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Boys Will be Boys: Juvenility, Mental Retardation, and the Death Penalty

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“BOYS WILL BE BOYS”: JUVENILITY, MENTAL RETARDATION, AND THE DEATH PENALTY

I. CAN YOU BLAME THEM?

Best friends Robert Tulloch and Jimmy Parker had a dream: they wanted to travel the world and the only thing stopping them was their lack of money.¹ “[L]egitimate ways to make money were ‘boring and take a lot of time,’” so they turned to crime, which “was easier, faster and more exciting.”² At first, their crimes were unimpressive. They stole things they thought they could re-sell or took mail from people’s mailboxes to get credit card applications.³ Then they got bolder. For six months they repeatedly “[tried talking] their way” into people’s houses, planning to steal ATM cards and PIN numbers and then kill the residents so there would be no witnesses.⁴ Nevertheless, their attempts usually failed, either because people were not home or because they refused to let the boys inside.⁵

On January 27, 2001, armed with the SOG SEAL 2000 knives they had purchased from the Internet, Robert and Jimmy approached an upscale house in Etna, New Hampshire.⁶ The home belonged to Dartmouth College professors Susanne and Half Zantop.⁷ Knocking at the Zantops’ door, the boys claimed to be taking an environmental survey for a class project.⁸ Half consulted Susanne and then “invited the polite, preppy youths into his home.”⁹ Hesitantly, Robert asked questions while Jimmy jotted notes in a notebook.¹⁰ At some point, Half pulled out his wallet to find phone numbers of some other people he thought the boys might like to talk to about their project.¹¹ In the

1. Denise Noe, *Court TV’s Crime Library: The Dartmouth Murders Case: The Truth of the Slayings* http://www.crimelibrary.com/notorious_murders/young/dartmouth_murders/7.html; *select* The Truth of the Slayings (accessed Nov. 27, 2005) (Robert and Jimmy were small-town boys from Chelsea, Vermont).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Noe, *supra* n. 1, at *select* False Leads. SOG SEAL knives are “commando weapon[s] with a seven-inch, powder-gray blade and a five-inch, contoured black handle.” Dick Lehr & Mitchell Zuckoff, *Judgment Ridge: The True Story behind the Dartmouth Murders* 123 (HarperCollins 2003). They are “honored as the ‘official knife’ of the Navy SEALs . . . [which] could only be considered a hunting knife if the intended prey were human.” *Id.* at 123–24.

7. Noe, *supra* n. 1, at *select* The Truth of the Slayings.

8. *Id.*

9. *Id.* Coincidentally, matters of the environment were Half’s forte. Half moved his family from Germany to accept a job teaching geology at Dartmouth. He taught at the College for twenty-five years. Half’s wife Susanne was also a Dartmouth professor, teaching German and Comparative Literature. *Id.* at *select* Half and Susanne; *id.* at *select* Popular Profs.

10. Noe, *supra* n. 1, at *select* The Truth of the Slayings; Lehr & Zuckoff, *supra* n. 6, at 57.

11. *Id.* at *select* The Truth of the Slayings.

process, he inadvertently revealed a substantial amount of cash in his wallet.¹² It was just what the boys were looking for.

In an instant, Robert grabbed a knife from his backpack, lunged at the professor, who was still seated in his chair, and stabbed him repeatedly.¹³ Hearing the commotion, Susanne ran from the kitchen, where she had been cooking since the boys arrived.¹⁴ Screaming in German, she tried to help her husband, but Jimmy grabbed her and ordered her to “Shut up!”¹⁵ Meanwhile, Robert, who was still stabbing Half, yelled at Jimmy to “Slit her throat!”¹⁶ Jimmy obediently plunged the knife into Susanne’s neck, pulled it across her throat, and dropped her body to the floor.¹⁷ Robert then jumped to take his turn at Susanne, stabbing her in the chest and head, while Jimmy slit Half’s throat, despite the fact that the professor was already dead.¹⁸ Half and Susanne were drenched in their own blood and left dead on their floor.¹⁹ Once out of the house, Robert commented to Jimmy that, “[i]t was too easy.”²⁰

That evening, when a colleague and friend of the Zantops arrived for dinner as planned, she found the horrifying scene: “Furniture had been broke, upended and turned around. Streaks of blood stained curtains and cabinets. Susanne lay face down on the floor. Half [was] twisted, his head resting on the bottom of a bookcase. Puddles of dark, dried blood surrounded their heads.”²¹

Meanwhile, as the boys were on the run, they lamented to each other that they only got a couple hundred dollars—they forgot to force Half to divulge his ATM PIN number before they killed him.²² “We have to do something again,” said Robert.²³ But, Jimmy did not reply.²⁴ Unlike Robert, Jimmy was “worr[ie]d about the potential fallout” for having just murdered two people.²⁵ Robert Tulloch was seventeen years old and Jimmy Parker was sixteen.²⁶

12. *Id.*

13. *Id.*

14. *Id.*

15. Noe, *supra* n. 1, at *select* The Truth of the Slayings.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Lehr & Zuckoff, *supra* n. 6, at 84.

21. Noe, *supra* n. 1, at *select* Etna Atrocity.

22. Lehr & Zuckoff, *supra* n. 6, at 84.

23. *Id.* at 85.

24. *Id.*

25. *Id.*

26. Noe, *supra* n. 1, at *select* The Boys with the Knives. Robert Tulloch had originally planned to plead not guilty because of insanity but ultimately pled guilty to first-degree murder and conspiracy to commit murder. Lehr & Zuckoff, *supra* n. 6, at 361–62. He was sentenced to life in prison without the possibility of parole. Throughout sentencing, Robert appeared cold and expressionless—he was unmoved by the words of the victims’ relatives. When given the opportunity to make a statement, he declined. *Id.* at 372. Jimmy Parker pled guilty as an accomplice to murder and received twenty-five years to life in prison but would be eligible for parole at age forty-one in exchange for his cooperation in the case against his friend, Robert. Jimmy cried while relatives and friends of the Zantops made their statements. Then, with tears in his eyes, he stood and faced the Zantops’ daughters saying simply, “I’m sorry.” *Id.* at 374–76. In medium-security prison, Jimmy has been quiet, shy, and well-behaved. He has kept to himself and not caused any problems. *Id.* at 386–88. Robert, in contrast, quickly developed an unfavorable reputation amongst prison inmates and officials. Having already gotten in a fight with another inmate, prison officials transferred him to a maximum-security prison

The story of these two boys and the “Dartmouth Murders” gives reason to reflect. They were just sixteen and seventeen years old, wanting to see the world. Can you blame them? One obvious answer is, “Of course!” Another is, “No—they are just kids!” But does that rationale not yield when the issue is cold-calculated murder? Although the death penalty was out of the question for Jimmy, it might not have been for Robert, had he chosen to go to trial instead of pleading guilty.²⁷ Nevertheless, as their story fades from the forefront of public attention, the stories of others fill its place. Although it is tragic, troubled teens are not new to the American justice system. Recently, however, the Supreme Court forever changed the way juveniles may be held accountable for their criminal actions.

II. INTRODUCTION

On March 1, 2005, the United States Supreme Court abolished the juvenile death penalty.²⁸ For some, the decision in *Roper v. Simmons*²⁹ was a statement of disapproval, long overdue. For others, the holding dealt an unsubstantiated blow to American capital punishment. The issue had come before the Court in years past but each time resulted in a split opinion.³⁰ It was not until the *Simmons* case that the Supreme Court finally reached a majority consensus regarding the imposition of the juvenile death penalty.³¹ By a five-to-four majority, the Court abolished capital punishment for juvenile offenders as cruel and unusual punishment.³² This decision concluded decades of controversy surrounding the constitutionality of imposing the death penalty on persons who were younger than eighteen when they committed a capital crime.

The death penalty is the severest punishment sanctioned by the American legal system.³³ For that reason, it “is reserved for a narrow category of crimes and [an increasingly narrower category of] offenders.”³⁴ Not even so-called “average” murderers are subject to execution because they are thought to lack the extremely culpable mental and emotional characteristics that warrant the penalty of death.³⁵ As

after they intercepted evidence that he might have been planning an escape. *Id.* at 388–89.

27. Jimmy was not eligible because, at the time, New Hampshire had set the minimum age for death penalty eligibility at seventeen. See generally Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973–December 31, 2004*, <http://www.law.onu.edu/faculty/streib/documents/JuvDeathDec2004.pdf> (last updated Jan. 31, 2005).

28. *Roper v. Simmons*, 543 U.S. 551 (2005). The phrase “juvenile death penalty” refers to the imposition of the death penalty on offenders who were younger than the age of majority (eighteen) when they committed a capital offense. *Id.* at 554. By the time an offender’s case reaches the judicial system, he or she may or may not have attained majority. In *Simmons*, the defendant was seventeen at the commission of the crime, but, by the time he stood trial, he had turned eighteen and was thus legally an adult. *Id.* at 556. Nevertheless, since the relevant age is that of the offender at the commission of the crime, the penalty of death imposed on an offender under eighteen is referred to as the “juvenile death penalty.” *Id.* at 554.

29. 543 U.S. 551.

30. The other prominent juvenile death penalty cases were *Stanford v. Ky.*, 492 U.S. 361 (1989), and *Thompson v. Okla.*, 487 U.S. 815 (1988).

31. *Simmons*, 543 U.S. 551.

32. *Id.* at 568 (Justices Stevens, Ginsburg, Kennedy, Souter, and Breyer concurred in the majority opinion—Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas dissented).

33. *Id.*

34. *Id.* at 569.

35. Victor L. Streib, *Executing Women, Juveniles, and the Mentally Retarded: Second Class Citizens in Capital Punishment*, in *America’s Experiment with Capital Punishment* 301, 302 (James R. Acker, Robert M.

society has progressed throughout history, the Supreme Court has frequently been asked to exempt certain classes of people from the death penalty. In 1977, rapists were exempted,³⁶ and, in 1982, so were those guilty of aiding and abetting felony-murder.³⁷ By 1986, the insane were exempt from execution,³⁸ and most recently, in 2002, the mentally retarded were exempted as well.³⁹

Borrowing arguments used to abolish the death penalty for the mentally retarded,⁴⁰ juvenile death penalty opponents recently asked the Court to abolish the execution of juveniles, believing such penalty unconstitutional under the Eighth and Fourteenth Amendments.⁴¹ Observing that mentally retarded people sometimes behave similarly to children, opponents of the juvenile death penalty argued that laws on capital punishment ought to treat both children and the mentally retarded equally.⁴² In March of 2005, a five-justice majority of the Supreme Court agreed with this argument.⁴³ The *Simmons* Court declared the juvenile death penalty unconstitutional, thus affirming the Missouri state court ruling setting aside *Simmons*' death sentence.⁴⁴

This casenote challenges the Supreme Court's reliance on *Atkins v. Virginia*,⁴⁵ and specifically the contention that, because the death penalty was held unconstitutional for the mentally retarded, it is unconstitutional for people, like Christopher Simmons, who committed capital crimes as juveniles.⁴⁶ Part III of this casenote examines the recent death penalty history for juveniles and mentally retarded persons prior to 2005.⁴⁷ Part IV discusses the facts and holding of *Simmons*.⁴⁸ Part V pays particular attention to Justice O'Connor's dissent in *Simmons*⁴⁹ and includes a brief discussion of the Eighth

Bohm & Charles S. Lanier eds., 2d ed., Carolina Academic Press 2003).

