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Alison R. Faltersack

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On June 26, 1989, the United States Supreme Court decided the fate of juveniles on death row. In Stanford v. Kentucky, the Court addressed the issue of whether the cruel and unusual punishment clause of the eighth amendment prohibits the death penalty for the maximum penalty — death.
individuals who commit capital crimes at sixteen or seventeen years of age. Through an incomplete analysis, the Court determined the minimum age for which an offender could receive the death penalty and thus resolved this emotionally charged issue. The Court limited the amendment’s extension to those practices contrary to the “evolving standards of decency that mark the progress of a maturing society,” concluding that the cruel and unusual punishment clause did not automatically exempt sixteen and seventeen-year-old capital murderers.

Stanford v. Kentucky involved two consolidated cases. The circumstances of the first case originated on the night of January 7, 1981, when twenty-year-old Baerbel Poore was repeatedly raped and

common criminal penalty. Id.

5. The death penalty is defined as a supreme penalty exacted as punishment for murder and other capital crimes. BLACK'S LAW DICTIONARY 360 (5th ed. 1979). For an overview of the death penalty including background, attitudes toward the penalty, and justification for it, see H. BEDAU, supra note 4. See also J. GORECKI, supra note 1, at 83-97 (detailing capital punishment in America from the 19th century to the present); Van den Haag, The Death Penalty Once More, 18 U.C. Davis L. Rev. 937 (1985) (people disagree on three issues of death penalty - constitutionality, deterrence, and moral justification).

6. Stanford, 109 S. Ct. at 2974. Most juveniles were age 16 or 17 when they committed their offenses, although history denotes cases of individuals age 10 being executed. See V. STREIB, DEATH PENALTY FOR JUVENILES 71 (1987) [hereinafter V. STREIB].

7. The Court previously resolved whether the execution of an individual, who was under 16 years of age at the time of the offense, violated the eighth amendment in Thompson v. Oklahoma, 108 S. Ct. 2687 (1988). Thompson participated in the brutal slaying of his sister's former husband, along with three older individuals. Id. at 2690. After being certified to stand trial as an adult, he was convicted and sentenced to death. Id. The Supreme Court, in striking down the sentence as unconstitutional, relied on the majority of states establishing a minimum age for the death penalty at no less than 16. Id. at 2693. The Court also looked to jury behavior, views of professional organizations, and beliefs of other countries. Id. at 2696-97. Since the Court refused to draw the line at 18 for infliction of the death penalty, it left unanswered whether a 16-or 17-year-old murderer could receive a death sentence. E.g., Too Young to Die, L.A. Daily J., Mar. 30, 1989, at 6, col. 1.


9. Id. (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (eighth amendment forbids Congress to punish by depriving a citizen of his nationality)).

10. Id.

11. 109 S. Ct. at 2972. See also Reuben, Court Takes Up 3 Capital Cases, 2 with Minors, L.A. Daily J., Mar. 27, 1989, at 1, col. 6 (addressing the case at bar including facts and arguments).
sodomized during the commission of a gas station robbery by Kevin Stanford, who at the time was seventeen years and four months of age. Stanford and his accomplice then drove Poore to a secluded area, where Stanford shot her point-blank in the face and then in the back of the head.

Following Stanford's certification for trial as an adult, he was convicted and sentenced to death for murder, first degree sodomy, first degree robbery, and receiving stolen property. The Kentucky Supreme Court upheld the death sentence by rejecting petitioner's argument that he had a constitutional right to rehabilitation.

The circumstances of the second case originated on the evening of July 27, 1985, when Heath Wilkins, who at the time was sixteen years and six months of age, stabbed to death twenty-six-year-old Nancy Allen, mother of two. Wilkins planned to rob Allen's conve-

12. Stanford, 109 S. Ct. at 2972. Upon leaving the gas station, Stanford ("petitioner") stole 300 cartons of cigarettes, two gallons of fuel and a small amount of cash. Id. at 2973.


14. Id. Johnson and Buchanan followed Stanford, who drove Poore in her mother's car to the secluded area. Id. "The victim's corpse was left kneeling in the back seat of her mother's car, naked from the waist down and with her buttocks elevated." Id. at 5.

15. Id. Petitioner explained Poore's execution as follows: "I had to shoot her, the bitch lived next door to me and she would recognize me. * * * I guess we could have tied her up or something or beat the . . . out of her and told her, if she tell, we would kill her." Id. at 6. During his conversation over the incident with a corrections officer, Stanford laughed. Id.

16. The Kentucky transfer statute certifying Stanford for trial as an adult provides in relevant part:

(3) If the court determines that probable cause exists, it shall then determine if it is in the best interest of the child and the community to order such a transfer based upon the seriousness of the alleged offense; whether the offense was against person or property, with greater weight being given to offenses against persons; the maturity of the child as determined by his environment; the child's prior record; and the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system.


Following Stanford's transfer, the Kentucky General Assembly enacted legislation abolishing juvenile executions. Brief for Petitioner at 44, Stanford v. Kentucky, 109 S. Ct. 2969 (1989) (No. 87-5765). This legislation was to take effect on July 15, 1984 but was repealed. Id. Finally, new legislation setting the minimum age at 16 replaced KRS 208.170 in 1987. Id. The juvenile court found transfer to be in the best interest of both petitioner and the community. Stanford, 109 S. Ct. at 2973.


