

## *Cruel and Unusual Punishment: The Juvenile Death Penalty* **Evolving Standards of Decency**

*“[O]ffenses committed by juveniles under the age of 18 do not merit the death penalty. The practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society. We should put an end to this shameful practice.”*

*In re Stanford, 537 U.S. 968, 971, 123 S.Ct. 472, 475 (2002), (Stevens, J., dissenting)*

This statement<sup>1</sup> is among the most recent expressions of a divided U.S. Supreme Court that 14 years earlier narrowly upheld the constitutionality of the right of states to execute juvenile offenders.<sup>2</sup> Ironically, this recent dissent was in the case of Kevin Stanford, the same juvenile offender who was the petitioner in the 1989 case which ultimately upheld the constitutionality of executing 16 and 17-year-old offenders. (*Stanford v. Kentucky*, 492 U.S. 361, (1989)).<sup>3</sup>

Since then, much has changed. This paper will outline these changes in light of the framework for evaluating Eighth Amendment claims that the Court established in *Atkins v. Virginia*, 536 U.S. 304 (2002). The *Atkins* Court considered the closely related issue of the death penalty for the mentally retarded, holding that a national consensus against executing the mentally retarded had evolved, and the practice was, therefore, unconstitutional. These two groups, juvenile offenders and mentally retarded offenders, have been deemed by one legal scholar the “Siamese twins” of the death penalty, their status inextricably linked in constitutional principle and substance.<sup>4</sup>

### **The Atkins Framework**

The *Atkins* opinion is launched from the touchstone of Eighth Amendment jurisprudence: Chief Justice Warren’s elegant axiom that “the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” (*Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

These evolving standards of decency are to be measured by “objective factors to the maximum possible extent.” (*Coker v. Georgia* 433 U.S. 584, 592 (1977)). These objective factors primarily include, in order of importance, (1) state legislation, (2) sentencing decisions of juries, and (3) the views of entities with relevant expertise.

In addition to these relatively measurable indicators, opinions from *Marbury v. Madison*, 5 U.S. 137 (1803), to the present day establish that the Court may bring its own judgment to bear. In modern Eighth Amendment jurisprudence, the criteria for this

judgment is outlined in *Gregg v. Georgia*, 428 U.S. 153 (1976), which established that imposition of the death penalty should “serve two principal social purposes: retribution and deterrence.”<sup>5</sup>

Although there is agreement that the Court must consider objective factors, the Justices disagree as to what degree of these factors indicates a consensus (e.g. What is an appropriate number of states? Death convictions? Executions?) and how a balance is struck between these measurable indicia and the Court’s judgment.

Based upon an examination of the objective factors and the Justices’ own judgment, the *Atkins* Court found a consensus against the execution of the mentally retarded. Using this framework, a comparison of the evidence of an “evolving standard of decency” between these two classes of offenders, the mentally retarded and juveniles, finds the two issues virtually indistinguishable.

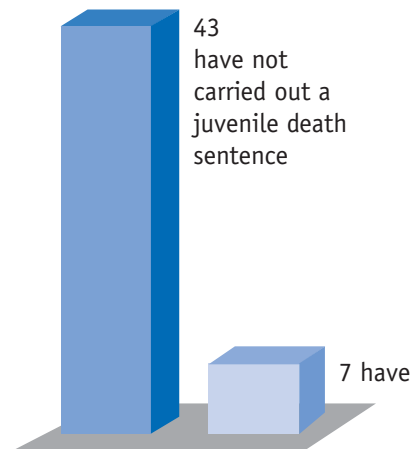
### **State Legislation**

In *Atkins*, the Court noted that 30 states had expressly prohibited the death penalty for the mentally retarded and declared that fact evidence of an evolving consensus. At the time of this report, 29 states prohibit the death penalty for juvenile offenders.

This is a reflection of state governments’ steadily growing opposition to the punishment. In *Stanford v. Kentucky* (1989), a contentious 4-1-4 plurality concluded that state actions did not, at that time, indicate an evolving consensus.