36. *Simmons*, 543 U.S. 597-98 (O'Connor, J., dissenting) (citing *Coker v. Ga.*, 433 U.S. 584, 595-96 (1977)).

37. *Id.* at 598 (O'Connor, J., dissenting) (citing *Enmund v. Fla.*, 458 U.S. 782, 792 (1982)).

38. *Id.* (citing *Ford v. Wainwright*, 477 U.S. 399, 408 (1986)).

39. *Id.* (citing *Atkins v. Va.*, 536 U.S. 304 (2002)).

40. See *Atkins*, 536 U.S. 304.

41. See *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 399 (Mo. 2003). The Eighth Amendment of the U.S. Constitution prohibits "cruel and unusual punishment." U.S. Const. amend. VIII. Section 1 of the Fourteenth Amendment mandates that "[no state shall] deprive any person life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1.

42. The fields of biology and psychology have been particularly involved in the development of scientific knowledge relating to adolescent and mentally retarded mental capacities and behaviors. Juvenile death penalty opponents assert that both groups of people tend to learn, behave, and process emotions in similarly deficient or unrefined manners. Mary Beckman, *Crime, Culpability, and the Adolescent Brain*, 305 Sci. 596 (July 30, 2004).

43. *Simmons*, 543 U.S. at 560. While the Court considered other factors in making the decision to abolish the juvenile death penalty, the scope of this casenote is confined to the arguments equating juveniles to mentally retarded offenders.

44. *Id.* at 578-79.

45. 536 U.S. 304 (abolishing the death penalty for the mentally retarded).

46. This casenote is not intended to argue either for or against the juvenile death penalty (or the death penalty in general). The sole contention of this casenote is that the Court improperly deduced its holding from unsound reasoning and, therefore, the juvenile death penalty should not have been abolished in this case. A personal moral judgment on the Court's holding is beyond the scope of this casenote.

47. Prior to March 2005, *Thompson*, 487 U.S. 815, and *Stanford*, 492 U.S. 371, were the leading juvenile death penalty cases. *Atkins*, 536 U.S. 304, was the leading death penalty case for the mentally retarded.

48. 543 U.S. 551.

49. *Id.* at 587-607 (O'Connor, J., dissenting).

Amendment and traditional notions of culpability and blameworthiness as applied in both *Simmons* and *Atkins*.⁵⁰ Part V of the paper shifts from the cases to examine currently available information about the characteristics of the mentally retarded mind as compared to the characteristics of the juvenile mind. Part VI considers the relevance of age-status statutes and the influence of abuse, neglect, and mental disorders on juvenile offenders. Ultimately, this casenote concludes by arguing that the Supreme Court erred in its reasoning in *Simmons*.⁵¹ Contrary to the Court's holding, the natures of the mentally retarded and juvenile minds are so distinguishable that any apparent likeness between the two groups is insufficient to warrant their equal treatment.

III. THE DEATH PENALTY FOR JUVENILES AND THE MENTALLY RETARDED BEFORE 2005

Historically, the execution of juveniles has been relatively rare.⁵² In fact, only twenty-two offenders were executed in the modern era⁵³ for crimes committed by people under the age of eighteen.⁵⁴ Since 1988, no state could execute juveniles who were younger than sixteen when they committed a crime punishable by death.⁵⁵ Prior to 2005, fourteen states had set the minimum age for death penalty eligibility at sixteen years of age, and five additional states had set the minimum age at seventeen.⁵⁶ In nineteen jurisdictions, the minimum age for eligibility was eighteen.⁵⁷

A. *Thompson v. Oklahoma*, *Stanford v. Kentucky*, and *Atkins v. Virginia*⁵⁸

Prior to *Simmons*,⁵⁹ two cases held the spotlight in juvenile death penalty law: *Thompson v. Oklahoma*⁶⁰ and *Stanford v. Kentucky*.⁶¹ In both *Thompson* and *Stanford*,

50. *Simmons*, 543 U.S. 551; *Atkins*, 536 U.S. 304.

51. *Simmons*, 543 U.S. at 564–75.

52. Streib, *supra* n. 35, at 305–06.

53. *Id.* at 302. The Modern Era in America began as legislatures re-wrote their death penalty statutes in the early 1970s to accord with the ruling in *Furman v. Georgia*, 408 U.S. 238 (1972). As early as 1973, sentencing began under the new statutes. Finally, in 1976, the United States Supreme Court formally recognized the constitutionality of the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976). By 1977, actual executions in the new era had begun.

54. Death Penalty Information Center, *Facts about the Death Penalty*, <http://www.deathpenaltyinfo.org/FactSheet.pdf> (Aug. 12, 2005). The twenty-two executed juveniles represent approximately two percent of all executions since 1976. *Id.* As of August 12, 2005, there have been a total of 979 executions in the United States. *Id.*

55. *Thompson*, 487 U.S. 815.

56. Streib, *supra* n. 27, at 7.

57. *Id.* Thirteen states and the District of Columbia had no death penalty whatsoever. *Id.*; see also Death Penalty Information Center, *Juvenile Offenders Who Were on Death Row*, <http://www.deathpenaltyinfo.org/article.php?did=204&scid=27#streibstats> (Dec. 31, 2004).

58. *Atkins*, 536 U.S. 304; *Stanford*, 492 U.S. 361; *Thompson*, 487 U.S. 815.

59. 543 U.S. 551.

60. 487 U.S. 815. William Wayne Thompson was fifteen years old when he and three others brutally murdered Thompson's former brother-in-law. The victim was shot twice, his leg was broken, his throat, chest, and abdomen were cut, and he had multiple bruises covering his body. After the attack, they chained the victim's body to a concrete block and threw him into a river. *Id.* at 819. The trial court certified Thompson for trial as an adult, and he and his three accomplices were tried separately and each was sentenced to death. *Id.* Thompson's jury found the murder "especially heinous, atrocious, or cruel" as an aggravating circumstance. The Oklahoma Court of Criminal Appeals affirmed Thompson's conviction and sentence. *Id.* at 820. The United States Supreme Court granted certiorari to consider whether the imposition of the death penalty on a

the United States Supreme Court failed to reach a consensus regarding the constitutionality of the juvenile death penalty. Nevertheless, the Court substantially refined the limits of its imposition.⁶² Prior to *Thompson*, most states had not expressly fixed a minimum age of eligibility for the death penalty.⁶³ In *Thompson*, however, the majority unequivocally held that the Eighth and Fourteenth Amendments prohibited the execution of a person who was under the age of sixteen at the commission of the crime.⁶⁴

In reaching that decision, the Court enumerated two bases for its reasoning: legislative enactments and jury practices.⁶⁵ Considering legislative enactments, the Court focused principally on age-status statutes, which prohibit juveniles of a specified age from engaging in certain activities.⁶⁶ Reviewing such statutes, the Court acknowledged society's basic assumption that children, as a class, are often unprepared to make certain decisions with the sort of cost-benefit analysis that adults make.⁶⁷ Consequently, the Court argued, adults owe children a certain paternalistic duty of protection, not only from things like alcohol and gambling, but also from capital punishment.⁶⁸ Practically, the Court further noted that, of the eighteen states that had "expressly established a minimum age" of death penalty eligibility, all of them fixed the age at sixteen.⁶⁹ These legislative considerations weighed in favor of limiting the imposition of the death penalty to persons sixteen years or older.

The second factor upon which the Court based its holding was the behavior of sentencing juries in capital murder cases.⁷⁰ Because juries generally declined to impose the death penalty on a fifteen-year-old offender, the Court reasoned that the practice was "abhorrent to the conscience of the community."⁷¹ Like legislative enactments, the trend in jury determinations favored establishing a minimum age of sixteen for death penalty eligibility. Ultimately, the Court made its own moral determination that capital punishment of minors younger than sixteen offended society's "evolving standards of decency,"⁷² and thus conflicted with the Constitution.⁷³

fifteen-year-old offender was cruel and unusual punishment under the Constitution. *Id.* at 820–21.

61. 492 U.S. 361.

62. *Stanford*, 492 U.S. 361; *Thompson*, 487 U.S. 815.

63. 487 U.S. at 826. Although almost every state at the time had established a minimum age at which a juvenile could be certified for trial in criminal court, as opposed to juvenile court, most states had not dealt with the issue of minimum age eligibility for capital punishment. *Id.* at 826 n. 24.

64. *Id.* at 838.

65. *Id.* at 822–23. Although these were the two factors highlighted by the Court, the opinion indicated that two other influential factors: international views on capital punishment and the Court's own moral discretion. *Id.* at 830, 833.

66. *Thompson*, 487 U.S. at 823 (specifically mentioning statutes establishing a minimum age for voting, sitting on a jury, driving without parental consent, marrying without parental consent, purchasing alcohol or cigarettes, and gambling).

67. *Id.* at 824–25.

68. *Id.* at 825 n. 23. The footnote continues, "the very assumptions we make about our children when we legislate on their behalf tells us that it is likely cruel, and certainly unusual, to impose on a child a punishment that takes as its predicate the existence of a fully rational, choosing agent." *Id.*

69. *Id.* at 829.

70. *Thompson*, 487 U.S. at 831.

71. *Id.* at 832.

72. *Id.* at 821 (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from

Stanford, decided almost exactly one year after *Thompson*,⁷⁴ required the Court to revisit the issue of whether the Eighth Amendment barred the juvenile death penalty (now concerned only with sixteen- and seventeen-year-old offenders).⁷⁵ Again, legislative enactments and the apparent reluctance of juries to impose the juvenile death penalty served as indicia of the public attitude towards the punishment.⁷⁶ This time, however, the Court concluded there was no persuasive evidence of a national consensus against the imposition of the death penalty on sixteen- and seventeen-year-old offenders and the penalty remained within the bounds of the Eighth Amendment.⁷⁷

In 2002, *Atkins v. Virginia* turned the Court's attention toward the constitutionality of executing mentally retarded offenders.⁷⁸ At sentencing, Atkins' defense counsel presented testimony of a forensic psychologist who evaluated Atkins before trial.⁷⁹ The doctor concluded that Atkins' IQ score of fifty-nine qualified him as "mildly mentally retarded."⁸⁰ In addition, the doctor noted that Atkins' limited intellect was a life-long condition and, of the forty-plus capital defendants the doctor had evaluated in the course

the evolving standards of decency that mark the progress of a maturing society.'").

