⁷ Given the rarity of such executions, it appears most Americans would agree.

As discussed previously,¹⁸⁸ the occasional execution of a juvenile offender will not serve any of the legitimate social purposes underlying capital punishment. In fact, it will do little more than assuage a particular judge or jury's distaste for a particular juvenile—not for

statement. Sperling, *supra* note 174, at 26. Of course, decisions declaring abortion legal, then tantamount to murder, and finally legal again, all within a 20- to 30-year time period, are likely to confuse the public and give it a jaded sense that constitutionality depends upon the opinions of nine people. *Id.*

186. *See supra* note 88.

187. Shipler, *Washington Talk: Soviet-American Relations*, N.Y. Times, Nov. 10, 1987, at 20, col. 1. In fact, the Soviet Union sent one of its officials to hear the oral arguments in *Thompson*. *Id.*

188. *See supra* notes 131-85 and accompanying text.

juvenile killers as a whole. For example, although two fifteen-year-old killers may have equal levels of emotional immaturity, one may be sentenced to death simply because he looks much older while another may be spared because he appears younger. Although the argument of arbitrariness supports the abolition of capital punishment for all ages, it is particularly appropriate when applied to children, who are often unable to fully appreciate the consequences of their actions.

Unfortunately, the present Supreme Court's failure to employ *Thompson* to declare juvenile executions for offenders under age sixteen per se unconstitutional is unlikely to be remedied in the next such case, which will presumably come before an even more conservative Court. Since newly elected President George Bush is already receiving intense lobbying to fill Court vacancies during his term with conservatives,¹⁸⁹ any immediate appointees are unlikely to take a liberal view of capital punishment, even as applied to minors. Thus, the nation will have to look ahead to a future Supreme Court to end this deplorable practice, hopefully before the lives of many children are lost.

SUSAN M. SIMMONS

189. See *supra* note 184 and accompanying text.