Section I of this Dialogue describes how juvenile court reforms of the late nineteenth century were intended to create a separate system of justice for juveniles that would emphasize rehabilitation over punishment. It also describes how, beginning in the late 1960s, the Supreme Court issued a series of opinions that required juvenile courts to introduce procedures resembling those used in criminal proceedings. In these opinions, a majority of the justices emphasized that they were trying to avoid having youth get “the worst of both worlds”—neither the procedural protections given to adults in the criminal courts, nor the care and emphasis on rehabilitation that juvenile courts were meant to provide.

In each of the Supreme Court’s decisions extending due process protections to juveniles, dissenting justices worried that by making juvenile court proceedings more like criminal court proceedings, the Supreme Court was weakening the justification for a separate juvenile justice system. In the decades since the Supreme Court’s “due process” juvenile justice decisions of the 1960s and ’70s, the question of if—or when—juveniles should be tried as adults has been the subject of much debate.
TRYING JUVENILE OFFENDERS AS ADULTS

Juvenile court judges have always had authority to “waive jurisdiction” over serious juvenile offenders. If a juvenile judge waives jurisdiction, the juvenile offender is transferred to criminal court to be tried as an adult. Beginning in the 1970s, many states made it easier and, in some cases, mandatory for juvenile court judges to transfer juvenile offenders to criminal court. The 2006 National Report on Juvenile Offenders and Victims, published by the U.S. Department of Justice, provides these statistics:

- Since 1992, all states (with the exception of Nebraska) have made it easier to transfer juveniles to criminal courts.
- Thirteen states have set the upper age limit of juvenile court jurisdiction at age 15 or 16. Youth older than this who are accused of crimes are tried as adults in these states.
- A majority of states have established a minimum age below which a child cannot be transferred to a criminal court for trial as an adult. This minimum age ranges from as young as 10 in Kansas and Vermont to as old as 15 in New Mexico. But in 22 states and the District of Columbia, no minimum age is defined, or the minimum age does not apply if a serious crime such as murder is at issue.
- As of 2004, 15 states had “concurrent jurisdiction” provisions. This means that both the juvenile court and the criminal court have original jurisdiction over certain categories of offenses (common examples are murder and other serious offenses against persons, drug offenses, and serious offenses against property such as arson). In states with concurrent jurisdiction laws, the prosecutor decides whether to bring charges in juvenile court or criminal court.
- As of 2004, 29 states had “statutory exclusion” provisions. This means that certain types of offenses—again, serious offenses such as murder are common—are excluded by law from juvenile court jurisdiction.

Changes in state law have made it easier in virtually all jurisdictions to try juveniles as adults when serious offenses are at issue. Criminal justice is much more focused on retribution and punishment for an offense than on rehabilitation of an offender to keep him or her away from a life of future crime. To what extent do these changes in state law reflect changing attitudes toward young people and the juvenile justice system?

QUESTIONS FOR REVIEW

1. What is meant by “waiver of jurisdiction” from a juvenile court to a criminal court?
2. What is the effect of “minimum age” laws?
3. What is the effect of “upper age limits”?
4. In states with “concurrent jurisdiction” laws, who decides whether a juvenile is charged in a juvenile court or a criminal court?
JUVENILES AND THE DEATH PENALTY

In 1988, the Supreme Court drew a line between “child” and “adult” on the emotionally charged issue of capital punishment. A 15-year-old Oklahoma boy actively participated in the brutal murder of his former brother-in-law. Under Oklahoma law, the boy was a “child,” but the district attorney filed a petition for a finding that the boy had the mental capacity to understand the wrongfulness of his conduct and, therefore, should be tried as an adult. The trial court, finding that there was virtually no hope for the boy’s rehabilitation, certified him to stand trial as an adult. He was tried in criminal court, convicted, and sentenced to death for the crime.

In Thompson v. Oklahoma, 487 U.S. 815 (1988), a four-member plurality of the Court ruled that a death penalty for a 15-year-old boy constituted “cruel and unusual punishment” under the Eighth Amendment to the Constitution according to “evolving standards of decency” (see sidebar “What Is a Plurality Opinion?”). In determining this standard, the plurality looked to the 18 states that had defined a minimum age for capital punishment and found that, in all these cases, the minimum age was at least 16. It also looked to the opinions of major legal organizations, including the American Bar Association, which had opposed the juvenile death penalty in amicus curiae (“friend of the court”) briefs filed with the Court, and to practices of other nations—including Western Europe, Canada, Australia, and the Soviet Union—where the death penalty for juveniles had been prohibited.

What Defines Evolving Standards of Decency?