18. Stanford v. Commonwealth, 734 S.W.2d 781, 792 (Ky. 1987). The court found there was no appropriate treatment for Stanford in the juvenile system. Id. Since age 10, he has been exposed to treatment for sexual abuse, arson, theft, assault, and burglary, to name but a few. Id.

19. Stanford, 109 S. Ct. at 2973. While Allen lay helpless on the floor after Wilkins' ("petitioner") initial stabbing, she spoke up to assist his accomplice in opening
nience store and murder whoever was behind the counter, so as not to leave witnesses.\textsuperscript{20}

After the juvenile court certified petitioner for trial as an adult,\textsuperscript{21} he pleaded guilty to first degree murder, armed criminal action and carrying a concealed weapon.\textsuperscript{22} The Supreme Court of Missouri affirmed the death sentence, rejecting the argument that such punishment violated the cruel and unusual punishment clause.\textsuperscript{23}

the cash register, which prompted petitioner to stab her three more times in the chest. \textit{Id.} Patrick Stevens assisted Wilkins in the actual robbery, while two other abettors, Ray Thompson and Marjorie Filipiak, secured transportation for a quick departure. State v. Wilkins, 736 S.W.2d 409, 411 (Mo. 1987). As Allen pleaded for her life, Wilkins stabbed her four more times in the neck to silence her. \textit{Stanford}, 109 S. Ct. at 2973. She was left to die on the floor, as petitioner and his accomplice gathered their proceeds from the robbery, including liquor, cigarettes, $450 in cash and checks, and rolling papers. \textit{Id.}

\textit{20. Stanford}, 109 S. Ct. at 2973. Prior to the crime, various steps were taken by Wilkins that indicated a great deal of planning. State v. Wilkins, 736 S.W.2d at 417. He sharpened his butterfly knife, wiped his muddy shoes so as to not leave mud prints in the deli, left the bag for the proceeds outside the store, and wiped his fingerprints off the door handle. \textit{Id.} at 411-12.

\textit{21. Wilkins}, 736 S.W.2d at 411-12. Wilkins could not automatically be tried as an adult, because he was six months short of the age of majority. \textit{Id.} See Mo. Rev. STAT. § 211.021 (1986) (adult defined as person 17 years of age or older). The Missouri statute under which Wilkins was transferred provides that in determining whether to certify, the juvenile 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 persons, 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 a juvenile justice 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. \textit{Id.}

\textit{22. Stanford}, 109 S. Ct. at 2973. Both the state and Wilkins urged the death penalty. \textit{Id.} at 2974. Other evidence at the punishment hearing indicated that he had frequented juvenile facilities since the age of eight for burglary, theft, arson, and attempting to kill his mother with tainted tylenol capsules. \textit{Id.}

\textit{23. Id.} The court found the slaying exceptional in its brutality. \textit{Wilkins}, 736 S.W.2d at 417. Not only did the petitioner have a pre-existing plan to kill, but he allowed the victim to suffer through further mutilation. \textit{Id.} The court also was disturbed by Wilkins' barbarous attitude toward human life. \textit{Id.} "In his words, Nancy Allen was a trash can whose most convenient disposition was to be killed so she would not be a bother to defendant in the future." \textit{Id.} See also United States v. Santiago, 582 F.2d 1128, 1137 (7th Cir. 1978) (trial court has broad discretion in sentencing defendant).
The United States Supreme Court granted certiorari\(^{24}\) in both cases to consider whether the eighth amendment protects individuals who commit crimes at sixteen or seventeen years of age from the death penalty.\(^{25}\) The Court held that imposing the death penalty for crimes committed at age sixteen and older does not violate the cruel and unusual punishment clause, as long as no national consensus develops against it.\(^{26}\)

In determining whether there had been a violation of the eighth amendment, the Court looked not only to historical evidence\(^{27}\) but to modern American\(^{28}\) standards.\(^{29}\) Although the Stanford Court interpreted the amendment in a dynamic and flexible manner,\(^{30}\) it lim-

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26. Id. at 2980.
27. Id. at 2974. The Court began its analysis by emphasizing that neither Stanford nor Wilkins' death sentence constitutes an act of punishment considered barbarous and thus condemned by the common law in 1789. Stanford, 109 S. Ct. at 2974; see also Ford v. Wainwright, 477 U.S. 399, 406 (1986) (eighth amendment prohibits the infliction of the death penalty on the insane); Note, Ford v. Wainwright, Statutory Changes and a New Test for Sanity: You Can't Execute Me, I'm Crazy!, 35 CLEV. ST. L. REV. 515 (1987) (discussing procedures and tests to determine validity of insanity claim). Since the earliest recorded lawful execution in this country in 1622 (Daniel Frank, Virginia, for theft), 18,000 to 20,000 individuals have lawfully been put to death. H. BEDAU, supra note 4, at 3. "Probably an equal number has been sentenced to death but spared for one reason or another sentencing, retrial, hospitalization as insane, executive clemency, natural death." Id.

Furthermore, the common law permitted capital punishment on anyone above the age of seven, as the rebuttable presumption of incapacity to commit a felony was 14 years old. Stanford, 109 S. Ct. at 2974; see also 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *23 (1847) (illustrating sentences of death on children); Kean, The History of the Criminal Liability of Children, 53 LAW Q. REV. 364 (1937) (detailing the historical punishment of children from the fourteenth century through the twentieth); Juveniles, supra note 2, at 614-616 (discussing the historical background of the death penalty for children while tracing its roots). According to professor Streib, 281 offenders under the age of 18 have been put to death in the states. V. STREIB, supra note 6, at 57. These executions account for 2% of the total number of executions. Id. at 55.