73. *Thompson*, 487 U.S. at 822–23.

74. *Id.* at 815.

75. *Stanford*, 492 U.S. 361. The *Stanford* decision was based on two consolidated cases. The first case involved Kevin Stanford, convicted of murdering twenty-year-old gas station attendant Barbel Poore. *Id.* at 366. Stanford was seventeen years old when he and his accomplice robbed a gas station and "repeatedly raped and sodomized" Poore during and after the robbery. *Id.* at 365. The duo drove Poore to a secluded area near the gas station, "where Stanford shot her pointblank in the face and then in the back of her head." *Id.* Stanford was certified for trial as an adult and convicted of murder, first-degree sodomy, first-degree robbery, and receiving stolen property. He was sentenced to death and forty-five years in prison. *Id.* at 366. The second case involved Heath Wilkins, who planned to rob a convenience store and "murder 'whoever was behind the counter' because 'a dead person can't talk.'" *Stanford*, 492 U.S. at 366. Wilkins was sixteen years old when he and his accomplice robbed and stabbed twenty-six-year-old Nancy Allen and left her for dead. *Id.* Of the eight or more stab wounds Allen sustained, two penetrated her heart and four punctured her neck, opening her carotid artery. *Id.* Certified for trial as an adult, Wilkins pled guilty to first-degree murder, armed criminal action, and carrying a concealed weapon. *Id.* at 367. The trial court sentenced Wilkins to death, and the Supreme Court of Missouri affirmed on mandatory review. *Id.* at 367–68.

76. *Stanford*, 492 U.S. at 370–77.

77. *Id.* at 380. According to the majority opinion, of the thirty-seven state laws permitting capital punishment, only fifteen declined to execute offenders sixteen or younger, and twelve declined to execute offenders seventeen or younger. *Id.* at 370. This was not the degree of national consensus that the Court believed necessary to conclude that the punishment was both cruel and unusual. *Id.* at 370–71. The Court also dismissed the reluctance-of-juries argument, observing that the fewer number of offenders sentenced to death under the age of eighteen was directly attributable to the fact that a smaller percentage of capital crimes were committed by persons under eighteen in the first place. *Id.* at 373–74. Finally, the Court invalidated the argument that age-status statutes are further evidence that the juvenile death penalty is an inappropriate punishment. Such laws, the Court said, are "determinations [made] in gross." *Stanford*, 492 U.S. at 374. In contrast, decisions in the criminal justice system, particularly as pertains to capital punishment, must be based on individualized considerations in accord with each defendant's constitutional rights. *Id.* at 374–75.

78. 536 U.S. 304, 307. Armed with semi-automatic weapons, Daryl Atkins (age eighteen) and William Jones (age twenty-six) abducted Eric Nesbitt, stole his money, drove him to an automatic teller machine, instructed him to withdraw more cash, and then took him to an isolated location. Nesbitt was shot eight times and died. Jones pled guilty to first-degree murder, but, in exchange for his testimony against Atkins, he was spared from execution. At trial, testimony from both Atkins and Jones conflicted on who actually shot and killed Nesbitt, each implicating the other. Ultimately, Jones' testimony was more coherent and credible, and his account undoubtedly established Atkins' guilt. Atkins was convicted of abduction and armed robbery, and sentenced to death for capital murder. *Id.* See also Donna St. George, *A Question of Culpability: Mental Capacity of Convicted Virginia Man Is a Murky Legal Issue*, Wash. Post A1 (July 23, 2005).

79. *Atkins*, 536 U.S. at 308.

80. *Id.* at 308–09. For more information on mental retardation and IQ, review *infra* notes 218 to 221.

of his career, Atkins was only the second individual to meet the criteria for mental retardation.⁸¹ Nevertheless, the trial jury sentenced Atkins to death,⁸² and the Supreme Court of Virginia affirmed.⁸³

In their dissent, two state court justices noted, “the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of nine and twelve is excessive” and “it is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts.”⁸⁴ The United States Supreme Court seemed sympathetic to the dissent’s argument and granted certiorari⁸⁵ “in light of the dramatic shift in the state legislative landscape . . . in the past [thirteen] years.”⁸⁶ At the time the case was under review by the Supreme Court, the federal government and a large number of states already prohibited the execution of mentally retarded persons, and the imposition of the penalty in the remaining states was overwhelmingly uncommon.⁸⁷ Ultimately, the Court concluded a national consensus had evolved that mentally retarded persons were categorically less culpable than the average criminal.⁸⁸ The execution of mentally retarded persons was excessive, cruel, unusual, and summarily unconstitutional punishment.⁸⁹ Whether the justices were aware or not, their holding in *Atkins* tightened the reigns on capital punishment, even beyond mentally retarded defendants.⁹⁰ In a final attempt to avoid the death penalty, the same arguments of “categorically” lesser culpability rose again in a new context: the case of *Roper v. Simmons* and the juvenile death penalty.⁹¹

IV. *ROPER V. SIMMONS*⁹²

A. *The Plan, the Boys, and the Fall*

In September of 1993, four days prior to the brutal burglary, kidnapping, and

81. *Id.* at 309 n. 5. In other words, the doctor was confident the test score was a true reflection of the defendant’s intellectual capacity and not the result of faulty assessment, fraud, or pure chance.

82. *Id.* at 309.

83. *Id.* at 310.

84. *Atkins*, 536 U.S. at 310 (quoting *Atkins v. Cmmw.*, 534 S.E.2d 312, 324–25 (Va. 2000) (Koontz & Hassell, JJ., dissenting)). These dissenting Justices objected to executing someone with a mental age between nine and twelve. *Atkins*, 534 S.E.2d at 324. However, subsequent to *Thompson*, only juveniles substantially older in age, sixteen and seventeen, were at issue. 487 U.S. 815. This discrepancy in age is particularly noteworthy when considering the comparisons of juveniles to the mentally retarded. If mentally retarded persons are said to have the mental age of a twelve-year-old, logic defies the conclusion that a sixteen- or seventeen-year-old should be regarded the same. Surely, the average sixteen-year-old is more intellectually developed than the average twelve-year-old.

85. *Atkins v. Va.*, 533 U.S. 976 (2001).

86. *Atkins*, 536 U.S. at 310.

87. *Id.* at 315–16. Well before the *Atkins* decision, even Congress had expressly prohibited the execution of mentally retarded persons in the course of the 1988 legislation that reinstated the federal death penalty. *Id.* at 314.

88. *Id.* at 316.

89. *Id.* at 321.

90. 536 U.S. 304.

91. 543 U.S. at 559.

92. 543 U.S. 551.

murder of Shirley Crook,⁹³ Christopher Simmons asked his friend, Charlie Benjamin, to help him and John Tessmer “kill someone and ‘get a bunch of money’ by tying them up and throwing them off a bridge or by tying [them] to a tree.”⁹⁴ Originally, Simmons targeted the “voodoo man,” who lived in a nearby trailer park (despite being rumored to have a lot of money).⁹⁵ According to Tessmer, Simmons even went so far as to gather ropes and gloves⁹⁶ and make masks “so the voodoo man would not see their faces.”⁹⁷ Simmons was shameless and boastful, and even as few as five hours before the commission of the crime, he bragged to people about the murderous plot.⁹⁸ Then, on September 8, Simmons arranged to meet with Tessmer and Benjamin at 2:00 a.m. the following day at the home of twenty-nine-year-old convicted felon Brian Moomey.⁹⁹ Simmons assured his friends that they could “get away with [murder]” because they were minors: Simmons was seventeen, Tessmer sixteen, and Benjamin fifteen.¹⁰⁰

In the early hours of September 9, 1993, the trio assembled as planned, but Tessmer got cold feet and chose to return home.¹⁰¹ Simmons made an impromptu change of plans: instead of targeting the “voodoo man,” he set his sights on Shirley Crook’s home, in a subdivision across the street from the mobile home park.¹⁰² Reaching through a back window that was cracked open at the rear of the home, the boys unlocked the door and let themselves in.¹⁰³ When Simmons turned on a light, Crook sat up in bed and called out, “who’s there?”¹⁰⁴ As Simmons entered the bedroom, he and Crook recognized each other from a previous automobile accident involving both of them.¹⁰⁵

Simmons ordered Crook out of her bed and, when she did not comply, he called for Benjamin’s help to force her to the floor.¹⁰⁶ They kicked and beat her, planting bruises on her body and breaking her ribs.¹⁰⁷ Stripping her of her clothes, Simmons duct-taped her eyes and mouth shut, taped her hands behind her back, bound the family poodle, and then, with Benjamin’s help, ushered Crook to the back of her own minivan.¹⁰⁸ Simmons drove the van some sixteen miles¹⁰⁹ to Castlewood State Park and

93. *Id.*

94. *State v. Simmons*, 944 S.W.2d 165, 177 (Mo. 1997).

95. *Id.* at 169. Rumor had it that “voodoo man” owned various hotels and motels. *Id.*

96. *Id.* at 178.

97. *Id.* at 177. The record does not clearly indicate whether Simmons actually used such preparations in the actual commission of the crime.

98. *Simmons*, 944 S.W.2d at 177.

99. *Id.* at 178. Moomey’s home was a frequent local hangout for teens like Simmons and his friends. *Id.* at 169. Moomey’s own criminal history included assault with a weapon, burglary, and stealing. *Id.* at 180.

100. *Id.*

101. *Simmons*, 944 S.W.2d at 169.

102. *Id.* at 169.

103. *Id.*

104. *Id.* at 170.

105. *Id.*

106. *Simmons*, 944 S.W.2d at 170.

107. James Carlson, *Victim’s Sister Tries to Live on: She Feels Court Thwarted Justice in Banning Execution of Juveniles*, St. Louis Post-Dispatch B1 (July 24, 2005).

108. Richard Heisler, *The Kids Are Alright: Roper v. Simmons and the Juvenile Death Penalty after Atkins v. Virginia*, 34 Sw. U.L. Rev. 25, 45 (2004).

