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Jeffery L. Robinette
West Virginia University College of Law

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I. INTRODUCTION

Although the imposition of capital punishment on juveniles may come as a shock to some, such punishment nevertheless has a long history of acceptance in this country and is reflected in contemporary sentencing practices. Between the years 1982 and 1988 there were
2,106 death sentences imposed in the United States.\(^1\) Of those individuals who were sentenced to death, five were under the age of sixteen,\(^2\) approximately ten were sixteen years of age,\(^3\) and thirty were seventeen years of age at the time the crime was committed.\(^4\) However, of those juveniles sentenced, a substantial number were not executed, but were granted executive clemency.\(^5\) Even though these statistics reflect a host of controversial conclusions, there nevertheless appears to be a consensus that (1) executive clemency is an indicator that there is at least executive unrest in executing individuals for crimes committed at an age below eighteen years; and (2) because there are an extremely low number of juvenile executions compared to the number of adult executions (about two percent) prosecutors and jurors question whether the most extreme sanction is proper and/or constitutional when applied to individuals under the age of eighteen.\(^6\)

Last Term, in *Thompson v. Oklahoma*,\(^7\) the United States Supreme Court addressed this issue and all nine Justices agreed on two fundamental propositions concerning the imposition of capital punishment on juveniles:

> [T]here is some age below which a juvenile's crimes can never be constitutionally punished by death, and that our precedents require us to locate this age in the light of the 'evolving standards of decency that mark the progress of a maturing society.'\(^8\)

Although the *Thompson* Court was invited to draw that line at eighteen years of age, the plurality Court refused to do so and only ruled on the facts of the case at hand; it held that no juvenile

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2. *Id*.
3. *Stanford v. Kentucky*, 109 S. Ct. 2969, 2977 (1989). From 1982 through 1988, out of 2,106 total death sentences only fifteen were imposed on individuals who were sixteen or under when they committed their crimes. Since five of those fifteen individuals were fifteen-years-old - and the last execution of any individual below the age of sixteen was in 1948 (See, *Thompson*, 108 S. Ct. 2687 (1988)) - it is logical to assume that ten of those individuals were sixteen years old.
offender who at the time of the capital offense was below sixteen years of age may be sentenced to death. Because the Thompson Court limited its ruling to the facts in that case (which involved a fifteen-year-old capital offender) it only partially addressed the critical issue: whether any individual who at the time of the capital offense was below eighteen years of age may be sentenced to death. Even though capital sentencing of sixteen and seventeen-year-old offenders was currently recognized by legislators and the courts, the United States Supreme Court, by not confirming the constitutionality of this punishment, created some doubt as to whether the execution of a sixteen or seventeen-year-old was unconstitutional as well.

Less than one year later, however, the Court decided whether the execution of sixteen or seventeen-year-olds was constitutional in Stanford v. Kentucky. In determining whether the death penalty imposed on an individual who committed murder at sixteen or seventeen years of age constitutes "cruel and unusual" punishment under the Eighth Amendment, the instant case afforded the Court an opportunity to either expand its precedent as set out in Thompson, or to confirm our nation's age-old capital sentencing practices with respect to sixteen and seventeen-year-old capital offenders.

II. STATEMENT OF THE CASES

Stanford v. Kentucky involved the shooting death of twenty-year-old Baerbel Poore in Jefferson County, Kentucky. On the evening of January 7, 1981, Poore was repeatedly raped and sodomized by Kevin Stanford and his accomplice during and after the commission of a robbery at a gas station where she was employed as an attendant. Stanford and his accomplice then drove her to a secluded area near the station, where Stanford shot her point-blank in the face and then in the back of the head. Stanford committed the murder when he was approximately seventeen years and four month of age.

After Stanford's apprehension, a Kentucky juvenile court conducted hearings to determine whether he should be transferred for

trial as an adult under Kentucky law.\textsuperscript{10} Stressing the seriousness of Stanford's offenses and the unsuccessful attempts of the juvenile system to treat him for numerous instances of past delinquency,\textsuperscript{11} the juvenile court found certification for trial as an adult to be in the best interest of Stanford and the community.\textsuperscript{12}

In August, 1982, Stanford was tried and convicted of murder, first-degree sodomy, first-degree robbery, and receiving stolen property and was sentenced to death and forty-five years in prison. The Kentucky Supreme Court affirmed the death sentence and stated that Stanford's "age and possibility that he might be rehabilitated were mitigating factors appropriately left to the consideration of the jury that tried him."\textsuperscript{13}

\textit{Wilkins v. Missouri} involved the stabbing death of Nancy Allen, a twenty-six-year-old mother of two who was working behind the sales counter of the convenience store she and her husband owned and operated in Avondale, Missouri. On July 27, 1985, Heath Wilkins and his accomplice, Patrick Stevens, carried out Wilkins' plan to rob the convenience store and murder "whoever was behind the counter" because "a dead person can't talk."\textsuperscript{14} According to his prearranged plan, Wilkins ordered a sandwich while Stevens went to the rest room behind the counter. Once Nancy Allen was close to the rest room door, Stevens rushed out and grabbed her. Wilkins went around the counter and thrust his knife into her back. Wilkins
testified that he was aiming at her kidneys, which he thought would be a fatal wound.15

Nancy Allen fell to the floor and rolled onto her back. When Stevens had difficulty operating the cash register, he asked Wilkins what to do. Allen replied, directing Stevens to what he sought but this caused Wilkins to stab her three more times in her chest, two of which pierced the heart. She continued to speak, begging for her life. Defendant silenced her with four stabs to the neck, one of which opened the carotid artery. Wilkins and Stevens then exited the store leaving Nancy Allen on the floor in a pool of blood.16

Wilkins was apprehended on August 10, 1985 and was advised of his rights. Wilkins admitted that he robbed the convenience store and also admitted that he murdered Nancy Allen. Wilkins was sixteen years and six months of age at the time of the murder; six months short of majority in Missouri.17