Since *Stanford*, however, six states have banned the practice. Indiana abolished the juvenile death penalty in 2002,<sup>6</sup> and Montana

### **States and their use of death penalty for juvenile offenders\***



\*since reinstatement of death penalty in 1976

did the same in 1999.<sup>7</sup> In both states, the legislation passed with a near-unanimous vote. When New York reinstated the death penalty in 1995,<sup>8</sup> it rejected the juvenile death penalty and set the minimum age at 18, as Kansas had done in 1994.<sup>9</sup> Finally, the Supreme Courts of Missouri<sup>10</sup> and Washington State banned the practice in 2003 and 1993, respectively.<sup>11</sup>

Other jurisdictions prohibiting the death penalty for those who committed crimes under the age of 18 are the District of Columbia, the federal government, and the U.S. Military.

States that do not have the death penalty on their books should also be included in determining a national consensus, since their legislatures have considered the issue and rejected capital punishment for all offenders, including minors.

Three states have carried out 82% of all executions of juvenile offenders in the United States in the last 25 years.

In *Atkins*, the Court considered the laws of 30 states to be “powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.”<sup>12</sup>

A majority of these states had changed their laws regarding offenders with mental retardation in the preceding five years, a fact which incurred criticism from Justice Scalia. His *Atkins* dissent suggested that this “very recently enacted”<sup>13</sup> legislation might be a passing fancy or fad. That argument does not apply to the trend of prohibiting juvenile executions. The 29 states that do not allow the juvenile death penalty have changed their laws over decades of steady deliberation.

## The “Direction of Change”

In *Atkins*, the Court considered the importance of an issue’s momentum: “It is not so much the number of these states that is significant, but the consistency of the direction of change.”<sup>14</sup>

Regarding juveniles, the direction is clear. Since *Stanford*, none of the 40 death penalty jurisdictions have passed legislation to lower the minimum age of eligibility for capital punishment to sixteen. This lack of action is significant. To use a related example, after *Gregg* established the guidelines for a constitutional death penalty standard, 38 states responded with new statutes, a reflection of a consensus for a death penalty. After *Stanford*, however, not a single state lowered its age of eligibility, despite receiving a green light to do so.

The *Atkins* plurality also took note of the three states that had passed legislation in only one chamber. The juvenile legislative record is more impressive in this regard: seven states have passed relevant legislation in one house since *Stanford*.

In 2002, the Texas House voted 72–42 to raise the age of eligibility to 18 (note that Texas is the only state that regularly carries out the executions of minors). The Florida Senate passed a bill in 2002 and 2001. The Arkansas Senate did so in 2002. In 2003, the Nevada Senate and South Dakota House passed a juvenile ban, and Missouri’s Senate voted to raise the age of eligibility to 17. In New

Hampshire, legislation was passed to abolish the death penalty completely in 2000, but the Governor vetoed it. In 2003, 14 states introduced legislation to ban the juvenile death penalty: AL, AR, AZ, DE, FL, KY, MS, MO, NV, PA, OK, SD, TX, and WY. This number represents more than half of the number of states that allow the execution of juvenile offenders.

Clearly, states that retain the juvenile death penalty but never use it have little incentive to pursue legislation banning it (a point raised in *Atkins* at 2249). This argument has greater force given that most state legislatures meet only for a few months each year, and some only hold session every other year. Likewise, there is little need for concerned organizations and members of the public to demand change, although support for such change appears to be high.

## Executions: Truly Unusual

Carrying out a juvenile execution has become a highly unusual occurrence. Of the 21 states that retain the death penalty for juvenile offenders, only one has utilized it with any frequency. Texas, having carried out 13 such executions since the death penalty was reinstated, stands apart. Virginia and Oklahoma follow distantly, having carried out three and two executions, respectively. At the time of this writing, these three states have carried out 82% of all executions of juvenile offenders in the United States in the last 25 years.

Georgia, Louisiana, Missouri, and South Carolina have each executed one juvenile offender since 1976. Prior to these modern day executions, Louisiana last executed a juvenile in 1948, Georgia in 1957, Missouri in 1921, and South Carolina in 1948. Oklahoma had never executed a juvenile offender prior to 1999.<sup>15</sup> Clearly, the punishment is “unusual” in these states.