109. Carlson, *supra* n. 107.

stopped the vehicle near a railroad trestle spanning the Meramec River.¹¹⁰ As the boys began to unload Crook from the back of her van, they realized she had freed her hands during the ride and begun to remove some of the duct tape from her face.¹¹¹ Simmons and Benjamin re-bound her, using the strap from her purse, the belt from her bathrobe, and some electrical wire they found on the railroad trestle.¹¹² Covering her head with a towel from the back of the van, Simmons and Benjamin walked Crook to the trestle, where they hog-tied her hands and feet with electrical cable, covered her face with duct tape, and shoved her to the river rushing below.¹¹³ For their efforts, the boys were a mere six dollars richer.¹¹⁴

Shirley Crook was forty-six years old, a wife, and the mother of two grown children.¹¹⁵ She was desperate for a grandchild, and although one of her daughters was pregnant, Crook would never know.¹¹⁶ Intensely afraid of heights,¹¹⁷ Shirley Crook was still alive and conscious as she plummeted into the waters of the Meramec River.¹¹⁸ Later that day, two fishermen found her body floating in the river, less than a mile from the railroad trestle.¹¹⁹ Crook “was clad in only underwear and cowboy boots.”¹²⁰ According to the medical examiner, Crook suffered “several fractured ribs and considerable bruising,” which were not the result of her fall from the trestle.¹²¹ The ultimate cause of her death was drowning.¹²² That same afternoon, Steven Crook (Shirley’s husband) returned home from an overnight trip to find his wife had not only missed work but she was not at home¹²³ and their bedroom was in disarray.¹²⁴ Growing increasingly distraught, he filed a missing persons report that evening.¹²⁵ Meanwhile, Christopher Simmons was bragging to friends like Brian Moomey about how he had killed a woman “because the bitch seen my face.”¹²⁶

Simmons was seventeen and still in high school when he conceived the murder and burglary plan that resulted in Shirley Crook’s brutal death.¹²⁷ Just after Simmons turned eighteen years old, the Circuit Court of Jefferson County, Missouri, tried Simmons for first-degree murder, convicted him, and sentenced him to death.¹²⁸ The jury was not

110. *Simmons*, 944 S.W.2d at 170.

111. *Id.*

112. *Id.*

113. *Id.*

114. Heisler, *supra* n.108, at 46.

115. *Id.* at 45.

116. Stephanie Simon, *Court Puts Age, Crime on Scales*, L.A. Times A20 (June 9, 2002).

117. *Simmons*, 944 S.W.2d at 185.

118. *Id.* at 170.

119. *Id.*

120. Heisler, *supra* n. 108, at 46.

121. *Simmons*, 944 S.W.2d at 170.

122. *Id.*

123. *Id.*

124. *Simmons*, 543 U.S. at 557.

125. *Simmons*, 944 S.W.2d at 170.

126. *Id.*

127. *Simmons*, 543 U.S. at 556.

128. *Id.* Missouri law considered Simmons an adult at age seventeen. Statutorily, he was beyond the reach of Missouri’s juvenile court system. *Id.* at 557 (citing Mo. Rev. Stat. §§ 211.021 (2000) & 211.031 (Supp. 2003)). (Prior to *State ex rel. Simmons*, 112 S.W.3d at 399–400 n. 2, Missouri’s minimum age for death penalty

convinced that Simmons deserved less than death for his blatant role in instigating and perpetuating such a vile and repulsive act of criminality.¹²⁹ Nevertheless, Simmons presented evidence on appeal that he suffered certain personality disorders, had a history of alcohol and drug use (particularly marijuana), and that his stepfather abused him.¹³⁰ School records indicated that, “his grades were not good . . . his absenteeism was high[,] . . . several times . . . disciplinary actions [were] imposed upon [him],” and he was thought to be in a “kiddy gang” called the Thunder Cats.¹³¹ All told, the picture of Simmons’ life appeared troubled at best.¹³² Nevertheless, whether his actions on that early September day were the mere cries of a juvenile in distress or the true manifestations of evil incarnate is anyone’s guess.

B. *The Trial and Appeals of Christopher Simmons*

At trial, the prosecutor submitted three aggravating circumstances to the jury.¹³³ Those circumstances were that (1) “the murder was committed for the purpose of receiving money”; (2) it was committed “for the purpose of avoiding, interfering with, or preventing lawful arrest of the defendant”; and (3) it “involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman.”¹³⁴ The jury recommended the death penalty after finding the State had adequately proven each of these factors.¹³⁵ The trial judge accepted the jury’s recommendation and sentenced Simmons to death.¹³⁶ Subsequently, Simmons obtained new counsel and moved to set aside the conviction and sentence based, in part, on alleged ineffective assistance of his previous counsel.¹³⁷ The trial court denied the motion for postconviction relief, forcing Simmons to appeal.¹³⁸

The Supreme Court of Missouri denied Simmons’s petition for writ of certiorari¹³⁹ and, on appeal, affirmed the conviction, sentence, and denial of postconviction relief in totality.¹⁴⁰ Simmons then made his next move in federal court, petitioning for a writ of habeas corpus.¹⁴¹ That too was denied.¹⁴² But, then a glimmer of hope appeared for

eligibility was sixteen.).

129. *Simmons*, 944 S.W.2d at 191.

130. *Id.* at 183–84.

131. *Id.*

132. *Id.* at 183–85. Simmons’ defense counsel and experts all seemed to conclude that the details of the boy’s life would not help mitigate the crime. One doctor stated, “The bad that I could say [about Simmons] would outweigh what I could say that could be helpful [to his defense].” *Id.* at 184. As a strategic decision, Simmons’ attorney, Mr. Burton, elected not to use evidence from psychological evaluations in the teen’s defense, believing such evidence would more likely work against Simmons than in his favor. *Simmons*, 944 S.W.2d at 184. His attorney wanted to use testimony of friends, teachers, or former employees to paint the picture of Simmons as a seventeen-year-old who, “to some extent did good for one of his age,” but none of those people were willing to discuss anything positive about the boy. *Id.*

133. *Simmons*, 543 U.S. at 557; see *Simmons*, 944 S.W.2d at 191.

134. *Simmons*, 543 U.S. at 557; see *Simmons*, 944 S.W.2d at 191.

135. *Simmons*, 543 U.S. at 558; see *Simmons*, 944 S.W.2d at 191.

136. *Simmons*, 543 U.S. at 558; see *Simmons*, 944 S.W.2d at 191.

137. *Simmons*, 543 U.S. at 558; see *Simmons*, 944 S.W.2d at 181.

138. *Simmons*, 543 U.S. at 559.

139. *Id.* (citing *Simmons v. State*, 522 U.S. 953 (1997)).

140. *Simmons*, 543 U.S. at 559 (citing *Simmons*, 944 S.W.2d at 191).

141. *Simmons*, 543 U.S. at 559 (citing *Simmons v. Bowersox*, 235 F.3d 1124, 1127 (8th Cir. 2001)).

142. *Simmons*, 543 U.S. at 559 (citing *Simmons*, 235 F.3d at 1127).

Simmons' defense. The United States Supreme Court decided *Atkins v. Virginia* and held that the Eighth Amendment prohibited the execution of mentally retarded persons, finding them categorically less culpable for their criminal actions.¹⁴³ Simmons filed a new petition for postconviction relief, asserting that the Constitution prohibited the execution of a juvenile who was less than eighteen years of age at the commission of a capital offense on precisely the same grounds that the *Atkins* Court abolished the execution of mentally retarded persons.¹⁴⁴ This petition succeeded, and the Missouri Supreme Court accepted Simmons' argument that a national consensus against the imposition of the death penalty on juveniles had in fact developed and that the Constitution prohibited the punishment.¹⁴⁵ Disregarding the binding precedent in *Stanford*,¹⁴⁶ the state court set aside Simmons' death sentence and re-sentenced him to life in prison.¹⁴⁷ Finally, the United States Supreme Court granted certiorari.¹⁴⁸

The United States Supreme Court approached the constitutionality issue in *Simmons* much the same as it had in previous cases, reviewing "objective indicia of consensus" and exercising the Court's own independent judgment.¹⁴⁹ As before, such objective indicia included legislative enactments and the practice of sentencing juries.¹⁵⁰ The Court's opinion draws direct parallels to *Atkins* and summarily concludes that, while there are some differences in the extent to which each issue manifested the development of a national consensus against the punishment, there was a consensus nonetheless.¹⁵¹

In the course of its reasoning, the Court pointed to three elements that distinguished juvenile offenders from adult offenders in such a way that juveniles should not be "classified among the worst offenders," and therefore not subject to capital punishment.¹⁵² First, the Court noted scientific and sociological studies suggesting

143. 536 U.S. at 306–07.

144. *Simmons*, 543 U.S. at 559; *Atkins*, 536 U.S. 304.

145. *Simmons*, 543 U.S. at 559 (citing *State ex rel. Simmons*, 112 S.W.3d at 399).

146. 492 U.S. 361.

147. *Simmons*, 543 U.S. at 560 (citing *State ex rel. Simmons*, 112 S.W.3d at 413 (noting the new sentence called for "life imprisonment without eligibility for probation, parole, or release except by act of the Governor")).

148. *Simmons*, 543 U.S. at 560 (citing *Roper v. Simmons*, 540 U.S. 1160 (2004)).

149. *Simmons*, 543 U.S. at 564. In addition to the other mentioned indicia, the *Simmons* Court was also compelled by international views and the fact that no other country besides the United States officially sanctioned the imposition of the death penalty on juveniles at the time the case was decided. In spite of the Court's assertion that international law did not control its decision, the influence of such law can not be doubted, as a notable portion of the *Simmons* opinion was devoted to discussing international policies against the juvenile death penalty. *Id.* at 575–78.

150. *Id.* at 564–65. The Court summarized,

As in *Atkins*, the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as "categorically less culpable than the average criminal."

Id. at 567 (citing *Atkins*, 536 U.S. at 316). For an interesting opinion-editorial discussion of the national-consensus argument in this case, review Tony Blankley, *Black Robes and Betrayal: When Less Than 50 Percent Is a Consensus*, Wash. Times (D.C.) A17 (Mar. 2, 2005). Blankley, echoing Justice Scalia's dissent, criticized the majority finding of a consensus based on the existence of eighteen states (that is, forty-seven percent of the Nation) having legislation prohibiting the execution of juvenile offenders. *Id.*

151. *Simmons*, 543 U.S. at 564–67; *Atkins*, 536 U.S. 304.