Because Wilkins was roughly six months short of the age of majority for purposes of criminal prosecution, he could not automatically be tried as an adult under Missouri law. Before that could happen, the juvenile court was required to terminate juvenile court jurisdiction and certify Wilkins for trial as an adult.18 Relying on

15. Id. at 412.
16. Id. Though the coroner indicated that Nancy Allen may have been dead by the time defendant imparted the last wound, it was the opinion of the trial court, the Missouri Supreme Court, and the United States Supreme Court that Mrs. Allen was not dead until sometime after Wilkins and Stevens exited the convenience store.
18. Stanford, 109 S. Ct. at 2978. That statute provided that in determining whether to transfer a juvenile the court must consider:
(1) The seriousness of the offense alleged and whether the protection of the community requires transfer to the court of general jurisdiction;
(2) whether the offense alleged involved viciousness, force and violence;
(3) whether the offense alleged was against persons or property with greater weight being given to the offense against person, especially if personal injury resulted;
(4) whether the offense alleged is a part of a repetitive pattern of offenses which indicates that the child may be beyond rehabilitation under the juvenile code;
(5) the record and history of the child, including experience with the juvenile justice
the "viciousness, force and violence" of the alleged crime, Wilkins' maturity, and the failure of the juvenile justice system to rehabilitate him after previous delinquent acts, the juvenile court made the necessary certification on August 15, 1985.

After hearing the evidence, including Wilkins' own testimony and the medical experts' testimony concerning his competency to stand trial, the court accepted the pleas of guilty to all charges including murder in the first degree.

At the sentencing hearing on June 27, 1986, Wilkins was sentenced to death for the murder of Nancy Allen. The Missouri Supreme Court affirmed the trial court's finding, ruling that the evidence supported a determination that the defendant was competent to stand trial, that the court properly considered Wilkins' age in imposing the death penalty, that the death sentence was supported by aggravating factors, and that the death sentence was not disproportionate or excessive when compared to similar cases.

system, other courts, supervision, commitments to juvenile institutions and other placements;

(6) the sophistication and maturity of the child as determined by consideration of his home and environmental situation, emotional condition and pattern of living;

(7) the program and facilities available to the juvenile court in considering disposition; and

(8) whether or not the child can benefit from the treatment or rehabilitative programs available to the juvenile court.

19. Id. at 4975.
20. Id. Wilkins, 736 S.W.2d at 413. Neither of the two medical experts that examined Wilkins were of the opinion that he suffered from a mental disease or defect as defined by Missouri law, notwithstanding the fact that both experts knew that Wilkins intended to plead guilty to all charges and pursue the death penalty.
21. Id. at 414.
22. Id. at 409.

23. For instance, in Wilkins's case, there was great emphasis placed on whether Wilkins was competent to stand trial, and whether he was competent to proceed pro se. A competency hearing was set for April 16, 1986, to inquire into the competency of Wilkins at the time of his act as well as his present competency to stand trial. During the competency hearing the trial court first became fully aware that Wilkins wanted to release counsel and proceed pro se, plead guilty, waive jury trial and actively seek a sentence of death as his penalty. Although the trial court found him competent to stand trial, the trial judge, however, did not immediately grant Wilkins's request to proceed pro se, and ordered that a hearing be set on April 23, 1986, to determine whether defendant may proceed pro se. When the hearing resumed on April 23, 1986, the judge strongly voiced his belief that Wilkins should be represented by counsel, and fully explained the consequences of his action. Seeing that Wilkins would not accept representation by counsel, the court set a pleading for May 9, 1986.
Though there were numerous points taken up by the Kentucky and Missouri Supreme Courts, the main issue before the United States Supreme Court was essentially whether the imposition of capital punishment on an individual for a crime committed at sixteen or seventeen years of age constitutes "cruel and unusual" punishment under the Eighth Amendment. In resolving this issue, the Court asked (1) whether the sentence constituted one of "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted," and (2) whether the sentence is contrary to the "evolving standards of decency that mark the progress of a maturing society." In a five-four decision, a plurality of the Court affirmed the Kentucky and Missouri Supreme Courts' decisions holding that the imposition of the death penalty on an individual for a capital crime committed at sixteen or seventeen years of age does not constitute cruel and unusual punishment under the Eighth Amendment.

III. PRIOR LAW

A. The Juvenile Court System in the United States

1. The Advent of the Juvenile Court System

The early criminal law did not differentiate between the adult and the minor who had reached the age of criminal responsibility; the fundamental thought in criminal jurisprudence was not reformation but punishment, and this principle was applied to children as well as adults.

The early reformers were appalled by the procedures and penalties applied to adults, and were profoundly convinced that society's duty to the child could not be governed entirely by the concept of justice. They believed that society's role was not to ascertain whether the child was guilty or innocent, but to consider the best interest of the child and "to save him from a downward career." The child was to be "treated" and "rehabilitated" and the procedures from apprehension through institutionalization were to be "clinical" rather than punitive.

The juvenile court movement began in this country at the end of the last century. From the first juvenile court statute adopted in Illinois in 1899, the system has spread to every State in the Union, to the District of Columbia, and to Puerto Rico. Notwithstanding society's and the courts' earlier views of punishing juveniles, the courts have since favored statutes creating courts having jurisdiction of juvenile delinquents, and the juvenile courts have been characterized by the courts as "progressive, humanitarian, and beneficential."