28. The Stanford Court rejected petitioners' argument that practices of foreign countries are dispositive. Stanford, 109 S. Ct. at 2975 n.1. The Court explained: [While 'the practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so implicit in the concept of ordered liberty that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well' see Thompson, 108 S. Ct. at 2716-17 n.4 (Scalia, J., dissenting) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) "they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people").

ited the cruel and unusual punishment clause's prohibition to practices contrary to the evolving standards of decency. The Court, deferring to state legislatures and the amendment's language, relied on objective factors as opposed to the subjective conceptions of each individual Justice.

The most reliable objective signs, indicating society's attitude toward a given punishment, consist of legislative enactments. The plurality's analysis focused generally on the thirty-seven states which authorize the death penalty, but specifically on the eighteen states which expressly establish a minimum age. Since a major-

ment of death for murder does not invariably violate the Constitution. Id. at 169. The Court upheld Georgia's sentencing procedures, which did not create a substantial risk of arbitrary and capricious infliction of the death penalty. Id. at 189; contra Furman v. Georgia, 409 U.S. 238, 239-40 (1972) (watershed decision declaring imposition of death penalty constitutes cruel and unusual punishment thereby placing most capital punishment states in limbo).


32. The Court owes deference to the state legislators due to the structure of the federal system and punishment as a peculiar legislative question. Gregg, 428 U.S. at 176.

33. The eighth amendment proscribes only those punishments which are both cruel and unusual. Stanford, 109 S. Ct. at 2975.

34. The individual Justices should not rely on their own personal consciences, but rather on objective factors to the maximum possible extent. Coker v. Georgia, 433 U.S. 584, 592 (1977); see also Penry v. Lynaugh, 109 S. Ct. 2934, 2952-55 (1989) (executing mentally retarded people is not prohibited by the cruel and unusual punishment clause); Enmund v. Florida, 458 U.S. 782, 788-89 (1982) (reversing death sentence in the absence of proof that defendant killed or attempted to kill in robbery-murder); Furman, 408 U.S. at 277-79 (Brennan, J., concurring) (reversing sentence of death for rape).

35. Stanford, 109 S. Ct. at 2975.

36. Justice Scalia explained that "it will rarely if ever be the case that the members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives." Thompson, 108 S. Ct. at 2715 (Scalia, J., dissenting).


38. The Supreme Court is incorrect as to the number of death penalty states due to Vermont's rejection. See Stanford, 109 S. Ct. at 2983 n.1 (Brennan, J., dissenting). The 15 states which do not authorize the death penalty include: Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. Thompson, 108 S. Ct. at 2694 n.25.

39. The 15 states which expressly establish a minimum age for the death penalty include: California (age 18); Colorado (18); Connecticut (18); Illinois (18); Maryland (18); Nebraska (18); New Jersey (18); New Hampshire (18); New Mexico (18); Ohio (18); Oregon (18); Tennessee (18); Georgia (17); North Carolina (17); and, Texas
ity\textsuperscript{41} of the states that allow capital punishment permit it for crimes committed at age sixteen or above, the Court concluded there was not a national consensus previously found sufficient to be characterized as cruel and unusual.\textsuperscript{42} The \textit{Stanford} Court distinguished four past cases - \textit{Coker v. Georgia},\textsuperscript{43} \textit{Enmund v. Florida},\textsuperscript{44} \textit{Ford v. Wainwright},\textsuperscript{45} and \textit{Solem v. Helm}\textsuperscript{46} - in which it invalidated the death penalty because a national consensus precluded such punishment.\textsuperscript{47} The Court then announced that \textit{Tison v. Arizona},\textsuperscript{48} which upheld the death penalty for participation in a felony resulting in murder, was more analogous as only eleven jurisdictions rejected the penalty in such instances.\textsuperscript{49}

With respect to federal statutes,\textsuperscript{50} the plurality relied on laws permitting sixteen and seventeen-year-olds to be tried as adults for offenses bearing a capital penalty.\textsuperscript{51} The Court emphasized that even if all federal statutes exempted individuals under eighteen from execution,\textsuperscript{52} this would not establish a national consensus opposing such punishment, due to the many states which allow it.\textsuperscript{53} As

