Juvenile Death Penalty:
Is it “cruel and unusual” in light of contemporary standards?

By Adam Caine Ortiz

Adam Caine Ortiz is the Juvenile Death Penalty Policy Fellow with the Section’s Juvenile Justice Center in Washington, D.C. He is also a winner of a 2003 Soros Justice Fellowship.

On May 28, 2002, five months before 17-year-old sniper suspect John Lee Malvo was known to the world, the nation approached a crossroads at which we still stand today. That was the day that Christopher Simmons and Napoleon Beazley were slated to die by lethal injection. Both had committed aggravated murders at age 17. Both were tried as adults. Both were sentenced to death—Simmons in Missouri, Beazley in Texas. Both had been on death row for approximately the same amount of time and expressed great remorse for their crimes. Both had been model prisoners, actively taking care of fellow inmates, engaging in community service, and expressing strong religious beliefs. Photogenic and articulate, they both attracted international attention.

But on May 28 their paths diverged: in Missouri, the state supreme court granted Simmons a temporary stay of execution to decide whether his death sentence was cruel and unusual; in Texas, Beazley was executed.

“We saw arbitrariness across the spectrum,” said Beazley’s attorney, Walter Long. Filings to the Texas Court of Criminal Appeals and the governor were denied “with full knowledge of the Missouri decision,” he said. Since Beazley’s execution, Texas has executed two more juvenile offenders while the country awaits a decision by the Missouri court on the Simmons case.

Beazley’s case illustrates an essential truth of sentencing an adolescent to society’s most extreme punishment—that adolescents, even those who commit violent crime, are uniquely capable of growth, maturation, and change. It was primarily for this reason that the American Bar Association established its policy against capital punishment for offenders under age 18 in 1983. The resolution establishing the policy drew from the lessons and history of the juvenile court system, established more than 100 years ago, which make clear that youthful offenders should not be subject to the severity of adult punishment. Of all offenders, adolescents are most amenable to treatment and rehabilitation.

ABA presidents have reinforced this commitment, as stated most recently by current ABA President A.P. Carlton in an op-ed in the Austin-American Statesman: “We dare not hold children accountable for their actions to the same degree as we do adults. To do so serves no principled purpose, and only demeans our system of justice.” (August 27, 2002).

Atkins v. Virginia
Juvenile justice advocates see a ray of hope in the recent U.S. Supreme Court decision in Atkins v. Virginia, 536 U.S. ___ (2002) (per curium). The landmark opinion bans the execution of offenders with mental retardation and provides greater definition to the phrase “cruel and unusual punishments,” a phrase that Supreme Court Chief Justice Earl Warren stated in Trop v. Dulles, 356 U.S. 86 (1958), is determined by the “evolving standards of decency that mark the progress of a maturing society.”

In Atkins, the Court based its decision on two criteria: (1) the existence of objective evidence of a national consensus of an evolving standard and (2) the Court’s own judgment as to whether the punishment measurably contributes to its goal of retribution and
deterrence. In evaluating the first criterion, the Court provided new definition of what “objective evidence” of a national consensus can be: the passage of state legislation, the behavior of juries, the “direction of change,” international opinion, and the judgment of organizations with expertise in the field. In evaluating the second criterion, it referred to scientific evidence regarding the diminished capacity and culpability of the mentally retarded.

Many advocates for juveniles believe that these clarifications open the door to a fresh challenge to the constitutionality of the execution of juveniles. The last time the Court considered the issue was in 1989, the same year that the execution of persons with mental retardation was examined. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), a plurality of the Court upheld the constitutionality of executing 16- and 17-year-old offenders. But in recent habeas petitions that were denied certiorari, Justice Stevens stated in his dissents that “it would be appropriate for the court to revisit the issue at the earliest opportunity,” (*Patterson v. Texas*, 536 U.S. ___ (2002), and that the reasons supporting the prohibition of executing the mentally retarded “apply with equal or greater force to the execution of juvenile offenders,” (*In re Kevin Nigel Stanford*, 537 U.S. ___ (2002)), which three Justices joined.

Many believe that these comments from the Court, the new findings in the field of adolescent brain research, and the momentum over the last 14 years signal the strong possibility of a reversal of *Stanford* in the near future.

**A truly unusual punishment**

Since reinstatement of the death penalty in 1976, 28 states expressly prohibit the execution of those who committed crimes while aged 17 or younger. (In comparison, the *Atkins* decision found that 30 states with prohibitions were sufficient.) Of the 22 states that do permit it, only seven have carried out such executions. And of those, only two states—Texas and Virginia—have used it more than once. (Texas has executed 13 such individuals, and Virginia has executed 3.) Together, these two states account for 76 percent of juvenile executions nationwide.

In recent years, five states have banned the punishment. The Supreme Court of Washington State outlawed the practice in 1993, *State v. Furman*, 858 P.2d 1092 (Wash. 1993). When Kansas and New York reintroduced the death penalty in 1994 and 1995, respectively, offenders under 18 years of age were specifically exempted. In 1999 Montana banned the practice, and Indiana followed suit in 2001. In the states of Arkansas, Florida, and Texas, such legislation passed in one branch of the state legislature before stalling in the other. In 2001, New Hampshire’s legislature passed a bill abolishing the death penalty altogether.

Similar legislation to exclude juveniles from the death penalty is currently under consideration in more than 10 states, a demonstration that momentum opposing the practice continues to gain speed.