2. Procedural Distinctions

Although the statutes in some jurisdictions vest in the juvenile courts original jurisdiction of offenses committed by minors up to a certain age, an exception is made in so far as capital offenses or those punishable by death or life imprisonment are concerned, which results in taking away from the juvenile courts, and conferring upon the general courts, jurisdiction of the more serious grades of homicide, such as first or second degree murder, committed by those...
who otherwise would be under the jurisdiction of the juvenile courts.\textsuperscript{34} Frequently, where such discretionary authority is originally vested in the juvenile court, and the state seeks a waiver of juvenile court jurisdiction in order that the youthful offender may be prosecuted as an adult, the burden of proof is on the state to show that the defendant is not amenable to the rehabilitative measures available to the juvenile court. Some jurisdictions, however, have enacted statutes that place the burden on the juvenile charged with certain violent crimes to prove that he would be amenable to the care, treatment, and training program available through the facilities of the juvenile court.\textsuperscript{35} Finally, the United States Supreme Court has upheld the transfer of juveniles to criminal courts when there has been a hearing on the transfer sufficient to demonstrate that there has been a full investigation, and specific enough to permit meaningful review.\textsuperscript{36}

The criteria to be utilized in making the waiver decision may be set forth in the juvenile court act itself (such as those statutes in the instant case),\textsuperscript{37} Federal Acts,\textsuperscript{38} or in court decisions. Of the statutes, there are some variations as to the precise exclusionary language used. Generally, though, the exclusionary language is such as to remove from the jurisdiction of the juvenile court the higher degrees of homicide, but frequently not lesser degrees, such as manslaughter.\textsuperscript{39} Of the court decisions setting forth the factors juvenile courts should consider before waiving jurisdiction, \textit{Summers v. State},\textsuperscript{40} gives the most comprehensive summary.

Once juvenile jurisdiction is waived, the juvenile is accorded the same constitutional rights as adults; however, the juvenile’s age and

\begin{itemize}
  \item \textsuperscript{34} Homicide by Juvenile - Jurisdiction, \textit{supra} note 23, at 666.
  \item \textsuperscript{35} Annotation, \textit{Rehabilitation - Juvenile Tried As Adult}, 22 A.L.R. 4th 1162, 1166 (1983).
  \item \textsuperscript{36} Kent v. United States, 383 U.S. 541 (1966).
  \item \textsuperscript{37} See Statutes cited, \textit{supra} notes 8 and 14.
  \item \textsuperscript{39} Homicide by Juvenile - Jurisdiction, \textit{supra} note 23, at 671.
  \item \textsuperscript{40} 230 N.E.2d 320 (Ind. 1967). Jurisdiction may be waived if the offense has specific consecutive merit in the opinion of the prosecution attorney; or it is heinous or of an aggravated character, greater weight being given to offenses against the person than to offenses against property; or, even though less serious, if the offense is part of a repetitive pattern of juvenile offenses which would lead to a determination that the said juvenile may be beyond rehabilitation under the regular statutory juvenile procedures; or where it is found to be in the best interest of the public welfare and for the protection of the public security generally that said juvenile be required to stand as an adult offender.
\end{itemize}
chances for rehabilitation are considered as mitigating factors.\textsuperscript{41}

\textbf{B. The Death Penalty and Eighth Amendment Analysis}

\textbf{1. Adult Death Sentencing}

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, \textit{nor cruel and unusual punishment inflicted}."\textsuperscript{42}

Because we live in an enlightened democracy, the Court has had little occasion to interpret the Eighth Amendment. However, the Court has held that "the basic concept underlying the Eighth Amendment's ban on ‘cruel and unusual’ punishment [which can be traced back to the Magna Carta], \textit{is nothing less than the dignity of man}.”\textsuperscript{43} In keeping with that basic concept, earlier modes of execution such as decapitation, disembowlement, and drawing and quartering were all considered to be below the dignity of man, and therefore, were cruel and unusual at the time of the Eighth Amendment's adoption.\textsuperscript{44} Conversely, every modern form of carrying out the death penalty, including electrocution,\textsuperscript{45} hanging,\textsuperscript{46} shooting,\textsuperscript{47} and lethal gas,\textsuperscript{48} has been upheld not to be below the dignity of man, and therefore, not "cruel and unusual" punishment.

The Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time the Bill of Rights was adopted,\textsuperscript{49} or any punishment that is contrary to the "evolving standards of decency that mark the progress of a maturing society.”\textsuperscript{50} At the time the Bill of Rights was adopted, the common law

\textsuperscript{41} See, Stanford, 734 S.W.2d at 792.
\textsuperscript{42} U.S. CONST. amend. VIII.
\textsuperscript{43} Trop v. Dulles, 356 U.S. 86, 100 (1958) (emphasis added).
\textsuperscript{45} In re Kemmler, 136 U.S. 436 (1880).
\textsuperscript{46} Dutton v. State, 123 Md. 373 (1914).
\textsuperscript{47} Wilkerson v. Utah, 99 U.S. 130 (1879).
\textsuperscript{48} Gray v. Lucas, 710 F.2d 1048 (5th Cir. 1983).
\textsuperscript{49} Ford, 477 U.S. at 405.
\textsuperscript{50} Trop, 356 U.S. at 101.
permitted the execution of adults, as well as juveniles. Concerning contemporary standards of modern society, the Court in *Gregg v. Georgia,* upheld capital punishment since the thirty-five states that permitted such punishment were "[t]he most marked indication of society's endorsement of the death penalty for murder." Moreover, the *Gregg* Court held that the imposition of the death penalty is not inherently cruel so as to constitute a violation of the Eighth Amendment. In reaching this conclusion, the *Gregg* Court emphasized three factors: (1) that the "imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and England"; (2) that it was "now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction"; and (3) that the death penalty serves "two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.

In a number of decisions, the Court enumerated those considerations that must be included within a state statutory scheme providing for the death penalty. Of those decisions, *Gregg* gives one of the most comprehensive summaries:

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\text{[T]he prohibition against the infliction of cruel and unusual punishment is not violated by the imposition of the death penalty for the crime of murder under state's statutory scheme whereby (1) guilt or innocence is determined, either by a jury or the trial judge, in the first stage of a bifurcated trial, with the judge being required to charge the jury as to any lesser included offenses when supported by any view of the evidence, (2) after a verdict, finding, a plea of guilty, a presentence hearing is conducted, where the jury (or judge in a case tried without a jury) hears argument and additional evidence in mitigation or aggravation of punishment, (3) at least one of 10 aggravating circumstances specified in the statutes must be found to exist beyond a reasonable doubt, and must be designated}
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in writing, before the jury (or judge) may elect to impose the death sentence on a defendant convicted of murder, the trial judge in jury cases being bound by the jury's recommended sentence, (4) on automatic appeal of a death sentence, the state's highest court must determine whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supported the finding of a statutory aggravating circumstance, and whether the death sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, and (5) if a death sentence is affirmed, the decision of the state's highest court must include reference to similar cases that the court considered.58

The above passage is unique in that it sets out three principles the courts consider when imposing capital punishment: (1) presence of mitigating or aggravating factors; (2) arbitrary imposition of capital punishment; and (3) proportionality analysis.