\begin{itemize}
\item \textit{Stanford}, 109 S. Ct. at 2975 n.2. In addition, three more states, Indiana, Kentucky, and Nevada set the minimum age at 16. \textit{Id}. at 2981 (O'Connor, J., concurring).
\item \textit{Id}. at 2975. Justice Scalia, who announced the decision upholding juvenile executions, also wrote the dissent in \textit{Thompson}, where the death penalty for a 16-year-old murderer was reversed. \textit{Thompson}, 108 S. Ct. at 2711 (Scalia, J., dissenting).
\item The Court included in the majority the 18 states with no minimum age, believing they would allow it for 16-year-olds. The 18 states include: Alabama; Arizona; Arkansas; Delaware; Florida; Idaho; Louisiana; Mississippi; Missouri; Montana; Oklahoma; Pennsylvania; South Carolina; South Dakota; Utah; Virginia; Washington; and Wyoming. \textit{Thompson}, 108 S. Ct. at 2895 n.26. Therefore, to achieve a majority the Court included the three states which set the minimum age at 16, and the 18 states with no minimum age.
\item \textit{Stanford}, 109 S. Ct. at 2975-76.
\item 433 U.S. 584, 595-96 (1977) (invalidated death penalty for rape because Georgia sole jurisdiction which allowed this punishment).
\item 458 U.S. 782, 792 (1982) (only eight jurisdictions allowed death penalty for participation in robbery, where accomplice takes life).
\item 477 U.S. 399, 408 (1986) (no state allowed execution of insane).
\item 463 U.S. 277, 300 (1983) (striking down life sentence without parole under a recidivist statute because no other state would have treated defendant so harshly).
\item \textit{Stanford}, 109 S. Ct. at 2976.
\item 481 U.S. 137 (1987). The Tison brothers assisted their father's escape from prison and later watched their father murder a family of four. \textit{Id}. at 154. The Court reasoned that the brothers' major participation in a felony with reckless indifference to human life justified capital punishment. \textit{Id}.
\item \textit{Stanford}, 109 S. Ct. at 2976.
\item The Court failed to find petitioners' argument that a new drug law, limiting the death penalty to those over 18, was relevant. \textit{Id}.
\item \textit{Id}. See also \textit{State v. Azevedo}, 386 F. Supp. 622 (D.C. Haw. 1974) (rejecting 16-year-old, charged with murder and possibility of death penalty, was denied right of juvenile treatment).
\item The Court drew an analogy between the absence of a federal statute exempting persons under 18 from capital punishment and the absence of a federal lottery. \textit{Stanford}, 109 S. Ct. at 2977. The Court concluded that neither established a national consensus against a lottery, or juvenile executions respectively. \textit{Id}.
\item 433 U.S. 584, 595-96 (1977) (invalidated death penalty for rape because Georgia sole jurisdiction which allowed this punishment).
\item 458 U.S. 782, 792 (1982) (only eight jurisdictions allowed death penalty for participation in robbery, where accomplice takes life).
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\item \textit{Id}.
\end{itemize}
it is not Kentucky nor Missouri's burden to establish a national consensus for such treatment of juveniles, petitioners failed to carry the burden of establishing a national consensus against it through legislative enactments.64

Next, the opinion addressed the behavior of juries in determining current standards.56 Although a smaller number of criminals under eighteen have received death sentences,66 the Court considered this misleading because a smaller number of juveniles commit capital crimes.57 The Court concluded that the reluctance of juries to impose, and prosecutors to seek, death sentences was not demonstrated by these statistics.58

Completing an analysis of the two primary indicators of evolving standards, the Stanford Court rejected all other factors put forth by petitioners.59 The Court excluded from its list of relevant sources age-based statutory classifications which set eighteen as the legal age for various activities such as voting and purchasing alcohol.60 The Supreme Court reasoned that such laws set ages appropriate for a system which makes determinations in gross and not individually.61 These age statutes are in stark contrast with the individualized considerations inherent in the criminal justice system.62 To determine societal views as to whether eighteen is the age before which no one can be held responsible, the Court looked to state statutes detailing the minimum age rendering a juvenile eligi-

55. Stanford, 109 S. Ct. at 2977.
56. The Court acknowledged that of the 2,106 death sentences handed down between 1982 and 1988, only 15 were imposed on individuals less than 16 years old at the time of the offense, and only 30 on individuals less than 17. Id.
57. Id. But see V. STREIB, supra note 6, at 29 (juveniles committing nine percent of capital murders, but receiving only two to three percent of death sentences).
58. Stanford, 109 S. Ct. at 2977.
59. Id.
60. Id. Various organizations filing briefs amicus curiae support age statutes as a relevant source for eighth amendment analysis. See, e.g., Stanford, 109 S. Ct. at 2985 n.n.4-5 (Brennan, J., dissenting) (Collateral Representative for the State of Florida, American Bar Association, and National Legal Aid and Defender Association to name but a few); See also Thompson, 108 S. Ct. at 2701-06 (1988) (detailing age statute including right to vote, serve on jury, drive, etc.).
61. Stanford, 109 S. Ct. at 2977. These age statutes do not represent that all minors are not responsible. Id.
62. Id. at 2978-79. See Lockett v. Ohio, 438 U.S. 586, 605 (1978) (dictates that individualized consideration is a constitutional requirement). The Court continued by stating that one individualized mitigating factor is age. Stanford, 109 S. Ct. at 2978. See also Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (evidence of age relevant as mitigating factor). For a list of the 29 states which have codified age as a mitigating factor, see Stanford, 109 S. Ct. at 2978 n.5. The Supreme Court declared that the juvenile transfer process to adult court ensures individual analysis. Id. at 2978.
ble for death rather than for voting and drinking.63

The Court declined to adopt public opinion polls, views of interest groups, and positions of professional associations as further indicators of contemporary standards of decency.64 The Supreme Court also rejected the theory that the death penalty for sixteen and seventeen-year old criminals should be invalidated because it fails to serve legitimate penal goals.65 Since the Court's function is to determine what the correct standards are and not what they should be, a subjective approach was emphatically repudiated in the opinion.66 Finally, the Stanford Court suggested that a proportionality analysis, examining whether the punishment imposed and the defendant's blameworthiness is proportional, was unnecessary since no punishment had ever been invalidated solely on that basis and such analysis was repetitive, as it could only be conducted through the use of contemporary standards.67

The Stanford decision correctly held that imposing capital punishment on a sixteen or seventeen-year old capital murderer was not prohibited by the eighth amendment's cruel and unusual punishment clause. This decision was correct for three reasons. First, eighth amendment analysis is informed by examining contemporary attitudes toward a punishment through the reliable indicia of legislative and jury response. Second, a rejection of other indicators of current standards including age-statutes, views of interest groups and foreign countries, goals of penology, and subjective preferences


64. Id. The Court, in disclaiming the opinions of respected organizations, announced that a revised national consensus of such constitutional magnitude must appear in the laws and applications of laws approved by the people. Id.