Nationwide, 43 states have not executed a juvenile offender, 39 have no juvenile offenders on death row, and five states have two or less. Again, Texas outdistances all other states with 28 juveniles facing death.

## Courts and Juries

The behavior of juries is a critical indicator nearly on par with the actions of legislators.<sup>16</sup> On this issue, trends in our courts are compelling. The reversal rate for death sentences imposed on juvenile offenders is an appalling 85%.<sup>17</sup> Juries are also increasingly reluctant to impose death on a juvenile. In 2003, juvenile death sentences dropped to only 2% of the total number of death sentences imposed, part of a steady decline from a high of 5.3% in 1994.<sup>18</sup>

Notably, a Virginia jury unanimously chose a life in prison sentence over the death penalty for juvenile “sniper” Lee Malvo. Not only did this Virginia jury, who was under no illusion as to the heinous nature of this crime, choose life over death for the youth, but an ABC News Poll released on December 14, 2003 found that a majority of Americans preferred to spare the life of Lee Malvo.<sup>19</sup>

Taken together, these trends suggest reluctance among prosecutors, judges and jurors to impose and carry out juvenile death sentences.

## Entities with Expertise

The *Atkins* Court looked at “[a]dditional evidence [that] makes it clear that this legislative judgment reflects a much broader social

and professional consensus,<sup>20</sup> including organizations with relevant expertise.

Although Justice Rehnquist dissented that “none should be accorded any weight,”<sup>21</sup> such organizations have historically served a critical function in the enlightenment of American society, a fact noted by Alexis de Tocqueville in 1840.<sup>22</sup> Indeed, as a national resource of special knowledge and significant part of the collective American mind, referenced in countless endeavors throughout our society, these organizations of expertise were deemed worthy of the Court’s consideration.

Explicit opposition to the execution of juvenile offenders by expert organizations has been longstanding, diverse, and continues to increase. Conversely, no such organization has taken a position in favor of executing minors.

Medical and health groups that oppose the juvenile death penalty include the American Association of Child and Adolescent Psychiatry, the American Academy of Pediatrics, the American Society for Adolescent Psychiatry, the American Psychiatric Association, the National Alliance for the Mentally Ill, the National Association of Social Workers, and the National Mental Health Association. Child welfare organizations that oppose the practice include the Children’s Defense Fund, the Child Welfare League of America, the Coalition for Juvenile Justice, the National Education Association and the Youth Law Center. Religious and ethical organizations include American Baptist Churches in the USA, the Catholic Bishops of the United States, the Episcopal Church, the Presbyterian Church, the Union of American Hebrew Congregations and the United Methodist Church. The American Bar Association has opposed the practice since 1983.

Notably, a blue-ribbon commission established by the Washington-based Constitution Project to examine the capital punishment system explicitly opposed the death penalty for juveniles in its final report, *Mandatory Justice*.<sup>23</sup> The diversity and credentials of its members are striking and include supporters and opponents of the death penalty, Democrats and Republicans, conservatives and liberals, former judges, prosecutors, crime victims, and scholars.