First, as the above statute proscribes, there must be an aggravating circumstance present before capital punishment may be imposed, and notwithstanding such aggravating factor, if one or more of the mitigating factors are present, then the jury or judge must determine if the death sentence should be reduced to life imprisonment.59

Second, in Furman v. Georgia,60 a landmark case decided before Gregg, the Court held that the death penalty cannot be imposed in an arbitrary and capricious manner. Although the Gregg Court later reconfirmed the constitutionality of capital punishment, it nevertheless expressed concerns similar to those expressed in Furman, and provided that the requirements set out in Furman could be met "by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance."61

Third, the leading case of Weems v. United States,62 established what is commonly referred to as the "proportionality analysis doctrine." Weems involved a public official in the Philippines convicted of falsifying an official record and was sentenced to fifteen years of hard and painful labor and constant enchainment, deprivation

59. See Gregg, 428 U.S. at 208-11, for a listing of various aggravating factors; see also State v. Wilkins, 736 S.W.2d at 410.
60. 408 U.S. 238, 249 (1972).
61. Gregg, 428 U.S. at 195.
of parental authority, loss of the right to dispose of property inter vivos, and continual surveillance for life. The *Weems* Court not only viewed the punishment as inherently cruel, but also condemned the penalty as excessive in relation to the crime committed.

Although the importance of proportionality analysis was significantly lessened in *Badders v. United States*, and *Perkins v. North Carolina*, the *Gregg* Court gave special attention to proportionality analysis with respect to the death penalty. The *Gregg* Court considered whether the punishment of death was disproportionate in relation to the crime for which it was imposed (murder), and concluded that "we are concerned here only with the imposition of capital punishment for the crime of murder, and when life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime."65

Although proportionality analysis has been used in part by the Court in post-*Gregg* decisions to invalidate capital punishment for the crime of rape, and to invalidate felony prison sentences, there is no evidence that the Court is willing to reevaluate whether the sentence of death is disproportionate to the crime of murder. Hence, it is clear, especially in light of the instant Court's plurality decision, that the death penalty is not disproportionate to the crime of murder. Based on *Gregg*, if an adult offender was convicted of murder, and the jury or judge found that certain aggravating circumstances were present, then a sentence of death would not as a matter of law be disproportionate to the crime. In effect, proportionality analysis is made obsolete under these circumstances. Moreover, if this is true for adult capital sentencing, then the same rationale should apply to juveniles under the jurisdiction of criminal courts.

2. Juvenile Death Sentencing

Because the Court has upheld the transferring of juveniles to criminal courts, thus making juveniles subject to the same pun-
ishments as adults, it only stands to reason that if a juvenile (over the age of fifteen) commits a heinous murder for which an adult would be sentenced to death, the juvenile would be subject to the same punishment. Note, however, that special emphasis is placed on the juvenile's age and chances of rehabilitation as mitigating factors.

Because juveniles were sentenced to death at the time of the Eighth Amendment's adoption, such punishment was not in violation of the Eighth Amendment. Thus, to determine whether such punishment offends the Eighth Amendment, it must be determined whether such punishment is contrary to contemporary standards of decency.

In Thompson, the plurality Court held that because all of the states that had established a minimum age for capital punishment had also prohibited the imposition of such punishment on fifteen-year-old offenders, a national consensus prohibiting such a punishment was shown.

In the instant case, the Court held that the petitioners failed to show "national consensus" prohibiting the courts from imposing the death sentence on sixteen or seventeen-year-old capital offenders because the majority of the states that permit capital punishment authorize it for crimes committed at age sixteen or above.

IV. THE DECISION OF THE COURT: THE SCALIA PLURALITY

A. Some Preliminary Remarks

It is important at the outset to highlight some of the differences, both factual and philosophical, which serve to distinguish the instant cases from Thompson and other previous cases.

Foremost, it is important to note how the Justices are generally aligned on this issue. Opponents of juvenile capital punishment in-

69. Stanford, 109 S. Ct. at 2974.
71. Thompson, 108 S. Ct. at 2695.
72. Stanford, 109 S. Ct. at 2975.
clude Justices Stevens, Brennan, Blackmun, and Marshall. Advocates of such punishment include Justices Scalia, White, Kennedy, and Chief Justice Rehnquist. Justice O'Connor falls somewhere in between the two: in *Thompson* she voted against such punishment, but in the instant case she voted for such punishment.

Justice Stevens, who joined in the dissenting opinion in the instant case, delivered the opinion of the Court in *Thompson*. Justice Stevens was opposed to the imposition of capital punishment on fifteen-year-old capital offenders. In support of its position, the *Thompson* Court argued those points as established in *Gregg*, that the enactments of state legislatures and the practice of juries are both determinative of contemporary attitudes concerning sentencing of juveniles. But the *Thompson* plurality (and Justice Brennan's dissenting opinion in the instant cases) went beyond the standards established in *Gregg* and held that legislation from other countries, age-based statutory classifications, and opinions of respected organizations are "further indicators of contemporary standards of decency."

Concerning the relevancy of other nations' laws, the *Thompson* plurality cited *Trop v. Dulles*, *Coker v. Georgia*, and *Enmund v. Florida*. The fact that the cited cases are not on point does not detract from the clear precedent that other nations' laws are relevant when considering whether a punishment is cruel and unusual. Moreover, the fact that the United States Supreme Court has recognized this factor on three separate occasions prior to *Thompson* tends to establish not only its validity but its utility.