65. Id. See generally Scheidegger, Capital Punishment in 1987: The Puzzle Nears Completion, 15 W. St. U. L. Rev. 95, 95-104 (1987) (detailing not only the three traditional reasons for punishment - retribution, deterrence, and rehabilitation - but also education, prevention, and restraint). The Stanford Court rejected that the death penalty fails to deter because juveniles have less cognitive skills than adults and also that it fails to yield just retribution because juveniles possess less blameworthiness due to immaturity. Stanford, 109 S. Ct. at 2979. To argue that a punishment is cruel and unusual, an opponent must be armed with eighth amendment analysis and not socioscientific evidence relating the emotional development of persons 16 or 17-years old. Id.

66. Stanford, 109 S. Ct. at 2979. The Court's interpretation of the eighth amendment must not be guided by personal preferences but by society's apparent skepticism. Id. But see Brief for Petitioner at 23, Wilkins v. Missouri, 108 S. Ct. 2896 (1988) (No. 87-6026) (arguing the Court should add its own informed judgment). The Court in rejecting a subjective approach states that such an approach would replace judges with philosopher-kings. Stanford, 109 S. Ct. at 2980.

67. Stanford, 109 S. Ct. at 2980. The Court, in excluding the proportionality analysis, relied on prior cases where a punishment was condemned not only under this analysis but also under the two primary indicators - state laws and jury determinations. Id. See, e.g., Solem v. Helm, 463 U.S. 277, 299-300 (1983) (court considered other state laws); Enmund v. Florida, 458 U.S. 782, 789-96 (1982) (court looked to both state law and jury determinations).
was proper for lack of relevancy. Finally, the evidence supported the holding as sixteen and seventeen-year-old offenders can reasonably be held fully responsible for their acts.

However, the Court's opinion contains two flaws. First, the plurality failed to identify the quantitative degree which would establish a categorical unacceptability of the death penalty for offenders under eighteen by juries. Second, the Court should have inquired further by focusing on a proportionality analysis as dictated by precedent. By evading specificity and ignoring precedent, the Supreme Court weakened its opinion creating uncertainty for future criminal defendants.

The framers of the Constitution delegated the task of defining the contours of an unconditional prohibition against cruel and unusual punishment to future generations. In defining an age below which a juvenile can never be held fully responsible for murder, the Supreme Court has been guided by evolving standards of decency. The Supreme Court has divided over the correct evaluation of indicia evidencing a national consensus. Where the law to be designed corresponds to social realities, deference to legislative judgment is a necessity. In a democracy, legislatures respond to the will of the people and consequently, the Court will rarely have a better sense of the evolution of American views than do the people's elected representatives. Further, the rationale for using the laws and applications of laws (legislative and jury determinations) lies in the language of the construed clause, because "unusual" depends upon the frequency of a penalty's occurrence.

68. Thompson, 108 S. Ct. at 2691.
69. Id. at 2706 (O'Connor, J., concurring). All of the Justices agree that some age exists, below which a juvenile murderer can never be constitutionally punished by death. Id. Furthermore, they agree that locating such an age requires guidance from an evolving clause, which acquires meaning through enlightened public opinion. Id. The Justices fail to agree on what factors determine a social consensus. Id.
70. Id.
72. See Gregg v. Georgia, 428 U.S. 153, 175 (1976). Since legislative judgment assists greatly in ascertaining current standards, the Supreme Court presumes the validity of a punishment selected by the representatives of the people. Id. Indeed, the legislature need not select the least severe penalty, only one which is not cruelly inhumane. Id.
73. See Thompson, 108 S. Ct. at 2715 (Scalia, J., dissenting).
74. See id. at 2692 n.7. "The focus on the acceptability and regularity of the death penalty's imposition in certain kinds of cases ... is connected to the insistence that statutes permitting its imposition channel the sentencing process toward nonar-
The legislative response to Furman v. Georgia, which invalidated nearly all capital punishment statutes then in existence, indicates society's endorsement of the death penalty for murder. Combining the fact that in the post-Furman era thirty-five states passed new death penalty statutes, most of which fail to expressly prohibit juvenile execution, and the current juveniles on death row, a national consensus opposing the execution of murderous juveniles is not apparent.