152. *Simmons*, 543 U.S. at 569. For a more detailed discussion of the Court's reasoning on these points,

juveniles lack a sense of responsibility and maturity and thus are prone to act impulsively and imprudently.¹⁵³ Second, juveniles are more vulnerable to outside influences, particularly peer pressure.¹⁵⁴ Third, because their personalities and sense of character are not well established, it is implied that juveniles are not as culpable for their actions.¹⁵⁵

Next, the Court considered the penological justifications of retribution and deterrence, yet another oft-argued point of death penalty jurisprudence.¹⁵⁶ On this issue, the Court again deferred to the *Atkins* rationale,¹⁵⁷ holding that the lesser culpability of juveniles invalidated the retributive theory and that deterrence provided no adequate justification for imposing the death penalty on a juvenile offender either.¹⁵⁸ Ultimately, the bare majority (though fiercely opposed by the dissenting Justices) held *Stanford*¹⁵⁹ no longer controlled on the issue of the juvenile death penalty.¹⁶⁰ Affirming Missouri's eleventh-hour judgment commuting Simmons' death sentence, the United States Supreme Court held that the execution of any juvenile offender was unconstitutional under the Eighth and Fourteenth Amendments.¹⁶¹

V. JUSTICE O'CONNOR AND THE EIGHTH AMENDMENT

A. Justice O'Connor Dissents

Justice O'Connor disagreed.¹⁶² In her opinion, the majority decision in *Simmons* was premature because very little had in fact changed since the 1989 decision of *Stanford*.¹⁶³ In her dissent, O'Connor discussed the concept of "national consensus"¹⁶⁴ to the extent she believed no genuine consensus existed to justify the majority's

review *id.* at 569–70.

153. *Id.* at 569.

154. *Id.*

155. *Id.* at 570.

156. *Simmons*, 543 U.S. at 571–72. *Thompson* held the death penalty did not serve the penological purpose of retribution (avenging the crime) because juvenile offenders under the age of fifteen were less culpable in the first place. 487 U.S. at 838. The purpose of deterrence, the Court said, also was not served because such offenders were likely incapable of cold-calculation of a murder, and, even if they were, the knowledge of the relative infrequency of the penalty would nullify any deterrent effect. *Id.* *Stanford* flipped the coin and rejected that very argument in the context of sixteen- and seventeen-year-old offenders. 492 U.S. at 377. The majority scoffed, "If such evidence could conclusively establish the entire lack of deterrent effect and moral responsibility, resort to the Cruel and Unusual Punishments Clause would be unnecessary; the Equal Protection Clause of the Fourteenth Amendment would invalidate these laws for lack of rational basis." *Id.* at 378. See *infra* n. 196 (discussing retribution and deterrence).

157. *Simmons*, 543 U.S. at 571 (citing *Atkins*, 536 U.S. at 319).

158. *Simmons*, 543 U.S. at 571–72. The Court was less definitive in rejecting the deterrence argument but nonetheless resolved its doubt given the opinion that life imprisonment without the possibility of parole was a severe enough sanction to achieve any deterrent effect. *Id.* at 572.

159. 492 U.S. 361.

160. *Simmons*, 543 U.S. at 574.

161. *Id.* at 578–79.

162. *Id.* at 587–607 (O'Connor, J., dissenting).

163. *Id.* at 588; *Stanford*, 492 U.S. 361.

164. Although the particular concept of national consensus is beyond the scope of this paper, review *Simmons*, 543 U.S. at 607–15 (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting); see also Tony Blankley, *supra* n. 150.

categorical exemption of sixteen- and seventeen-year-old murderers from execution, irrespective of “how deliberate, wanton, or cruel the offense.”¹⁶⁵ In her opinion, the majority failed in two respects: (1) it failed to rebut the notion “that at least *some* [seventeen]-year[-]old murderers . . . deserve the death penalty” and (2) it failed to prove that “juries [were] incapable of accurately” taking a defendant’s age and maturity into account.¹⁶⁶ She criticized the majority for relying “on its [own] independent moral judgment” to so great an extent that its reasoning lacked any clear or substantial supporting evidence.¹⁶⁷ Because, historically, evidence has shown “at least *some*” juvenile offenders are sufficiently mature to warrant the death penalty and because juries have not habitually failed to consider the mitigating factors of youth in recommending death, the majority’s categorical prohibition was unsubstantiated.¹⁶⁸

Nevertheless, Justice O’Connor conceded two critical points to the majority. She believed (1) the Court’s description of Eighth Amendment jurisprudence was sound, with attention to the principle of *proportionality* remaining critical to the discussion of capital punishment,¹⁶⁹ and (2) generally, adolescents are indeed less mature and therefore less blameworthy than adults.¹⁷⁰ That being said, however, the mere fact “that juveniles as a class are *generally less* mature, *less* responsible, and *less* fully formed than adults, and that these differences bear on juveniles’ comparative moral culpability”¹⁷¹ is neither reliable nor reasonable grounds for categorically finding sixteen- and seventeen-year-old murderers wholly incapable of “[being] *sufficiently* culpable to merit the death penalty.”¹⁷²

Though she validated the Court’s Eighth Amendment analysis, Justice O’Connor suggested the majority went too far by misapplying its thought processes from *Atkins* to the distinguishable case of *Simmons* and the issue of executing juvenile offenders.¹⁷³ Where the majority focused on the apparent similarities between juveniles and the mentally retarded, O’Connor found such evidence too weak to warrant equal treatment of the two groups.¹⁷⁴ Though she stood with the *Atkins* majority, even in that case, O’Connor believed evidence of a national consensus, absent any other objective consideration, was not strong enough to support the Court’s holding.¹⁷⁵ Consequently the Court compensated for that deficiency by infusing its own moral judgment, which

165. *Simmons*, 543 U.S. at 587 (O’Connor, J., dissenting).

166. *Id.* at 588 (emphasis in original).

167. *Id.*; see also *id.* at 617 (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting) (“[T]he Court looks to scientific and sociological studies, picking and choosing those that support its position . . . [but] never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding.”).

168. *Id.* at 588 (O’Connor, J., dissenting).

169. *Simmons*, 543 U.S. at 588–89 (An analysis of proportionality is critical to determining whether a punishment is excessive or appropriate in its severity as compared to the crime it is intended to redress.).

170. *Id.* at 591.

171. *Id.* at 599 (emphasis added).

172. *Id.* (emphasis in original).

173. *Id.* at 592–93; *Atkins*, 536 U.S. 304.

174. *Simmons*, 543 U.S. at 595 (O’Connor, J., dissenting) (She concludes, “[O]bjective evidence of national consensus” against the execution of juvenile offenders “is marginally weaker” than it was for the execution of mentally retarded offenders at the time of *Atkins*, 536 U.S. 304.).

175. *Simmons*, 543 U.S. at 598 (O’Connor, J., dissenting); *Atkins*, 536 U.S. 304.

“played a *decisive* role in” the decision to exempt mentally retarded persons from capital punishment.¹⁷⁶ In *Simmons*, with the evidence of national consensus also weak, O’Connor believed even the rationale behind the Court’s moral judgment was too “flawed” to support the same holding exempting juveniles from capital punishment.¹⁷⁷

As a class, juveniles are “qualitatively and materially different from the mentally retarded.”¹⁷⁸ For the Court to treat the two groups as equivalent is to say that juvenile immaturity “equat[es] with the major, lifelong impairments suffered by the mentally retarded,” and such a conclusion, says O’Connor, “defies common sense.”¹⁷⁹ Although the two groups may be comparable to some degree, they are certainly not equivalent—the attributes that define mental retardation are much more standardized and pervasive than those of adolescence.¹⁸⁰ There is little doubt that juveniles might be *less* culpable and that the threat of execution is *less* likely to deter juveniles than adults, but mentally retarded people represent an entirely distinct population.¹⁸¹ Mentally retarded people are *so* severely impaired, “so highly,” if not completely, incapable of the requisite criminal culpability, and *so* unlikely to be deterred by the threat of execution that they are not just *less* deserving of the death penalty; rather, the penalty is simply so inappropriate for them as to be unconstitutional.¹⁸² In the words of Justice O’Connor, the group of persons immunized from the threat of execution by *Simmons* “is too broad and too diverse to warrant a categorical prohibition. Indeed, the age-based line drawn by the Court is indefensibly arbitrary.”¹⁸³

The majority’s penchant for making conclusions without supporting evidence drew additional criticism from O’Connor. The majority elicited nothing to support “that it is only in ‘rare’ cases, if ever, that [seventeen]-year-old murderers are sufficiently mature and act with sufficient depravity to warrant the death penalty.”¹⁸⁴ Similarly, while it might indeed be true that the threat of death may be a less effective deterrent for juveniles than adults, such assertion is largely conjecture, and the Court failed to elicit any evidence that such threat is entirely incapable of *ever* being an effective deterrent for at least *some* sixteen- and seventeen-year-olds.¹⁸⁵ O’Connor continued, “at least at the

176. *Simmons*, 543 U.S. at 598 (O’Connor, J., dissenting).

177. *Id.* (“[T]he proportionality argument against the juvenile death penalty . . . proves too weak to resolve the lingering ambiguities in the objective evidence of legislative consensus or to justify the Court’s categorical rule.”).

178. *Id.* at 602.

179. *Id.*

180. *Id.*

181. *Simmons*, 543 U.S. at 598–604 (O’Connor, J., dissenting).

182. *Id.* at 602, 606.

183. *Id.* at 601.

184. *Id.* at 599 (citing *id.* at 572 (majority)).

185. *Simmons*, 543 U.S. at 600 (O’Connor, J., dissenting). Victor Streib makes the following observation about deterrence:

The death penalty has always been and is likely always to be extremely rare, and thus its ineffectiveness as a deterrent stems in part from the knowledge that more than [ninety-nine percent] of offenders who kill will never face execution. . . . Therefore, any possible deterrent effect for [juveniles and the mentally retarded] is greatly limited by this overall phenomenon.