However, no case prior to *Thompson* establishes age-based statutory classifications or the opinions of respected organizations, as

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73. *Id.* at 2982 (Brennan, J., dissenting) Justice Brennan, who not only joined in the plurality of *Thompson*, but penned the dissenting opinion in the instant cases, was totally opposed to capital sentencing of any individual below eighteen years of age.
77. 433 U.S. 584, 596 (1977) (involving capital sentencing for rape).
objective indicators of American contemporary standards of decency.\textsuperscript{79} The Thompson plurality’s apparent basis in accepting these data as relevant “indicators” of contemporary standards of decency is by way of analogy to the Court’s acceptance of other nations’ laws as being relevant. The analogy being that since other nations’ laws were relevant, surely the enactments of American legislatures and the positions of American organizations should be relevant also.

On the other hand, Justice Scalia, who not only filed the dissenting opinion in Thompson, but also delivered the opinion of the Court in the instant cases made no mention of Thompson in his opinion. Not surprisingly, Justice Scalia firmly rejected petitioners’ arguments concerning the relevancy of public opinion polls, views of interest groups, and the positions of various professional associations stating that “constitutional law [can not rest] upon such uncertain foundations,”\textsuperscript{80} and further, rejected petitioners’ arguments on the issue of age-based statutory classifications because of the “general” nature of the statutes.\textsuperscript{81}

Because the plurality did not discuss the relevancy of other nations’ laws, the dissent suggests that the plurality failed to recognize the relevancy of such data as established in Thompson, Enmund, Coker, and Trop.\textsuperscript{82} However, simply because the plurality did not discuss this issue does not mean that it did not consider it. Nevertheless, in rejecting those arguments, especially those made by the Thompson plurality, Justice Scalia essentially reduced the Eighth Amendment question to an analysis of legislative acts and jury sentencing.

B. Juvenile Executions: A Glance at Old Common Law

Although Justice Scalia did not explain his conclusion that a punishment may be declared unconstitutional if it was considered “cruel and unusual” at the time of the Eighth Amendment’s adoption, it nevertheless appears to be well settled that, at a minimum,

\textsuperscript{79} Thompson, 108 S. Ct. at 2692, 2696.
\textsuperscript{80} Stanford, 109 S. Ct. at 2979.
\textsuperscript{81} Id. at 2977.
\textsuperscript{82} Id. at 2985-86.
if a mode or act of punishment was considered "cruel and unusual" at the time of the Eighth Amendment’s adoption, then it was unconstitutional. 83

In determining that the imposition of the death penalty on juveniles did not constitute "cruel and unusual" punishment, the plurality cited eighteenth century common law that at least in theory permitted capital punishment to be imposed on anyone over the age of seven. 84 In what appears to be an effort to quickly dismiss discussion on this point, the plurality made reference to at least 407 executions of juveniles in this country since the Eighth Amendment’s adoption demonstrating that the execution of juveniles was not in violation of the Eighth Amendment. The plurality’s hasty dismissal of its discussion on this point was nevertheless justified because (1) neither petitioner raised this issue on appeal; (2) even if petitioners would have made an issue on this point, it would have been futile because the existing body of law would not support their contentions; (3) its apparent intentions in raising this point was to establish an historical precedent in this country that juvenile capital offenders have been sentenced to death; and (4) although past precedent is extremely relevant, the central issue in the instant cases must be decided by contemporary standards of decency.

C. The Evolving Standards of Decency

1. Objective Indicia: Legislative Enactments

In determining whether a punishment was barred by the Eighth Amendment, the Court held in Trop v. Dulles that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 85

In recent years the Court has been of the opinion that American society’s current conceptions of decency as pronounced by its legislative acts, and not the individual beliefs of the Court, are the

83. Ford, 477 U.S. at 405; Solem, 463 U.S. at 285-86.
84. Stanford, 109 S. Ct. at 2974.
appropriate indicators of this nation's "evolving standards of decency." The Gregg plurality further noted:

In a democratic society legislators, not courts, are constituted to respond to the will and consequently the moral values of the people. The assessment [of contemporary values] does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.

Based on its earlier holdings, and the deference owed to state legislators, the Court concluded that the statutes passed by society's representatives were the first "objective indicia" that reflect the "public attitude toward a given sanction."

Because Justice Scalia was of the opinion that a resolution of this issue only involved those states that permitted capital punishment, he therefore did not consider those states that prohibited capital punishment altogether. By eliminating such states, fifteen in all, he was left with a total of thirty-seven states that permitted capital punishment. Of the thirty-seven states whose laws permit capital punishment, fifteen decline to impose it on sixteen-year-old offenders and twelve decline to impose it on seventeen-year-old offenders. Justice Scalia concluded that the petitioners failed to show a "national consensus" prohibiting such punishment because the majority of states, twenty-two out of thirty-seven permit sixteen-year-olds to be executed; and the majority of states, twenty-five out of thirty-seven permit seventeen-year-olds to be executed.

It is not clear whether Justice Scalia's opinion reflects American society's attitudes toward such punishment, or the Court's. As the
dissenting opinion pointed out, a "national consensus" cannot be reached without considering those states that totally prohibit capital punishment. In those fifteen states, including the District of Columbia, neither adults nor juveniles may be executed. Because the Court's goal was to ascertain the number of states that prohibit such punishment, those fifteen states should have been included in the survey. If they would have been included, the Court would have found that a majority of the states, thirty out of fifty-one, prohibit the execution of sixteen-year-olds, and that twenty-seven out of fifty-one prohibit the execution of seventeen-year-olds. Justice Scalia based his analysis on this point on the Court's earlier decision in \textit{Tison v. Arizona}. In upholding Arizona's death penalty for major participation in a felony with reckless indifference to human life, the \textit{Tison} Court noted that only eleven of those jurisdictions imposing capital punishment rejected its use in such circumstances. The \textit{Tison} Court properly excluded those states that prohibited capital punishment altogether because it was not determining whether capital punishment was per se unconstitutional (that issue was decided by \textit{Gregg}) but rather, what crimes were punishable by the death penalty in those states which provided for such a punishment. Based on \textit{Tison}, Justice Scalia concluded that since the majority of the states that permit capital punishment authorize it for crimes committed at age sixteen or above the petitioners failed to show a national consensus prohibiting such a punishment.