The Stanford Court was also correct in rejecting irrelevant indicators of contemporary standards. Ages set forth in the generalized system of voting, drinking and driving are not comparable to the ages at which the states allow their individualized criminal systems to operate. Indeed, an individual can be mature enough to comprehend that murder is wrong without being old enough to drink responsibly. Positions adopted both by interest groups and

75. 408 U.S. 238 (1972).
76. Gregg, 428 U.S. at 179. See also Gorecki, supra note 1, at 105-07 (discussing how the growth of crime leads to anger, which leads to an increased acceptance of death penalty); W. White, Life in the Balance 2 (1984) (detailing the effects of Furman); Streib, Executions Under the Post-Furman Capital Punishment Statutes: The Halting Progress from "Let's Do It" to "Hey, There Ain't No Point in Pulling So Tight", 15 Rutgers L. Rev. 443, 447 (1984) (comparison between the first 11 executions following Furman).
78. See supra note 2 and accompanying text; see also Brief for Petitioner at 25a, Stanford v. Kentucky, 109 S. Ct. 2969 (1988) (No. 87-5765) (detailing the juveniles sentenced to death since 1982).
79. Contra V. Streib, supra note 6, at 30-34 (favorably discussing other indicia of current standards, besides legislative and jury decisions).
80. Stanford v. Kentucky, 109 S. Ct. 2969, 2979 (1989). But see Batey, The Rights of Adolescents, 31 Wm. & Mary L. Rev. 363 (1982) (noting the ages at which individuals are considered children versus adults for purposes of driving, voting, working . . .). In contrast to the generalized system of driving, drinking, and voting, the criminal justice system can conduct individualized maturity tests and thus the two systems are not comparable. Stanford, 109 S. Ct. at 2977. As evidence of this individualized treatment, see Brief for Petitioner at 28a, Stanford v. Kentucky, 109 S. Ct. 2969 (1988) (No. 87-5765) for a list of ten states which codify age as a mitigating circumstance.
81. See Stanford, 109 S. Ct. at 2977. Statutes more applicable than age based statutory classifications, such as drinking and driving, are the juvenile waiver statutes. See National Institute for Juvenile Justice and Delinquency, United States Dept. of Justice, Major Issues in Juvenile Justice Information and Training, Youth in Adult Courts: Between Two Worlds 203 (1982) [hereinafter Between Two Worlds]. Almost every jurisdiction has at least one route in which juveniles are transferred into criminal courts. Thompson v. Oklahoma, 108 S. Ct. 2687, 2694 n.24 (1988). See also Brief for Respondent at 28, Stanford v. Kentucky, 109 S. Ct. 2969 (1988) (No. 87-5765) (all 36 death penalty states have passed or amended juvenile waiver statutes after the seminal Furman case).
by foreign countries are also inappropriate as having no constitutional foundation. To establish a consensus among American people, where none exists, by superimposing the standards of other countries, who are situated differently, is unquestionably dubious.

Furthermore, the Court properly rejected that juvenile executions failed to serve the age old justification of retribution and deterrence, because it has not been proven that a sixteen-year-old is not adequately responsible. Moreover, the constantly changing social conditions hinder any statistical attempt to evaluate the deterrent value of the death penalty, leading to inconclusive results. The Court also properly suppressed personal preferences in support of objective legislative wisdom. When the Court chooses between competing political and economic interests, the judiciary's independence is endangered by the petty passions of the day.

Finally, the Supreme Court justifiably affirmed the death sentences, because a sixteen or seventeen-year-old can form cold, calculative criminal intent as easily as can an adult. These young, street-wise offenders, deemed inappropriate candidates for treatment in the juvenile system, are transferred to adult courts. As

82. The Thompson dissent emphasized the inappropriateness of establishing the fundamental beliefs of this country through the standards of foreign countries. Thompson, 108 S. Ct. at 2716 n.4 (Scalia, J., dissenting). Even if the rest of the world was opposed to juvenile executions, that would not be determinative in the instant case. Id. But cf. Hill, supra note 77, at 18 (discussing international opinion on the death penalty for juveniles).

83. Just as non-capital states are irrelevant to minimum age for the death penalty, so are foreign countries. Brief for Respondent at 21, Stanford v. Kentucky, 109 S. Ct. 2969 (1988) (No. 87-5765). Furthermore, international comparisons are unreliable due to the different cultures and crimes. Id. at 22. American homicide rate is as much as ten times higher than numerous other countries. Id.

84. Stanford, 109 S. Ct. at 2979; see also H. Bedau, supra note 4, at 311 (Committee on Judiciary, U.S. Senate: protecting society is adequate justification for capital punishment). Contra Gale, Retribution, Punishment, and Death, 18 U.C. Davis L. Rev. 973 (1985) (justification of punishment is insufficient for capital punishment); Children, supra note 1, at 637 (justification of retribution less appealing for minors); but cf. Comment, The Cost of Taking a Life: Dollars and Sense of the Death Penalty, 18 U.C. Davis L. Rev. 1221 (1985) (arguing more costly to execute than to rehabilitate).

85. Gregg v. Georgia, 428 U.S. 153, 184-85 (1976). A scientific conclusion as to the worth of the death penalty as a deterrent is impossible. Id. at 185. The problem is that social conditions in any state fluctuate, and social conditions in any two states are not similar. Id.

86. Id. at 176 n.20. Justice O'Connor, in her concurring opinion in Thompson, 108 S. Ct. at 2709, stated: "I would not substitute our inevitably subjective judgment about the best age at which to draw a line . . . for the judgments of the nation's legislatures."


88. More serious juvenile offenders are transferred out of the juvenile justice system and into adult courts, subjecting them to the harshest sanctions. V. Streb, supra note 6, at 22. See also Fare v. Michael, 442 U.S. 707, 734 n.4 (1979) (Powell, J., dissenting) (some older minors become hardened criminals and deserve no special treatment).
society becomes less tolerant of young offenders committing heinous crimes and not responding to rehabilitation, adult punishment seems a plausible solution to protecting both community interests and juvenile needs. Removing hard-core criminals along with their negative influences from the less culpable youth, prosecutors preserve the juvenile system for those more susceptible to rehabilitation. Following the transfer process, juvenile offenders are justifiably held to the same standards as adults due to their adult-like acts.