Justice O’Connor agreed with the plurality that the death penalty in this case violated the Eighth Amendment. She disagreed, however, with the plurality’s analysis of “evolving standards of decency.” While she did not dispute that evolving standards of decency are appropriately used to determine the meaning of “cruel and unusual punishment,” she was reluctant to freeze into constitutional law a standard of decency that might not truly express national consensus. Many states, for example, had abolished or severely restricted use of capital punishment for adults in the years preceding 1972. That year, the Court was asked in Furman v. Georgia whether capital punishment violated the Eighth Amendment’s prohibition of “cruel and unusual punishment.” If the Court has decided that a national consensus rejecting capital punishment had developed by 1972, Justice O’Connor noted, it would have been mistaken. Following the Furman decision, capital punishment was revived in many states.

Justice O’Connor agreed that the death penalty should not apply in the Thompson case for a different reason. The Oklahoma state legislature had decided to authorize capital punishment for murder without setting any minimum age for the punishment. Separately, it had decided 15-year-old murder defendants could be tried as adults in some circumstances. There was no evidence, however, that the Oklahoma legislature gave serious consideration to—or even realized—the fact that by saying some 15-year-olds could be tried for murder as adults, they could also theoretically be subject to the death penalty. Because the Court handles the death penalty differently from any other punishment, giving it far more scrutiny, Justice O’Connor thought the Court should require that the Oklahoma legislature demonstrate that it had carefully considered whether it wanted to make juveniles subject to the death penalty. This approach, Justice O’Connor noted, “allows the ultimate moral issue at stake in the constitutional question to be addressed in the first instance by those best suited to do so, the people’s elected representatives.”
Do Juveniles Have Diminished Personal Culpability?

Less than 20 years after Thompson, the juvenile death penalty came before the Supreme Court again in Roper v. Simmons, 543 U.S. 551 (2005). This time, the Court was asked whether execution of juveniles between the ages of 16 and 18 violated the “cruel and unusual punishments” clause of the Eighth Amendment. A five-member majority of the Court held that it did.

Christopher Simmons, the defendant in the Roper case, was seventeen when he committed his crime and 18 when he was tried and sentenced to death. The crime was brutal. Simmons and another boy, age 15, kidnapped a woman from her home, bound her hands and feet with wire and wrapped her head in duct tape, and threw her from a railroad bridge into a river, leaving her to drown. Shortly after his arrest, Simmons confessed to the crime.

Three years before the Roper case, the Supreme Court had ruled that the execution of a mentally retarded person violates the Eighth Amendment (Atkins v. Virginia, 536 U.S. 304 (2002)). The Atkins decision rested on a finding that mentally retarded individuals have diminished personal culpability, even if they can distinguish between right and wrong. (Culpability means “guilt” or “blameworthiness.”) On the basis of the Supreme Court’s reasoning in Atkins, the Missouri Supreme Court held that Christopher Simmons could not be executed because, as a juvenile, he similarly had diminished personal culpability. It set aside Simmons’s death penalty and resentedenced him to life imprisonment without possibility of parole.

The U.S. Supreme Court’s majority opinion, which affirmed the decision of the Missouri Supreme Court, found that a majority of states had rejected the death penalty for juvenile offenders. It also found that there was a trend in the states against the juvenile death penalty. It then identified three general differences between juveniles under 18 and adults that “demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders”:

- First, juveniles show a lack of maturity and an underdeveloped sense of responsibility in comparison to adults and thus are more likely to make ill-considered decisions.
- Second, juveniles are more susceptible to negative influences and peer pressure and have a reduced sense of control over their environment.
- Third, a juvenile’s character is not yet fixed. “The reality that juveniles still struggle to define their identity,” said the majority, “means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”

WHAT IS A PLURALITY OPINION?

A plurality opinion of the Supreme Court is a decision in which more justices (but not a majority) join than in any concurring opinion. Concurring opinions are written by justices who agree with the outcome of a case but base their decision on different or additional considerations.

In Thompson v. Oklahoma, for example, five members of the court agreed that the death penalty for juveniles, as defined by Oklahoma law, violated the Eighth Amendment. If all five had agreed on the reason why the Eighth Amendment had been violated, there would have been a majority opinion. But Justice O’Connor did not agree with the other four justices on why the Eighth Amendment had been violated. Thus, the four justices who agreed joined in a plurality opinion. Justice O’Connor explained her reasoning in a separate concurring opinion.
Together, these factors suggested to the majority that the culpability of juveniles is diminished as compared to adults. This diminished culpability, in turn, weakened two primary justifications for the death penalty. The first justification, retribution, is weakened because it does not make sense to impose the most extreme form of retribution on an offender with lesser culpability. The second justification for capital punishment, deterrence, is similarly weakened, because it is less likely that juveniles will carefully consider the possible impact of their decisions before they act.