95. It scarcely advanced the plurality's argument to point out that the dissent, in its tallying of the applicable states, overlooked those eighteen states that not only permit capital punishment, but also, set no minimum age limit. Such reference only tended to distort the tolling process because the number of states that presently permit such punishment does not disturb the number of states that presently oppose such punishment.

96. Of the states that impose capital punishment, fifteen decline to impose it on sixteen-year-old offenders while fourteen states and the District of Columbia prohibit capital punishment altogether. This makes a total of thirty states opposed to the execution of sixteen-year-olds. The dissenting opinion also pointed out that the plurality's tallying of those states that prohibit capital punishment was in error. To those fourteen states, the dissent would add the states of Vermont and South Dakota. However, even if Vermont and South Dakota were improperly excluded, such error was harmless; the inclusion of the fourteen uncontested states would have been sufficient to overturn the decision - without Vermont or South Dakota.

97. Of the states that impose capital punishment, 12 decline to impose it on seventeen-year-old offenders while fourteen states and the District of Columbia prohibit capital punishment altogether. This makes a total of 27 states opposed to the execution of seventeen-year-olds.


The plurality, in basing its analysis on this point on *Tison* overlooked its analysis in *Ford v. Wainwright*.\(^{100}\) In striking down the execution of the insane, the *Ford* Court held that the contemporary values of American society did not permit such punishment on the insane.\(^{101}\) In determining such a national consensus, the *Ford* Court did not begin its survey with those states that provided for capital punishment, rather it first turned to each of the States, *including those that prohibit capital punishment altogether*.\(^{102}\) Further, the central issue posed in the instant cases, whether juveniles may be executed, is more analogous to the central issue posed in *Ford* (whether the insane may be executed) and less analogous to the central issue in *Tison* (whether a person convicted of major participation in a felony with reckless indifference to human life could be executed). In *Tison*, the Court ruled on what type of *crimes* are punishable by death. In the instant case (regarding juveniles) and the *Ford* case (regarding the insane) the Court ruled on what type of *individuals* may be sentenced to death. Justice Scalia noted in the instant cases that “the issue . . . is not whether capital punishment is thought to be desirable but whether [individuals] under eighteen are thought to be specially exempt from it.”\(^{103}\) Likewise, the *Ford* Court was not ruling on whether capital punishment was thought to be desirable but whether insane individuals were thought to be specially exempt from it.

Although the Court plurality *could* have distinguished the instant cases from *Tison* and ruled that it was proper to include in the survey all 50 states in determining a “national consensus,” it was not bound to do so. The *Ford* Court noted that “no State in the Union permits the execution of the insane,” but in a footnote of

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100. 477 U.S. 399, 408. Ford was convicted of murder in 1974 and sentenced to death. There was no suggestion that he was incompetent at the time of his offense, at trial, or at sentencing. While imprisoned, in 1983, Ford was diagnosed as having a major mental disorder. Counsel for Ford moved to have Ford declared incompetent. A panel of three psychiatrists diagnosed Ford as having three different mental disorders, but each concluded that Ford understood why he was going to be executed. The Governor signed the death warrant. Counsel for Ford filed a habeas corpus proceeding in Federal District Court which denied the petition. The Eleventh Circuit Court of Appeals affirmed. The U.S. Supreme Court reversed and remanded the case to determine if Ford was incompetent.

101. *Id.*

102. *Id.*

that text the *Ford* Court explained that "[o]f the 50 States, 41 have a death penalty or statutes governing execution procedures." The *Ford* Court went on to analyze those forty-one state statutes. It is not clear whether the *Ford* Court placed a premium importance, or any importance at all, on the fact that all 50 States prohibited the execution of the insane. More specifically, the mere mention of those states that prohibited capital punishment altogether could be construed to mean that their importance was nominal *since all forty-one states that permitted capital punishment at that time prohibited the execution of the insane.* Nevertheless, the fact that the *Ford* Court did note that all 50 states prohibited such punishment in ruling that there was a "national consensus" against executing the insane was sufficient grounds for the Court to have adopted the principles set out in *Ford*, thus distinguishing *Tison* from the instant cases.

2. Objective Indicia: Sentencing Practices of Juries

Concerning the relevancy of jury sentencing practices in determining this nation's contemporary attitudes toward juvenile capital punishment, the *Gregg* Court held that "[t]he jury also is a significant and reliable objective index of contemporary values because it maintains 'a link between contemporary community values and the penal system.'"

Justice Scalia's rejection of petitioners' claim that the sentencing practices of juries established a national consensus against sentencing juveniles to death was not in contravention of the Court's holding in *Gregg* because (1) the Court met its requirement to include jury sentencing practices as an objective indicium in determining American contemporary values; and (2) it assessed that objective indicium in a manner consistent with *Gregg*.

Of course, any assessment of statistical data, such as sentencing statistics, necessarily induces different interpretations. As Justice

106. *Id.* at 182.
Stevens pointed out in *Thompson*, "[s]tatistics of this kind can, of course, be interpreted in different ways." 107

In *Thompson*, Justice Stevens interpreted similar data: Out of 1,393 total death sentences between 1982-86, only five individuals under the age of sixteen were sentenced to death. Justice Stevens concluded that the statistics "suggest that these five young offenders have received sentences that are "cruel and unusual in the same way that being struck by lightning is cruel and unusual." 108

Justice Scalia, however, interpreted the sentencing data in the instant cases to mean something quite different. Justice Scalia found that (1) the reason there are fewer death sentences imposed on juveniles than adults was because there are fewer number of juvenile capital offenders; and, (2) the reason prosecutors and juries rarely impose the death penalty on juveniles (less than two percent of the total death sentences imposed) is because they are induced to believe that it should never be imposed. 109 The main weakness with Justice Scalia's interpretation of course, is that it should not make a difference why juries rarely impose the death penalty on juvenile offenders, but simply that they do. Though Justice Scalia's interpretation may seem skewed, it nevertheless was well founded on the Court's earlier decision in *Gregg* which held that "the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases." 110 Further, because there was no inference that the sentences were "arbitrarily imposed" due to their *rarity*, the Court did not contravene its holding in *Furman*, 111 which held arbitrary death sentences unconstitutional.