Young culprits capable of brutal and vicious crimes, which are overwhelmingly murder, should be held personally culpable. Since moral culpability implies an understanding of right and wrong, the real issue in determining guilt or innocence is whether youth prevented that understanding. Many scholars agree that an adolescent, an individual advancing from a dependent irresponsible age to

89. See Comment, Youth on Death Row, supra note 71, at 502-03. Generally, the juvenile system has been unsuccessful with older minors, who have had prior encounters with the law. Id. at 497. Factors influencing transfer to criminal court include age, maturity, seriousness of offense, prior delinquency, results of previous treatment, and available treatment resources within the state. See Note, Thompson v. Oklahoma: An Analysis of the Death Penalty as Applied to Juvenile Offenders, 34 S.D.L. Rev. 762, 770 (1989) [hereinafter Note, Juvenile Offenders]; see also Kent v. United States, 383 U.S. 541, 566 (1966) (Supreme Court declaring principle which should be followed with respect to transfer); Between Two Worlds, supra note 81, at 210-11 (case study detailing seven reasons for prosecuting youths as adults).

90. See Comment, Youth on Death Row, supra note 71, at 502. A study examining the psychological and intellectual differences between juveniles who had been petitioned for certification to adult court and those, with similar prior delinquency, who had not, indicated that the certified group had higher IQs. Solway, Hays, Schreiner, & Reiser, Clinical Study of Youths Petitioned for Certification as Adults, 46 PSYCHOLOGICAL REP. 1067, 1072 (1989). Also, more murder charges were filed against the certified group. Id. at 1070.

91. See Brief for Respondent at 18, Stanford v. Kentucky, 109 S. Ct. 2969 (1988) (No. 87-5765); see also Between Two Worlds, supra note 81, at 211 (adult courts better qualified to hand out punishment). Contra V. STREIB, supra note 6, at 23-4 (adult-like acts fail as justification).

92. See Reiderger, Fate of the Teenage Killers, 73 A.B.A. J. 89, 92 (Oct. 1987). Many young offenders are in custody for murder, forcible rape, robbery and aggravated assault. Elastic, supra note 71, at 666 n.99. The common law treated young murderers no different than their adult counterparts. See 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *23 (1854) (rebuttable presumption of incapacity to form criminal intent ended at age fourteen); see also In re Gault, 387 U.S. 1 (1967) (Supreme Court accepted presumption).

a self-reliant responsible age of adulthood, begins to think beyond the present engaging in deductive reasoning as early as age twelve.\textsuperscript{94}

Chronological age should not excuse the murder and thus bar the juvenile’s execution; rather, it should mitigate circumstances.\textsuperscript{95} If the offender was beyond the age limit, the act would be subject to criminal penalties, but due strictly to age such conduct is treated differently.\textsuperscript{96} Even conceding the differential treatment of a juvenile because of age, the victim still suffered the same horrible abuse as if inflicted by an adult.

Despite the accuracy of the Stanford decision, the Court relied on a statistical fallacy relating to jury behavior. The Court, in assuming that the scarcity of juvenile death sentences stems from the rarity of criminal homicides by juveniles, disregards other plausible reasons.\textsuperscript{97} Other factors include the many young offenders arrested for murder but retained in juvenile court, and those transferred to criminal court but not charged with capital murder.\textsuperscript{98}

Since statistics, due to their manipulative nature, can be suggestive without being conclusive, jury verdicts should be analyzed cautiously.\textsuperscript{99} The plurality relied on statistics which failed to indicate how many juries had the opportunity to impose the death penalty

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\textsuperscript{94} See G. MANASTER, ADOLESCENT DEVELOPMENT AND THE LIFE TASKS 4-5 (1977). Piaget, a pioneer in the field of cognitive development, found at age 11 individuals can conceive of the range of possibilities including hypothetical situations. S. HENGGELER, DELINQUENCY AND ADOLESCENT PSYCHOPATHOLOGY 191 (1982); see also G. MANASTER, supra, at 5 (adolescents can plan realistically for the future while becoming accountable to society).

\textsuperscript{95} Age, as an aspect of defendant’s character, must be considered as a mitigating factor. See Lockett v. Ohio, 438 U.S. 586, 604 (1978). Compare Penry v. Lynaugh, 109 S. Ct. 2934, 2955-58 (1989) (allowing execution of mentally retarded capital murderer, since age was not sufficient basis for categorical eighth amendment rule) with Thompson, 109 S. Ct. at 2700 (eighth amendment prohibits execution of individual under 16 at time of offense).

\textsuperscript{96} V. STREIB, supra note 6, at 7. Age is the only factor tipping the scales in favor of the minor, but can be overcome by aggravating circumstances. See Comment, Youth on Death Row, supra note 71, at 516.

\textsuperscript{97} Cf. Juveniles, supra note 2, at 396 (documenting that young offenders committing 9.2\% of the murders, but receiving only 2.6\% of death sentences, although his statistics include assumptions). Hugo Adam Bedau, an expert on capital punishment, noted the difficulty in statistical reliance by stating: “it is impossible with the present sort of criminal statistics to specify the exact amount of capital crimes for even one jurisdiction in even one year for even one crime.” Bedau, supra note 4, at 312.