Streib, *supra* n. 35, at 320. In other words, because deterrence is generally such a weak justification, juveniles and the mentally retarded are likely to be even less deterred.

margins between adolescence and adulthood . . . the relevant differences between ‘adults’ and ‘juveniles’ appear to be a matter of degree, rather than of kind.”¹⁸⁶ Because evidence was so scant in support of the majority’s “sweeping conclusion[s],” such conclusions should not have been made law.¹⁸⁷

While there very well might be a day when the Nation as a whole finds the juvenile death penalty grossly unreasonable and contrary to the “standards of [human] decency,”¹⁸⁸ that day was not March 1, 2005, when five Supreme Court Justices in *Simmons* narrowly abolished the penalty.¹⁸⁹ “Whatever can be said about the comparative moral culpability of [seventeen]-year-olds as a general matter, Simmons’ actions unquestionably reflect “a consciousness materially more depraved than that of . . . the average murderer.”¹⁹⁰ The simple fact that Simmons thought he could get away with murder indicates a conscious contemplation of the risks of punishment. Further, his belief that his minority shielded him from the ultimate penalty only bolstered his murderous resolve.¹⁹¹ If any juvenile could suffice as what the majority termed a “rare case,”¹⁹² Simmons seemed to be it. It was entirely reasonable for the jury to find that, in spite of his youth, Simmons was sufficiently psychologically mature and depraved to merit execution for his crimes.¹⁹³ As one of Crook’s surviving daughters said, “‘Boys will be boys’ is for when they break a vase or throw a ball through a window accidentally,” not for when they plan and execute the brutal torture and murder of an innocent woman.¹⁹⁴

The holding and conclusion seem unsubstantiated or, at the very least, premature given the facts of this case and the rationale of the Court, particularly concerning the comparative culpability of juveniles and the mentally retarded. Justice O’Connor’s predominant complaint with the majority’s holding was simply that it was unsupported: the objective evidence was less than conclusive and the Court’s own moral conclusions lacked any sound evidentiary basis to compensate.¹⁹⁵

B. *Eighth Amendment Culpability, Blameworthiness, and Proportionality*

A government’s authority to punish has been upheld only to the extent the punishment “makes ‘[a] measurable contribution’ to acceptable penal goals” and is not “grossly [disproportionate] to the severity of the crime.”¹⁹⁶ Those imposing capital

186. *Simmons*, 543 U.S. at 600 (O’Connor, J., dissenting).

187. *Id.* at 599.

188. *Trop*, 356 U.S. at 101.

189. 543 U.S. at 591. Justice O’Connor makes an almost identical argument to this one, quoting herself in *Stanford* saying, “The day may come when there is such general legislative rejection of the execution of [sixteen]- or [seventeen]-year-old capital murderers that a clear national consensus can be said to have developed. . . . I do not believe that day has yet arrived.” 492 U.S. at 381–82 (O’Connor, J., concurring in part and concurring in the judgment).

190. *Simmons*, 543 U.S. at 601 (O’Connor, J., dissenting) (quoting *Atkins*, 536 U.S. at 319) (internal quotation marks omitted) (omitted text in original).

191. *Id.*

192. *Id.* at 572 (majority).

193. *Id.* at 601 (O’Connor, J., dissenting).

194. Simon, *supra* n. 116.

195. *Simmons*, 543 U.S. at 606 (O’Connor, J., dissenting).

196. *Id.* at 589 (quoting *Coker*, 433 U.S. at 592). In the context of the death penalty, the predominant penal

punishment must be particularly attentive “to the nature of the crime itself and to the defendant’s ‘personal responsibility and moral guilt,’” lest they risk offending the defendant’s constitutional rights.¹⁹⁷ Under the Eighth Amendment, determining what constitutes “grossly out of proportion,” and therefore cruel and unusual, depends on the people’s moral disposition.¹⁹⁸ Consequently, the concept of what is cruel and unusual punishment changes over time, such that a practice acceptable and routine at one place and time might later be unconstitutional as the standards of judgment evolve.¹⁹⁹

Determining the bounds of the Eighth Amendment entails a careful interpretation of the statutory language, legislative history, common law precedents, and society’s “evolving standards of decency.”²⁰⁰ While the Court purported to discern these “standards” through an analysis of “objective indicia,”²⁰¹ the dissenting Justices in *Simmons* revealed that such analysis can be a judicial exercise that is actually quite far from objective.²⁰² Ultimately, the *Simmons* Court heavily applied its own independent moral judgment to determine the constitutionality of executing juvenile offenders who were sixteen or seventeen years old at the commission of the crime.²⁰³

Culpability and blameworthiness are the issues at the crux of the “evolving standards of decency” analysis and the arguments to abolish the death penalty for both juveniles and mentally retarded persons.²⁰⁴ The terms “culpability” and “blameworthiness” are generally synonymous in meaning and influence the determination of the severity of punishment to impose on an offender.²⁰⁵ The concepts

goals involve the deterrence and retribution theories of punishment. Retribution has been described as “seeing that the offender gets his ‘just deserts.’” *Atkins*, 536 U.S. at 319. In other words, retribution uses punishment as pay back, avenging the criminal offense. More so than other theories, retribution is reminiscent of the proverbial “eye for an eye” type of punishment. The theory of deterrence, instead, focuses on the preventative quality of the penal system (i.e., punishment to prevent would-be criminals from going through and perpetrating crimes), relying on the notion that people generally watch and learn from the experiences and mistakes of others. *Id.* The fact that another person commits a crime and is sentenced to execution, theoretically, serves to prevent you from committing that same crime for fear that you too would be executed. As pertains to juveniles and mentally retarded persons, the death penalty has been thought to further neither goal, and, consequently, the punishment is regarded as futile and unconstitutional. The death penalty is reserved for a very narrow group of people that society deems to be the absolute worst offenders. As Victor Streib comments, “The American death penalty system shunts aside the arguments either that *all* murderers should be executed or that no murderers should be executed.” *Supra* n. 35, at 318. If, for the sake of argument, juveniles and mentally retarded persons are not even capable of the level of criminal culpability that is implicated in capital crimes, it does not seem appropriate to seek revenge on such “blameless” individuals who arguably act in spite of themselves. *Simmons*, 543 U.S. at 560–62; *Atkins*, 536 U.S. 319. Furthermore, if because of their incapacities, those same people are deficient in their abilities to rationalize and weigh the costs of crime against the benefits, it is doubtful that the threat of death, particularly being that it is so rarely applied, would ever prevent their criminal actions. *Simmons*, 543 U.S. at 560–62; *Atkins*, 536 U.S. 319.

197. *Simmons*, 543 U.S. at 589 (O’Connor, J., dissenting) (quoting *Enmund*, 458 U.S. at 801).

198. *Id.* (quoting *Coker*, 433 U.S. at 592).

199. *Id.* (citing *Trop*, 356 U.S. 86; *Stanford*, 492 U.S. 361).

200. *Simmons*, 543 U.S. at 551 (majority) (quoting *Trop*, 356 U.S. at 101).

201. *Simmons*, 543 U.S. at 552 (majority); see *Atkins*, 536 U.S. 304.

202. *Simmons*, 543 U.S. at 588 (O’Connor, J., dissenting), 608 (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting). Justice Scalia comments directly, “I do not believe that the meaning of our Eighth Amendment . . . should be determined by the subjective views of five Members of this Court.” *Id.* at 608 (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting).

203. *Id.* at 560 (majority).

204. *Simmons*, 543 U.S. at 568 (majority) (citing *Atkins*, 536 U.S. at 319); Streib, *supra* n. 35, at 318.

205. In the context of the Eighth Amendment, courts use the terms “culpability” and “blameworthiness” interchangeably to indicate the defendant’s particular *mens rea* at the commission of the crime, specifically in

refer to a state of guilt and necessarily take into account “the amount of harm inflicted[, and] the maturity and clarity of the mental and emotional state of the offender at the time of the crime.”²⁰⁶ In the criminal context, the Eighth Amendment tends to mandate that the death penalty may only be constitutionally imposed in direct proportion to the criminal’s conduct.²⁰⁷ If such proportionality is not adhered to, a sentence of death is likely “cruel and unusual.”²⁰⁸

Advocates in support of the abolition of the death penalty for the mentally retarded noted that the very nature of mental retardation impairs moral reasoning and impulse control to such an extent that it is essentially *impossible* for mentally retarded persons to be that highly culpable to merit capital punishment for the crimes they commit.²⁰⁹ Recognizing apparent similarities in the behaviors of mentally retarded persons and juveniles,²¹⁰ advocates for the abolition of the juvenile death penalty reasoned that the same absence of culpability exempted juveniles from death-penalty eligibility.²¹¹ Their argument focused primarily on the inability of both groups to fully deliberate and understand the consequences of their actions.²¹² If a person, because of their mental incapacities, is unable to carry out the sort of consideration and contemplation that the average person can carry out, then it seems only just that that person should not be held to the same standards or subject to the same penalties as the rest of society.²¹³ This sort of if-then analysis, however, is not what was objectionable about the Supreme Court’s opinion in *Simmons*.

The tragic error of the Court’s opinion was that it determined, without substantiation, that juveniles, as a class, are *wholly incapable* of the sort of mental processes and culpability that would justify a sentence of death.²¹⁴ It concluded that juveniles, without exception or qualification, are not culpable enough to deserve our Nation’s severest criminal sanction without any solid evidence to suggest that this is true.²¹⁵ More tragic still is the Court’s willingness not only to accept but also to advance the argument that juveniles are the same as mentally retarded persons. They are not.

VI. CHARACTERIZING THE OFFENDER

A. *The Mentally Retarded Mind and Being*

Professionals and lay people alike often characterize mentally retarded persons as

terms of the defendant’s guilty intent. See *Simmons*, 543 U.S. at 562 (citing *Stanford*, 492 U.S. at 377–78).

206. Streib, *supra* n. 35, at 318.

207. *Id.*

208. *Id.*

209. *Id.*

210. Typically, the analogy has implied a likeness to younger juveniles (e.g., under the age of fourteen or fifteen); however, *Simmons* uses that the term “juvenile” to encompass all those persons below the age of eighteen.

211. See Beckman, *supra* n. 42.

212. *Id.*

213. *Simmons*, 543 U.S. at 569–72 (majority).

214. *Id.*

215. *Id.*; see e.g. *id.* at 569–72.

functionally equivalent to ten- or fourteen-year-old children.²¹⁶ In fact, most mentally retarded people,²¹⁷ classified as mildly retarded, may only attain the academic skills of a fifth- or sixth-grade child.²¹⁸ Hence, opponents of the juvenile death penalty argue, “mental age should determine death penalty eligibility.”²¹⁹ Further, because the Court exempted juveniles under the chronological age of sixteen from the death penalty in 1988,²²⁰ mentally retarded people, whose mental age scarcely reaches that of an eleven- to twelve-year-old, should certainly be exempt from capital punishment.²²¹ Accordingly, in the 2002 United States Supreme Court decision in *Atkins*, they were.²²²

Historically, people have referred to mental retardation variously, using terms like “idiocy” and “mental deficiency.”²²³ Once regarded as a homogeneous genetic defect, which caused delinquency and lewdness, people regarded mental retardation as a threat to “the genetic stock of the population.”²²⁴ Negative attitudes and stigmas against mental retardation did not relent much until President John F. Kennedy presented Congress with a task force report on mental retardation and mental illness in 1963.²²⁵ In conjunction with that report, the President called for a national program to help prevent mental retardation, which in turn led to modern efforts to identify the causes of other associated disorders and to better define the condition itself.²²⁶ Today, the American Association on Mental Retardation defines the condition thus:

Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, homeliving, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age eighteen.²²⁷

216. Streib, *supra* n. 35, at 314.

217. Irwin G. Sarason & Barbara R. Sarason, *Abnormal Psychology: The Problem of Maladaptive Behavior* 488 (9th ed., Prentice Hall 1999). Approximately eighty-five percent of people diagnosed as mentally retarded are diagnosed as mildly retarded; ten percent are considered moderately retarded; three or four percent are severely retarded; and one or two percent, with IQs below twenty to twenty-five, are considered profoundly retarded. *Id.*

218. *Id.* Mentally retarded people represent the lowest 2.5 percent of the population in IQ; *see also* Streib, *supra* n. 35, at 315.