3. "Illegitimate" Objective Indicia?

Justice Brennan claims in his dissenting opinion that Justice Scalia treats the statute and jury investigation as a complete and conclusive

108. *Id.*
110. *Gregg*, 428 U.S. at 182.
111. 408 U.S. at 249. Rarity of a sentence leads to an inference of its arbitrary imposition. The Eighth Amendment prohibits arbitrary death sentences.
indicator of a "national consensus."” Justice Brennan suggests that since the Thompson plurality established age-based statutory classifications, as a proper "indicator" of contemporary standards, Justice Scalia improperly rejected the indicia such as Federal Legislation, "socioscientific" evidence, views of professional organizations and interest groups, and other nations' laws as relevant indicators of contemporary views.

To be sure, the Gregg Court did not specifically limit the objective indicia of contemporary standards to only legislative acts and jury decisions, but it did specify certain criteria that indicia should meet in order to be considered as "objective indicia of contemporary standards." The indicia must not only be "representative" of society, but also, a "good reflex" of society's views. The Gregg Court found that state statutes promulgated by society's representatives, and the practices of American juries clearly reflected and represented society's contemporary views. Conversely, the Gregg Court rejected the courts as proper "objective indicia" because they were not representative bodies and "[were] not designed to be a good reflex of a democratic society." Although Justice Scalia did not specifically mention these criteria, his rejection of petitioners' arguments concerning the relevancy of other laws (federal statutes and age-based statutes) and the opinions of other non-representative groups (professional associations, organizations, and interest groups) was apparently based on similar grounds.

Petitioners' claimed that The Anti-Drug Abuse Act of 1988, which prohibited the capital sentencing of drug offenders under the age of eighteen, was a proper "objective indicia" of society's views concerning this issue. Not surprising, Justice Scalia rejected this contention stating (1) that even if there were no federal statute permitting capital sentencing of individuals under eighteen years of age, "that would not remotely establish—in the face of a substantial number of state statutes to the contrary—a national consensus that

112. Stanford, 109 S. Ct. at 2982.
113. Gregg, 428 U.S. at 175.
114. Id.
such a punishment is inhumane . . .”¹¹⁶ and (2) that the judgment by the Federal Legislature does not even suggest that “no murder is heinous enough to warrant the execution of such a youthful offender, but merely that the narrow class of offense it defines is not.”¹¹⁷ Although it is fairly clear that the Act does not apply to the specific issue at hand, it is nevertheless important to note whether Justice Scalia treated this federal legislation as a proper “objective indicia” of society. Justice Scalia’s statement that “[petitioners’] reliance [on the Act] is entirely misplaced”¹¹⁸ dispels any notion that he treated the Act as an objective indicia. Based on the criteria outlined in Gregg, Justice Scalia could have recognized this federal legislation as an objective indicia; however, because the Act only prohibited the execution of individuals under the age of eighteen for drug-related offenses under the Act, such recognition was not necessary for the Court to come to the same conclusion.

Petitioners further argued that age-based statutory classifications (drinking, driving and voting) reflect a public attitude that individuals below eighteen years of age are not responsible for their actions. In rejecting this contention the plurality held that (1) there can be no meaningful comparison between the maturity required to partake in the aforementioned privileges and the maturity required to “understand that murdering another person is profoundly wrong and is contrary to most minimum of civilized standards;” (2) such laws do not represent a social judgment that all persons under 18 are not responsible enough to drink, drive, or vote, but at most a judgment that the vast majority are not; and (3) that the criminal justice system must provide individual testing, not in-gross categorizing.¹¹⁹ Since these statutes were also promulgated by state legislators, it would stand to reason that they would fall under the heading of “objective indicia” as set out in Gregg. However, the Gregg Court did not suggest that general laws concerning age were relevant, rather, those enactments setting forth the punishments that were at issue. The Court concluded that “in assessing a punishment

ⁱ¹⁷. Id. at 2976.
ⁱ¹⁸. Id. (emphasis added).
ⁱ¹⁹. Id. at 2977-79.
selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.120 Based on the Court’s decision in Gregg, and notwithstanding Justice O’Connor’s concurring opinion in Thompson,121 Justice Scalia properly rejected petitioners contentions that age-based statutory classifications reflect a public policy against the capital sentencing of sixteen and seventeen-year-old offenders.

Finally, petitioners asserted that “socioscientific” evidence indicates that executing juveniles fails to serve the legitimate goals of penology (deterrence and retribution). Petitioners asserted that “[the death penalty] fails to deter because juveniles, possessing less developed cognitive skills than adults, are less likely to fear death; and it fails to exact just retribution because juveniles, being less mature and responsible, are also less morally blameworthy.”122 In rejecting this notion, Justice Scalia noted that if petitioners’ contention was true, “the Equal Protection Clause of the Fourteenth Amendment would invalidate these laws for lack of rational basis.”123 However, Justice Scalia ruled that because it cannot be shown that no sixteen or seventeen-year-old is not deterred or responsible, such punishment does not fall under the Fourteenth Amendment. Thus, Justice Scalia returned to the Eighth Amendment to determine that such evidence was not an “objective indicia” of contemporary views.