\textsuperscript{98} See Juveniles, supra note 2, at 387. A study on the transfer of young offenders to adult court found that few minors are referred to these criminal courts. Between Two Worlds, supra note 81, at 212.

\textsuperscript{99} See Comment, Elastic, supra note 71, at 663. Statistics are subject to manipulation and thus “sometimes generate misleading results that are mistakenly accepted as accurate.” Rubinfeld, Econometrics in the Courtroom, 85 COLUM. L. REV. 1048, 1050 (1985); see also Note, Juvenile Offenders, supra note 89, at 769 (numbers can be used to support or oppose a specific position).\
\end{footnotesize}
but were reluctant.\textsuperscript{100} In the absence of such data, sentencing and execution statistics alone are analogous to two hydrogen atoms attempting fruitlessly to create water without oxygen. An inference that juries are unwilling to impose the death penalty on a sixteen or seventeen-year-old murderer, must be developed from appropriate statistics to ensure such punishment is categorically unacceptable.\textsuperscript{101}

An additional flaw in the Court’s reasoning involved its failure to conduct eighth amendment proportionality analysis, acknowledged for almost a century.\textsuperscript{102} The Supreme Court has previously recognized that the standards of decency analysis, incorporating public attitudes toward a given sanction, is not conclusive.\textsuperscript{103} A thorough analysis warrants a more individualized approach, since a penalty must agree with the dignity of man by not being excessive.\textsuperscript{104}

The main thrust behind the eighth amendment is the prohibition against excessiveness, because the “cruel and unusual” language immediately follows words proscribing excessive bail and fines.\textsuperscript{105} A criminal sanction is excessive and unconstitutional when a disproportionate exists between the punishment imposed and the defendant’s


\textsuperscript{101} See Thompson, 108 S. Ct. at 2708 (O’Connor J., concurring) (number of cases in which prosecutors did not seek death sentence also needed for statistical analysis).


\textsuperscript{103} See Gregg v. Georgia, 428 U.S. 153, 173 (1976) (legislation is important indicator of current standards but not end of inquiry because eighth amendment is safeguard against legislative abuse); e.g., Robinson v. California, 370 U.S. 660 (1962) (illustrating penal law as violative of eighth amendment).

\textsuperscript{104} See Gregg, 428 U.S. at 173. An individualized consideration will ensure sentencing practices which distinguish immature, irresponsible adolescents from young, calculating murderers. See Comment, Elastic, \textit{supra} note 71, at 672. The Stanford Court incorrectly assumed that juvenile transfer statutes ensure individualized consideration because transfer and sentencing are quite different.

Just as individualized consideration is a constitutional requirement, a challenged punishment must comport with basic humanity underlying the eighth amendment. Trop v. Dulles, 356 U.S. 86, 100 (1958). However, death is not cruel within the amendment’s meaning, but rather implies more than mere extinguishment of life. Gregg, 428 U.S. at 178.

Consequently, the Court must not only address whether legislative or jury rejection of a penalty prevails, but also whether punishment is disproportionate to the blameworthiness of the offender.

In other words, the Court should compare the harshness of the penalty to the gravity of the offense. Weighing both elements, the Supreme Court must consider injury to person and public, and offender's moral depravity and culpability. To ensure accuracy in determining culpability, the Court should factor in components from the transfer statutes including maturity, seriousness of the offense, and response to prior juvenile treatment.

The Stanford decision truly reflects the evolving standards of decency, as no national consensus against executing a sixteen or seventeen-year-old murderer exists. However, the Court relied on faulty statistics and failed to search further by not conducting a proportionality analysis, which is mandated by eighth amendment jurisprudence. The decision will undoubtedly impact the prosecutorial judgments of the numerous states with no minimum age for infliction of the death penalty. In light of the Court's active involvement

106. Stanford, 109 S. Ct. at 2987 (Brennan, J., dissenting). Two views of the proportionality analysis exist: (1) the traditional view weighs the severity of the punishment in relation to the severity of the offense, and (2) the Enmund view examines the severity of the punishment in relation to the defendant's blameworthiness. See Elastic, supra note 71, at 665-67. See also Radin, Proportionality, Subjectivity, and Tragedy, 18 U.C. Davis L. Rev. 1165 (1985) (proportionality is subcategory of desert). To clarify, the Supreme Court in the past focused on the harm caused (the offense). More recently, however, the Court considers the defendant's responsibility for the harm. This casenote predominately examines the latter.

The Court applied the traditional proportionality analysis in Coker v. Georgia, 433 U.S. 584, 597-600 (1977), where it compared the consequences of the punishment and the consequences of the crime on the victim. The death penalty for rape was disproportionate because the victim is still alive. Id. In contrast, the Enmund Court concluded that the death penalty for a felony murderer was disproportionate to his culpability, and thus unconstitutional. Enmund v. Florida, 458 U.S. 782, 798 (1982). If the Court would have focused on the harm done, Enmund's culpability would not be distinguishable and therefore the death penalty would have been constitutional.


in death penalty cases year after year, its vain attempt to go beyond the laws and applications of laws could be quite deadly.

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111. Reidinger, The Death Row Kids, 75 A.B.A. J. 78, 82 (Apr. 1989). While the Justices issued ten full opinions on the death penalty in 1987, they had at least ten capital cases on the docket this year. Id.