219. *Id.* at 314 “Mental age” is a term that refers to the technique of “compar[ing] the intellectual functioning of the individual being tested with that of a mentally typical person.” *Id.* at 315.

220. *Thompson*, 487 U.S. 815.

221. Streib, *supra* n. 35, at 314.

222. 536 U.S. 304.

223. Sarason & Sarason, *supra* n. 217, at 489.

224. *Id.* at 487. Eugenics, a now-discarded social movement most prevalent in the late nineteenth to early twentieth centuries, advocated for the genetic improvement of the population via sterilization, institutionalization, restricted immigration, and even extermination of “imbeciles” and the “feeble-minded” (terms understood to include the mentally retarded). *See id.* at 487–88; Wikipedia, *Eugenics*, <http://en.wikipedia.org/wiki/Eugenics> (accessed Oct. 29, 2005). Mental retardation is now understood to be a heterogeneous classification with various causes, not all of which are currently known or fully understood. Sarason & Sarason, *supra* n. 217, at 489.

225. *Id.* at 488–89.

226. *Id.* at 489.

227. Streib, *supra* n. 35, at 314 (quoting Am. Assn. Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (9th ed., AAMR 1992)). This definition is nearly equivalent to the American Psychiatric Association’s definition in the Diagnostic and Statistical Manual of Mental Disorders

As a direct consequence of their “subaverage intellectual functioning,”²²⁸ mentally retarded people have trouble with “reasoning, judgment, and control of their impulses.”²²⁹

The causes of mental retardation are numerous but can generally be categorized into two groups: one group originating from pathological conditions affecting the brain and nervous systems and the other group with apparently psychosocial origins.²³⁰ The cognitive impairments associated with mental retardation seem to have both genetic and environmental components “that bring the person over the threshold from normality to pathology.”²³¹ Studies suggest that as many as forty percent or more of the people diagnosed with mental retardation also suffer from some other psychological disorder.²³² People who are severely retarded are more likely to be self-injurious and display psychosis or hyperactivity, while people who are mildly or moderately retarded frequently tend to suffer from depression.²³³ “Up to [ten percent] of mentally retarded persons have serious mood disorders,”²³⁴ and as many as “half of all adults with mental retardation have dysfunctional personalities.”²³⁵ Mentally retarded people are often over-dependent and have poor self-image and limited aspirations.²³⁶ Due to their deficiencies in reasoning and judgment,²³⁷ their methods of problem solving are typically ineffective.²³⁸

Research shows that their notions of “blameworthiness and causation” can be “incomplete or immature.”²³⁹ As a defendant, an entirely innocent mentally retarded person might plead guilty to a robbery simply because she thinks someone ought to be blamed or might confess to a murder just because she thinks it will please her accuser.²⁴⁰ Complicating matters even further, mentally retarded people often fail to acknowledge

(commonly referred to as the DSM-IV). That definition characterizes mental retardation as satisfaction of the following criteria:

(1) [s]ignificantly below-average intellectual functioning, with an IQ of approximately [seventy] or below on an individually administered IQ test . . . and (2) deficits or impairments in the person's effectiveness in meeting the standards expected for his or her age by his or her cultural group in at least two of the following areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety, [and (3) all manifesting] before the age of [eighteen].

Sarason & Sarason, *supra* n. 217, at 487; *see Atkins*, 536 U.S. at 308 n. 3.

228. Streib, *supra* n. 35, at 314.

229. *Atkins*, 536 U.S. at 306.

230. Sarason & Sarason, *supra* n. 217, at 489.

231. *Id.*

232. *Id.* at 501–02 (citing S.L. Einfeld & B.J. Tonge, *Population Prevalence of Psychopathology in Children and Adolescents with Intellectual Disability: II Epidemiological Findings*, 40 *J. Intell. Disability Research* 99–109 (1996)).

233. Sarason & Sarason, *supra* n. 217, at 502.

234. *Id.*

235. *Id.* (citing J.D. Bregman & J.C. Harris, *Mental Retardation*, in *A Comprehensive Textbook of Psychiatry* 2207–41 (Harold I. Kaplan & Benjamin J. Sadock eds., 6th ed., Williams & Wilkins 1995)).

236. Sarason & Sarason, *supra* n. 217, at 502 (citing Edward Zigler & Jacob A. Burack, *Personality Development and the Dually Diagnosed Person*, 10 *Research in Developmental Disabilities* 225–40 (1989)).

237. *Atkins*, 536 U.S. at 306.

238. Sarason & Sarason, *supra* n. 217, at 502.

239. Streib, *supra* n. 35, at 315 (citing James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 *Geo. Wash. L. Rev.* 414 (1985)).

240. *Id.* at 315.

their disability in the criminal justice system and may even deny that they are disabled while showboating, bragging, and simply fabricating facts for any audience they might gain.²⁴¹ Mentally retarded *adolescents* typically display such behaviors to an even greater extent as they become painfully aware of their differences from other normal teenagers.²⁴²

Compared to their normal peers, mentally retarded adolescents are more prone to the vices of the teen-age years, including alcohol and substance abuse, temper tantrums, and aggressive, destructive, and rebellious behavior.²⁴³ Unlike adolescence, however, mental retardation is not something a person can ever just “grow out of.”²⁴⁴ Mental retardation manifests in childhood or adolescence and continues into adulthood with little change.²⁴⁵ If any change does occur, it is more likely for the worse as symptoms of other psychological maladies begin to manifest.²⁴⁶

B. *The Juvenile Mind and Being*

“Juvenile” is a term typically applied to any person younger than eighteen.²⁴⁷ Since *Thompson*, no juvenile under the age of sixteen has been eligible for the death penalty.²⁴⁸ Since 1988, juries could only consider imposing the death penalty on those juvenile offenders who were ages sixteen or seventeen at the time they committed a capital offense.²⁴⁹ It is only this narrow group of adolescents that recently concerned courts and the public, seeking a determination of the appropriateness and constitutionality of the juvenile death penalty.

“Adolescence,” says the Juvenile Justice Center, “is a transitional period during which a child is becoming, but is not yet, an adult.”²⁵⁰ It is “a crossroads of changes where emotions, hormones, judgment, identity and the physical body” are anything but calm and collected.²⁵¹ People who have experienced this stage in life personally, have teenage family members or friends, or who watch television or movies can attest to the fact that adolescence is certainly a trying time of life—not just for the teenager but for those who must live and interact with them.²⁵² Scientific studies, particularly in the

241. *Id.*

242. Sarason & Sarason, *supra* n. 217, at 502.

243. *Id.*

244. *Id.* at 101.

245. *Id.* Mental retardation and personality disorders are classified in the DSM-IV (mentioned *supra* n. 227) as Axis II disorders. Mental retardation is regarded as a pervasive impairment to intellectual functioning. *Id.* For further information on the DSM-IV system of classification, review Sarason & Sarason, *supra* n. 217, at 98–102.

246. *Id.* at 502.

247. Streib, *supra* n. 35, at 305.

248. 487 U.S. 815.

249. *Id.*

250. ABA, *Cruel and Unusual Punishment: The Juvenile Death Penalty—Adolescence, Brain Development and Legal Culpability*, <http://www.abanet.org/crimjust/juvjus/Adolescence.pdf> (Jan. 2004).

251. *Id.*

252. Frontline & PBS, *Inside the Teenage Brain*, <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/etc/script.html> (accessed Sept. 7, 2006). For an interesting discussion on the nature of adolescence in America as compared to other countries, review Leslie Sabbagh, *The Teen Brain, Hard at Work No, Really*, 17 *Sci. Am. Mind* 21, 24–25 (Aug.–Sept. 2006). Sabbagh cites psychologist Robert Epstein, who observed that various studies suggest the tumultuousness of the teenage years and prevalence of antisocial adolescent behavior is

fields of neurology and psychology, show that adolescents are not often as mentally and emotionally mature as adults are and thus are not *as* culpable for their indiscretions as adults are.²⁵³

In the first eighteen months of life, the brain appears to go through a stage of over-production, where it creates more cells and brain-cell connections than can possibly survive.²⁵⁴ While people once popularly thought the first three years of life were the most critical period of brain development, evidence now suggests that different parts of the brain grow and mature at different rates and during different stages in a person's life, well into adolescence.²⁵⁵ By the time a child reaches approximately six years of age, the brain has nearly grown to its full adult capacity, but its complexity has only just begun to develop.²⁵⁶ As time goes on, the brain weeds out excess cells and connections and refines, for example, those parts of the brain that affect judgment and the abilities to organize, plan, strategize, and focus one's attention.²⁵⁷ Biologically, scientists now think that the human brain does not fully mature until some time between the ages of twenty and twenty-five.²⁵⁸

The *Simmons* Court made similar observations, noting that "juveniles have less control, or less experience with control, over their own environment";²⁵⁹ they lack both maturity and a developed sense of responsibility; their actions and decisions are often "impetuous and ill-considered";²⁶⁰ and their sense of character or personality are under-developed.²⁶¹ In the decades-long marathon of maturation, cognitive and emotional functioning seem to cross the finish line in last place.²⁶² Accordingly, given the apparent instability of the human brain, particularly during the teenage years, opponents of the juvenile death penalty argue that capital punishment for sixteen- or seventeen-year-olds is exceedingly cruel and unusual punishment, grossly inappropriate for individuals that are even hard-pressed to get out of bed without a surge of spiteful emotion.²⁶³

Adolescents not only behave differently than adults, but their brains are structured differently and even function differently than adults' brains.²⁶⁴ One study presented

unique to American culture and, therefore, probably not an inherent feature of the brain but rather a learned behavior. *Id.* at 24. In fact, Sabbagh's article notes the lack of words in other cultures to describe the state of "adolescence" reflects that many cultures do not even recognize adolescents as being distinct from adults. *Id.*

253. Frontline & PBS, *supra* n. 252, at *select* Interviews, *select* Deborah Yurgelun-Todd.

254. *Id.* at Yurgelun-Todd. Reading this PBS/Frontline report in full provides a more complete explanation of the developmental processes of the brain..