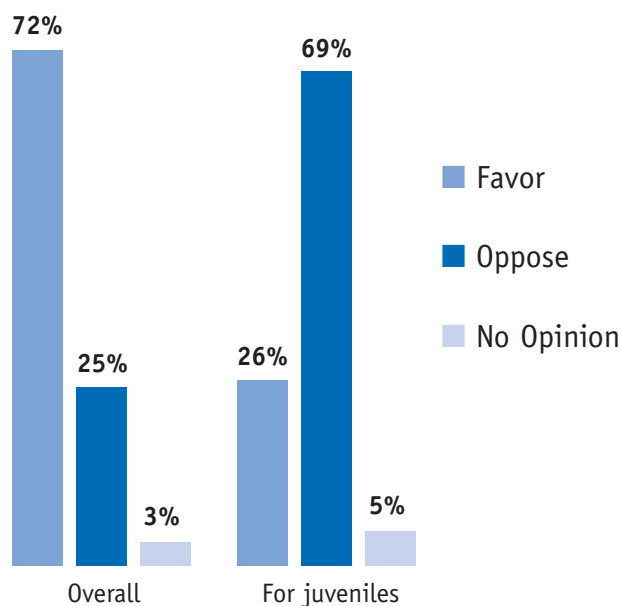
## The American Public

Although not a primary indicator of a national consensus, the *Atkins* Court did reinforce its findings by examining public opinion research. Similar findings abound regarding the juvenile death penalty. A 2001 University of Chicago study found that while 62% support the death penalty in general, only 34% “favor it for those under age 18.” Another study by Princeton Survey Research Associates showed that 72% favored the death penalty for serious murders, but only 38% wanted it applied to juveniles. Similarly, a May 2002 Gallup poll showed that 69% of Americans oppose executing juveniles, a level of opposition that has remained constant for 70 years.<sup>24</sup>

## A Global Anomaly

The *Atkins* Court also considered international opinion. Worldwide, the execution of juvenile offenders has all but ended.<sup>25</sup> In fact, the Inter-American Commission on Human Rights found that the U.S. is violating a *ius cogens* norm of international law by executing juvenile offenders.<sup>26</sup> In regard to codified international

## Public Opposition to Juvenile Death Penalty



Gallup, May 2002.

law, it is clearly prohibited by the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights, and the U.N. Convention on the Rights of the Child (CRC). The United States and Somalia (which, according to the State Department, has not had a recognizable central government since 1991) are the only two countries (of 193) that have not yet ratified the CRC.

In the last ten years, the U.S. has executed more juvenile offenders (17) than all other nations combined (9),<sup>27</sup> and with greater frequency. In the U.S., juvenile executions comprise approximately 4% of all executions in the last 10 years. However, for the rest of the world, juvenile executions comprise approximately .04% of all executions during the same time.<sup>28</sup> Also, fewer nations are carrying out juvenile executions. Since 2000, four other countries in the world are known to have executed juveniles: China, Democratic Republic of Congo (DRC), Iran, and Pakistan. However, China’s law forbids executing juveniles,<sup>29</sup> Pakistan recently abolished the death penalty for juvenile offenders,<sup>30</sup> and Iran has publicly stated that it does not use the punishment and intends to outlaw it.<sup>31</sup>

## Conclusion

A look at the standards employed by the *Atkins* Court that rendered the execution of the mentally retarded unconstitutional, i.e. the actions of states, juries and entities with expertise, among other indicia, apply with comparable or greater force toward juveniles.

It is beyond the scope of this paper to examine the vast and growing body of scientific evidence supporting the assertion that juveniles cannot possess the level of maturity, reasoning, and judgment necessary to justify the ultimate punishment. Again, the parallels between the Court’s considerations in *Atkins* justifying a categorical exemption for the mentally retarded and those of juveniles are clear; there is the higher possibility of false confessions, the lesser ability to give meaningful assistance to their counsel, and a special risk of wrongful execution.