Evidence of a consensus is supported further by public opinion. A May 2002 Gallup poll found that although 72 percent of Americans support the death penalty in general, only 26 percent supported it for juveniles (69 percent opposed.) The poll also found that support for the death penalty in general has fluctuated between 45 percent and 72 percent in the past 40 years, while support for the juvenile death penalty has always remained low.

**An international consensus**

In the last decade, the United States has executed more juvenile offenders than all other nations combined. According to Amnesty International, only one other government, Iran, currently sanctions juvenile executions. Last year, the United States was the only country in the world to carry out these executions (all in Texas). The practice has resulted in harsh criticism by the European Union, the United Nations, and a number of U.S. allies.

This criticism is drawn from a body of international law to which the United States takes exception. The United States is the only major government that has failed to sign the UN Convention on the Rights of the Child, and it takes specific exception to portions of the International Covenant on Civil and Political Rights that deals with the execution of those who were minors when they committed their crimes. In October 2002, the Inter-American
Commission on Human Rights, an arm of the Organization of American States, ruled that when the United States imposed the death penalty on Mexican national and juvenile offender Michael Domingues, the country violated the norm of jus cogens; that is, the world community considers the practice gravely inconsistent with prevailing standards of decency, as evidenced by a preponderance of law and practice among developed nations, particularly those of the Americas.

**Considering “cruel”: Deterrence and retribution**

Advocates have long argued that the two purposes ostensibly served by the death penalty—deterrence and retribution—are not served by executing juvenile offenders. The deterrent effect of a punishment rests on the assumption that offenders deliberately premeditate their crimes. It presumes that killers rationally consider the potential for an increase in the severity of their punishment. This type of reasoning is opposite that of an adolescent. Adolescents, by nature, are immature, impulsive, and inexperienced and are going through physical, emotional, and psychological change.

Retribution is based on an interest by society in seeing that offenders get “what they deserve.” However, the severity of punishment should depend upon the culpability of the offender. Our law has consistently held that the death penalty should only be imposed on those who are most guilty, and that the “average murderer” is not deserving of this most extreme of punishments. It would seem evident that the immaturity of juvenile offenders places them in a category less culpable than mature adults and, therefore, not deserving of death.

This is not to say that youths who are found guilty of murder should not face punishment, even adult punishment. The ABA recommends that for serious crimes, such as murder, it may be appropriate, under limited circumstances and only under a judicial determination, to try juveniles as adults. However, the ABA maintains that the death penalty for such offenders goes too far.

**Science sheds new light**

As is true in many other areas of the criminal justice system, science is now a factor in juvenile adjudication. Researchers at Harvard University Medical Center, the University of California–Los Angeles, and the National Institute of Mental Health have teamed up on a massive project to “map” the development of the human brain from childhood to adulthood utilizing magnetic resonance imaging (MRI).

These scientists have learned that the frontal lobe of the brain—the part that controls impulse and judgment—undergoes massive changes between the ages of 12 and 22. The brain begins by overproducing gray matter, the “thinking tissue” in the frontal lobe of the brain, followed by a period of “pruning” in which the brain trims and discards sections of the frontal lobe in an effort to become more efficient. The pruning is accompanied by an increase in white matter (a process called myelination), which is a fatty tissue that insulates brain connections. (See Elizabeth Sowell, et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex; Inverse Relationships During Postadolescent Brain Maturation*, 21 (22) J. NEUROSCIENCE 8819-29 (Nov. 2001); also “Adolescent Brain Development and Legal Culpability” on the ABA Juvenile Justice Center website at [www.abanet.org/ crimjust/juvjus/juvdp.html](http://www.abanet.org/ crimjust/juvjus/juvdp.html).) Not until this process is complete can a human brain be considered physiologically “mature.”

According to Dr. Ruben Gur of the University of Pennsylvania, this process continues into late adolescence and “the behavioral significance of this neuroanatomical finding is that the very brain system necessary for inhibition and goal-directed behavior comes ‘on board’ last and is not fully operational until early adulthood” at approximately 18 to 22 years of age. (See [www.abanet.org/crimjust/juvjus/patterson.html](http://www.abanet.org/crimjust/juvjus/patterson.html), *Petition for Writ of Certiorari*, Supreme Court of the United States, Aug. 26, 2002, pages 22–23.)

In a television report, Dr. Jay Giedd, National Institute of Mental Health, stated that “it’s sort of unfair to expect [adolescents] to have adult levels of organizational skills or decision making before the brain is finished being built.” (*Frontline: Inside the Teen Brain*, PBS)
television broadcast, Jan. 31, 2002; also see
www.pbs.org/wgbh/pages/frontline/shows/teenbrain/.)

These and similar findings suggest that the issues of juvenile culpability are not only a
matter of legal theory or morality, but also a matter of biology.

At the crossroads

In August 2002, the State of Texas executed T.J. Jones and Toronto Patterson, who
became the twentieth and twenty-first juvenile offenders executed since the reinstatement of
the death penalty in 1976. The Missouri Supreme Court is expected to rule on Christopher
Simmons’s case before spring 2003. Of the more than 80 other juvenile offenders on death
row, roughly five cases are in late postconviction stages. It’s anyone’s guess as to how long
it will be before the Supreme Court accepts one of these cases for consideration, but the
foundations for a positive ruling exist given the actions of states and the new scientific
findings that juveniles exhibit diminished capacity.