A dissenting opinion authored by Justice Scalia strongly questioned this reasoning. Justice Scalia’s dissent argued that in other contexts, studies had indicated that persons under 18 were sufficiently mature to make difficult moral decisions, such as the decision to have an abortion. It noted that the majority was making generalizations about young people, while capital punishment decisions require a jury to make individualized assessments of each defendant. And it argued that there was a difference between the willingness of juveniles to engage in risky or anti-social behavior and the decision of a juvenile to commit murder. “It is entirely consistent to believe that young people often act impetuously and lack judgment,” the dissent argued, “but, at the same time, to believe that those who commit premeditated murder are—at least sometimes—just as culpable as adults.”

Justice O’Connor also wrote a dissent in Roper. She agreed with Justice Scalia’s opinion that even though juveniles in general might have diminished culpability, a particular juvenile offender could have sufficient culpability to warrant a death penalty. But she was equally concerned by the Court’s finding of an emerging national consensus against the juvenile death penalty. A significant number of states still allowed it, and Justice O’Connor worried that the Court was substituting its judgment “for the judgment of the Nation’s democratically elected legislatures.”

**QUESTIONS FOR REVIEW**

1. Why is the relationship between “national consensus” and “evolving standards of decency” in capital punishment cases?
2. What is meant by “diminished personal culpability”?
3. What do the terms “retribution” and “deterrence” mean? What is their relationship to capital punishment?
INTERNATIONAL LAW AND THE DEATH PENALTY

The majority opinion in *Roper v. Simmons* looked to international law to support its finding of a consensus against the juvenile death penalty. It noted that Article 37 of the United Nations Convention on the Rights of the Child—ratified by every country in the world except the United States and Somalia—expressly prohibits capital punishment for crimes committed by juveniles under 18. It also stated that only seven countries, including the United States, had executed juvenile offenders since 1990, and that each of these countries, except the United States, had since abolished or publicly disavowed the juvenile death penalty. “In sum,” the majority concluded, “it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”

Justice Scalia’s dissent disapproved of this turn to foreign law. It noted that in many areas—including the exclusion of illegally seized evidence from trial, the separation of church and state, and right to trial by jury—American law is distinct from most of the world. “What these foreign sources [on the juvenile death penalty] ‘affirm,’ rather than repudiate,” Justice Scalia argued, “is the Justices’ own notion of how the world ought to be, and their diktat that it shall be so henceforth in America.”

**DISCUSSION QUESTIONS FOR PART II**

**TAKE A STAND**

Begin your discussion of the issues raised in Part II by asking participants to “take a stand” on the following statements. Designate corners of the room for participants who agree, disagree, or are not sure of their opinion. For each question, ask the participants to move to the corner of the room that reflects their opinion. After your dialogue on the Discussion Questions, you can repeat the “take a stand” activity to see if anyone’s opinions have changed.

“Take a stand” indicating whether you agree, disagree, or are not sure of your opinion on these statements:

- Punishment is more important than reform for juvenile offenders who commit serious crimes such as murder or rape.
- Juveniles are less able than adults to determine the implications of their actions.
- Life imprisonment is less cruel than the death penalty.
- Neither the death penalty nor life imprisonment is an appropriate punishment for juvenile offenders, no matter how serious their offense.

**DISCUSSION QUESTIONS**

1. Do you think that the move by states to make it easier to try juveniles as adults means that our society has given up on the possibility of reform for young offenders who commit serious crimes? Do you agree that reform is not worth trying for certain serious juvenile offenders?
2. Christopher Simmons was sentenced to life imprisonment when the Missouri Supreme Court ruled that the death penalty could not apply to juveniles who committed their crime under age 18. This means that, absent a pardon from his state’s governor, he will never be released from prison. Is this punishment less “cruel and unusual” than capital punishment? Why or why not?
3. Do you agree with the majority conclusion in *Roper v. Simmons* that juveniles between the ages of 16 and 18 have diminished personal culpability? Do you agree that a general diminished culpability for juveniles means that juveniles should be categorically excluded from capital punishment? Why or why not?
4. How much weight do you think the U.S. Supreme Court should give to an apparent international consensus against the death penalty for juvenile offenders?
5. The Convention on the Rights of the Child also prohibits the imposition of “life imprisonment without possibility of release” for serious crimes committed by juveniles under the age of 18. Many states in our country still allow such a sentence for a juvenile tried as an adult. Do you think this type of “lifetime sentence” for a juvenile should be prohibited? Why or why not?