# American Bar Association Juvenile Justice Center

## Notes

- <sup>1</sup> This was a dissent to the Court's denial to grant a petition for writ of habeas corpus for a juvenile offender facing imminent execution.
- <sup>2</sup> The term "juvenile" refers to a person under 18 years of age.
- <sup>3</sup> On December 8, 2003, Kentucky Governor Paul Patton commuted Stanford's death sentence to life in prison without parole. A release from his press office stated his longstanding "opposition to the death penalty for juvenile offenders and his support of legislation to abolish the death penalty for juveniles."
- <sup>4</sup> Streib, Victor L., *Adolescence, Mental Retardation, and the Death Penalty: The Siren Call of Atkins v. Virginia*, 33 N. Mexico Law Review \_\_\_ (2003) (article in press).
- <sup>5</sup> *Gregg v. Georgia*, 428 U.S. 153, 183, 96 C.Ct. 2909, 2930 (1976).
- <sup>6</sup> S. 426, 112th Leg., Reg. Sess., 2002 In. Laws.
- <sup>7</sup> H.B. 374, 1999 Leg., Reg. Sess., 1999 Mt. Laws.
- <sup>8</sup> N.Y. Crim. Proc. Law §400.27 (McKinney 2002).
- <sup>9</sup> Kan. Crime. Code Ann. §21-4622.
- <sup>10</sup> 112 S.W. 3d 397 (*Simmons v. Roper*).
- <sup>11</sup> 122 Wn.2d 440, P.2d, 1092, *State v. Furman*.
- <sup>12</sup> *Atkins v. Virginia*, 536 U.S. 304, 316, 122 S. Ct. 2242, 2249 (2002)
- <sup>13</sup> *id.* 536 U.S. at 342, 122 S.Ct. at 2261 (Scalia, J., dissenting).
- <sup>14</sup> *id.* 536 U.S. at 315, 122 S.Ct. at 2249.
- <sup>15</sup> Streib, *supra*.
- <sup>16</sup> There is consensus among the Justices on this point. In his *Atkins* dissent at 536 U.S. at 324, 122 S.Ct. at 2255, Chief Justice Rehnquist stated that "the work product of legislatures and sentencing jury determinations... ought to be the sole indicators [of] ... American conceptions of decency... [They are] better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments."
- <sup>17</sup> Streib, Victor L., *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 – November 15, 2003*. Online at [www.law.onlu.edu/faculty/streib/juvdeathnov2003.pdf](http://www.law.onlu.edu/faculty/streib/juvdeathnov2003.pdf).
- <sup>18</sup> *Id.*
- <sup>19</sup> ABC News Poll, <http://abcnews.go.com/images/pdf/883a38MalvoDeathPenalty.pdf>
- <sup>20</sup> *Atkins*, 536 U.S. at 316, 122 S.Ct. at 2249.
- <sup>21</sup> *Id.* 536 U.S. at 326, 122 S.Ct. at 2255 (Rehnquist, C. J., dissenting)
- <sup>22</sup> For a compelling exposition of the virtues of "civil associations" to democratic society (distinct from "political associations" and government itself), see Volume II, Chapter V of *Democracy in America*. Excerpt: "Nothing, in my opinion, is more deserving of our attention than the intellectual and moral associations of America. The political and industrial associations of that country strike us forcibly; but the others elude our observation, or if we discover them, we understand them imperfectly because we have hardly ever [before the creation of America] seen anything of the kind. It must be acknowledged, however, that they are as necessary to the American people as the former, and perhaps more so. In democratic countries the science of association is the mother of science; the progress of all the rest depends upon the progress it has made." (Page 110, Knopf (1972)).
- <sup>23</sup> See The Constitution Project, *Mandatory Justice, Eighteen reforms to the Death Penalty*, 2001.
- <sup>24</sup> See *Slim Majority of Americans Say Death Penalty Applied Fairly*, Gallup News Service, May 20, 2002.
- <sup>25</sup> *Indecent and Internationally Illegal; the death penalty against juvenile offenders*, Amnesty International (2002).
- <sup>26</sup> *Domingues v. United States*, Inter-American Commission on Human Rights, Report No. 62/02, October 22, 2002.
- <sup>27</sup> Amnesty International, *Executions of Child Offenders*, updated regularly at: [web.amnesty.org/pages/deathpenalty-children-eng](http://web.amnesty.org/pages/deathpenalty-children-eng).
- <sup>28</sup> *Id.*, Figures derived from statistics therein.
- <sup>29</sup> Amnesty International, *The Exclusion of Child Offenders from the Death Penalty Under General international Law*, July 2003, page 17.
- <sup>30</sup> *Id.*, page 6.
- <sup>31</sup> "Iran to stop executions of 15–18 year-olds," Reuters, September 29, 2003. Also, Amnesty International reported that Iranian government has stated to the U.N. that "under the Islamic Penal Code, no person under the age of 18 is sentenced to death," Amnesty International, *id.*, page 7.

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[www.abanet.org/crimjust/juvjus/](http://www.abanet.org/crimjust/juvjus/)*