D. Proportionality Analysis

As noted above, the Court in post-Weems cases124 significantly curtailed the importance of proportionality analysis. Gregg gave special consideration to proportionality analysis only as it related to

120. Gregg, 428 U.S. at 175.
121. Stanford, 109 S. Ct. at 2980. In Thompson, J. O’Connor specifically identified age-based statutory classifications as relevant to Eighth Amendment proportionality analysis. Thompson is the only opinion establishing age-based classification as “objective indicia.”
122. Id. at 2979.
123. Id.
the punishment of death for the crime of murder. However, *Coker* reaffirmed the significance of proportionality analysis in that it examines whether the punishment imposed is proportionate to the defendant's blameworthiness, and whether the punishment makes any "measurable contribution to acceptable goals of punishment."125

In the light of all the different applications of "proportionality analysis" Justice Scalia implied that (1) the results of proportionality analysis are based on the same "objective indicia" as the "evolving standards of decency" analysis; (2) the two methodologies, in effect, are duplicative of one another; and (3) since "evolving standards of decency" analysis is necessary to determine whether contemporary standards prohibit such punishment, proportionality analysis is obsolete. In furtherance of that proposition, Justice Scalia suggests that since society has not set its face against such a punishment through its legislative acts and jury decisions it has thus condoned such punishment as being proportional to the crime committed and the petitioners' blameworthiness.126

V. CONCURRING OPINION OF JUSTICE O'CONNOR

Justice O'Connor in agreeing with the judgment of the Court placed special emphasis on the fact that eighteen states expressly set the age of sixteen as the minimum age in which an individual may be executed. This emphasis is problematic. In *Thompson*, Justice O'Connor (separate concurring opinion) gave identical treatment to those eighteen states as she did in the instant cases. To those eighteen states, however, Justice O'Connor added those fourteen states that prohibited capital punishment altogether in concluding that "almost two thirds of the state legislatures have definitely concluded that no fifteen-year-old should be exposed to the threat of execution."127 If those fourteen states that prohibited capital punishment altogether were applicable in showing a "national consensus" concerning the imposition of capital punishment on fifteen-year-olds, there is no sound reason why Justice O'Connor excluded those fourteen states.

126. *Id.*
in her analysis in the instant cases. If those fourteen states would have been added to those fifteen states that prohibited the execution of sixteen-year-olds, and to those twelve states that prohibited the execution of seventeen-year-olds, the majority of the states would have prohibited such punishment on sixteen and seventeen-year-old capital offenders. If the Court's "objective" ideals fall short of reality, it was due to Justice O'Connor's careless disregard of her own holdings.

Finally, although Justice O'Connor noted that the plurality emphatically rejected her suggestion that it was constitutionally obligated to judge whether the "nexus between the punishment imposed and the defendant's blameworthiness is proportional," she nevertheless held that such analysis was not necessary because "these . . . cases cannot be resolved through proportionality analysis." This apparent contradiction is somewhat explained in Justice O'Connor's concurring opinion in Thompson. Justice O'Connor suggests that because no evidence can be proffered showing that no sixteen or seventeen-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment, or that sixteen or seventeen-year-olds as a class are inherently incapable of being deterred from major crimes by the prospect of the death penalty, proportionality analysis is not a totally reliable test. In other words, there are some sixteen and seventeen-year-old individuals that are blameworthy and are capable of being deterred. Notwithstanding all these differences, the plurality (including Justice O'Connor) arrived at a common ground: proportionality analysis, at the very least, was not essential to the resolution of these particular cases.

VI. CONCLUSION

Although the Court's decision in Stanford was intended to reflect contemporary society's values regarding the execution of sixteen and seventeen-year-old criminal offenders, it failed to do so because the Justices made their decision based on objective data interpreted in

129. Id. at 2982.
a subjective manner. The Court in Stanford thus reflected its own interpretation of the Eighth Amendment values far more than it reflected the values of contemporary American society.

Justice O’Connor’s opinion was not consistent with her prior holding in Thompson where she considered the laws of those states that categorically prohibited capital punishment as “objective indicia” of contemporary society’s views. At the very least, it appears that Justice O’Connor’s rejection of those same data in the instant case was a subjective (and inconsistent) decision, and therefore, in contravention of the ruling in Coker which held that “Eight Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.”131 The significance of this discrepancy is enormous; if Justice O’Connor would have included those fourteen states which prohibited capital punishment altogether, it is highly probable that she would have joined with the dissent, and therefore, in effect, reversed the decision of the Court.

The plurality also rejected the same data, and based such a rejection on its earlier decision in Tison. As noted above, the plurality could have distinguished Tison, (deciding the propriety of the death penalty for certain crimes) from the instant case (deciding the propriety of capital punishment for certain classes of individuals) by reflecting on its decision in Ford. Again, if such a distinction would have been made, the plurality would have come to the conclusion that the majority of the states prohibit the execution of sixteen and seventeen-year-olds.

Although the Gregg Court intended to limit its “subjective” influence in determining contemporary standards, it did not intend to completely erase the Court’s role in resolving constitutional questions. “Of course, the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts. This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of leg-

islative power." Further, if the Court was confined to making decisions based solely on the "objective" guidelines as stated in Gregg, state legislators could cumulatively pass laws in contravention of the U.S. Constitution. Such a result was clearly not the intent of the Gregg Court. It seems clear from Gregg that although the Court could not dictate personal preferences in selecting various indicia, it could, however, assess those indicia in a subjective manner once they were objectively established. This back-door analysis was exactly how the Court in Gregg, Thompson, and Stanford reached their respective, and sometimes differing, conclusions concerning the same objective indicia.

Thus, the instant decision may be viewed either as an invalid reflection of contemporary society's attitudes toward juvenile capital punishment, or a proper reflection based on the Court's ability to interpret "objective indicia" of contemporary society's views. If the former is true, then, those states which permit capital punishment but set no minimum age limit may amend their laws in response to this decision. Even if the latter is true, this decision is still extremely important because it is a pronouncement of this nation's policy concerning juvenile capital punishment.

Jeffery L. Robinette

133. Stanford, 109 S. Ct. at 2976, n.3.