255. *Id.* at *select* Interviews, *select* John Bruer.

256. *Id.* at *select* Interviews, *select* Jay Giedd.

257. *Id.*

258. Beckman, *supra* n. 42 (posing the question: why not give raise the minimum age for death penalty eligibility even higher than eighteen, to perhaps twenty or twenty-five?); see *Young v. State*, 2005 WL 2374669 at *9 (Tex. Crim. App. Sept. 28, 2005), *cert. denied*, 126 S. Ct. 1652 (2006) (defendant unsuccessfully argued that the Texas death penalty scheme violated the Constitution by permitting the execution of offenders between the ages of eighteen and twenty-one).

259. 543 U.S. at 569.

260. *Id.* (quoting *Johnson v. Tex.*, 509 U.S. 350, 367 (1993)).

261. *Simmons*, 543 U.S. at 570.

262. ABA, *supra* n. 250.

263. *Id.*

264. Beckman, *supra* n. 42, at 597.

adolescents and adults with the same series of photographs and monitored their brains' responses through magnetic resonance imaging.²⁶⁵ Where all the adults in the study would look at a particular face and see, for example, fear, many of the teenagers often interpreted the facial expression as shock, anger, or sadness.²⁶⁶ Adolescents, scientists observe, react emotionally, and their "emotional responses have little inhibition."²⁶⁷ Interestingly though, in a subsequent study where researchers showed adolescents the expressions of *people they knew*, the accuracy with which they identified the correct corresponding emotion improved significantly.²⁶⁸ This finding suggested to scientists that, "adolescents pay attention to things that matter to them but have difficulty interpreting images that are unfamiliar."²⁶⁹

Teens' ability to control their impulses and to look rationally into the future to imagine the consequences of their actions is similarly underdeveloped when compared to the normal abilities of adults.²⁷⁰ The most predictable thing about teen behavior might be, in fact, its unpredictability: moodiness, depression, anger, escapism, drugs, and sexual activity can all be a normal part of "growing up."²⁷¹ Teenagers are often self-absorbed, in need of privacy, prone to unique dress and fascination with music, video games, and talking on the telephone.²⁷² Some people are greatly alarmed by these "symptoms" of adolescence and regard them as clinical "deficiencies"²⁷³ of the utmost concern. Others believe that "[t]his transition in adolescence is not a disease or an impairment [at all. Instead, it's] an extremely adaptive way to make an adult."²⁷⁴ Nevertheless, the concerns of the former group of people fueled this most recent and successful push to abolish the juvenile death penalty in the United States.²⁷⁵ When science found logic buried in the mystery that was adolescent behavior, those eager to eliminate the juvenile death penalty were quick to declare, "[c]apacities relevant to criminal responsibility are still developing when you're [sixteen] or [seventeen] years old."²⁷⁶ Therefore, they argue, to hold adolescents to the same level of moral culpability as adults would be imprudent and contrary to American ideals of justice and civility.²⁷⁷

265. Frontline & PBS, *supra* n. 252, at Yurgelun-Todd. MRI is a noninvasive use of radiofrequency waves and strong magnetic fields to produce detailed images of solid structures, such as human tissues and organs. See Radiology Info, *MR Imaging (MRI)—Body*, http://www.radiologyinfo.org/content/mr_of_the_body.htm (accessed Nov. 25, 2005).

266. Frontline & PBS, *supra* n. 252, at Yurgelun-Todd (noting, however, that the adolescents only seemed less skilled at differentiating subtle emotional variations; they were not, for example, mistaking negative emotions for positive ones).

267. Beckman, *supra* n. 42, at 599.

268. *Id.* (Looking at expressions of familiar faces, they identified the emotion correctly ninety-five percent of the time; with unfamiliar faces, they only interpreted the emotions accurately about seventy-five percent of the time.).

269. *Id.* (suggested by Abigail Baird of Dartmouth College, working with Yurgelun-Todd on adolescents' emotional responses).

270. *Id.*

271. ABA, *supra* n. 250, at 3; see Sarason & Sarason, *supra* n. 217, at 141.

272. ABA, *supra* n. 250, at 3.

273. *Id.*

274. Beckman, *supra* n. 42, at 599 (quoting neuroscientist Beatriz Luna of the University of Pittsburgh).

275. ABA, *supra* n. 250.

276. Beckman, *supra* n. 42, at 596 (quoting Laurence Steinberg of the American Psychological Association).

277. ABA, *supra* n. 250.

Nevertheless, not all adolescents are the same. One author writing about the juvenile justice system suggested that there are essentially two modern conceptions of juvenile offenders: they are either “naïve risk-takers” or “rational calculators.”²⁷⁸ While the “naïve risk-takers” are clearly just “adolescents acting the way adolescents always have: wild and crazy,”²⁷⁹ a select group of “rational calculators” are “hardened criminals” capable of forming criminal intent and committing horrendous crimes with full knowledge of their actions.²⁸⁰

“Naïve risk-takers” are legitimately and understandably unable to appreciate fully the consequences of their action, and they may have no concrete sense of what it means to take the life of another person.²⁸¹ They might not fully think through how their actions will affect a victim physically or psychologically, or, in turn, they might not understand that their criminal actions could result in apprehension and punishment, possibly for the rest of their lives.²⁸² This naïve-risk-taker argument seemed to be at the heart of the abolition of the death penalty. The *Simmons* Court, however, seemed unwilling to address the existence of those “rational calculators” who are fully aware of their actions, fully aware of the consequences and ramifications of those actions (for both themselves and their victims), and yet simply do not care.²⁸³ They methodically and logically plot and plan their crime, they weigh the benefits of committing the crime against the possibility of its consequent injuries and penalties, and they systematically prefer to go through with the criminal act.²⁸⁴ Such behavior is anything but “typical” of adolescent behavior.

278. Thomas J. Bernard, *The Cycle of Juvenile Justice* 168–69 (Oxford U. Press 1992).

279. *Id.* at 267. Bernard continues to poetically explain that process of “growing up.” He says,

After years of being children under the control of adults, they suddenly find they have the freedom to do what they want and adults can't stop them. They celebrate their freedom with exuberance and joy, but they have not yet learned that their actions can have hurtful consequences. They believe they can take all kinds of risks and nothing will ever happen to them. Like Superman, they think bullets bounce off their chest. . . . They are having a good time.

Sooner or later, the consequences actually happen. . . . Someone flunks out of school and is kicked out of the house and takes a dead-end job or can't get a job at all. Someone overdoses on drugs and suffers permanent brain damage. Someone is seriously injured or killed while driving drunk.

Id. at 167. All of a sudden, adolescents are faced with a world that is not all sunny-side-up and they are no longer so indestructible. The realization that “that could happen to me” is a painful experience, which helps an adolescent mature into adulthood. *Id.* at 168.

280. *Id.* at 162.

281. Bernard, *supra* n. 278, at 168–69. This type is particularly descriptive of younger juveniles who are still influenced by “TV image[s] of cops and robbers shooting everyone in sight” and yet everything turns out okay, like the fantasy notion that the good guys always win. *Id.* at 169.

282. *Id.*

283. *Id.* The Court does acknowledge, in passing, that the horrendous crimes and circumstances of some juvenile cases reveal at least “a rare case might arise” where a juvenile is sufficiently mature to warrant the imposition of the death penalty. *Simmons*, 543 U.S. at 599. However, the Court then undermines this very concession by remarking that, categorically, “the differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.” *Id.* However, there is no such risk when it is determined that one particular individual is *sufficiently culpable*—a decision traditionally left to the trier-of-fact.

284. Bernard, *supra* n. 278, at 169. These people, Bernard argues, are first and foremost criminals, and they should be tried and penalized accordingly—they are not appropriate for treatment in the juvenile court system. *Id.*

C. *Juvenility Is Not a Disorder—It Is Not Mental Retardation*

Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia filed an amici curiae brief in *Simmons* presenting a series of cases wherein sixteen- and seventeen-year-olds were “most assuredly . . . able to distinguish right from wrong and to appreciate fully the consequences of their murderous actions.”²⁸⁵ Because such cases exist, the states argued there should be no “bright-line rule categorically exempting” such juveniles from the death penalty, given the arbitrariness of ignoring “how sinister the killing, or how sophisticated the cover-up.”²⁸⁶ Courts, they said, should always assess moral culpability on an individualized basis, and this is precisely where the criminal treatment of juveniles and mentally retarded persons ought to diverge.²⁸⁷ Categorically, evidence suggests that mentally retarded people are virtually *without* blameworthiness as compared to non-retarded offenders, but the evidence for juveniles is simply not as conclusive, either by scientific fact or by common experience.²⁸⁸ Even the few unnamed studies mentioned by the Court fail to support further insinuation that “*all* individuals under [eighteen] are *unable* to appreciate the nature of their crimes.”²⁸⁹ Thus, the amici curiae best summarize their argument in saying:

Where an individual offender—whether adolescent or adult—truly cannot appreciate the wrongfulness of his actions, he should by all means be spared the death penalty. But where an individual—again, adolescent or adult—*can* make informed moral choices, he should be held fully responsible for the human consequences of those actions.²⁹⁰

Unlike juveniles, it is not that the mentally retarded generally *do not* carefully think through their actions or understand the potential consequences, but rather that the mentally retarded often *cannot* engage in such mental and moral deliberations. Ultimately, the objection is to the drawing of a bright-line categorical exemption for a class that, while certainly prone to recklessness and impulsivity, is not clearly “deficient” the way mentally retarded people are.²⁹¹ By and large, the “sort of calculus” involved in committing capital murder, “is at the opposite end of the spectrum from behavior of mentally retarded [people].”²⁹² For juveniles, however, such behavior is certainly within the realm of possibility. Although it is undeniable that juveniles are less mature than normal adults are, “that lesser maturity simply cannot be equated with the major, lifelong impairments suffered by the mentally retarded.”²⁹³

285. Br. of Sts. of Ala., Del., Okla., Tex., Utah & Va. as Amici Curiae in Support of Petr. at 1–2 (Apr. 20, 2004).

286. *Id.* at 1; see also Joseph L. Hoffmann, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 *Hastings L.J.* 229 (1989).

287. *Id.* at 3.

288. Hoffmann, *supra* n. 286, at 234. Hoffmann contends that age is an imperfect reflection of a combination of factors (e.g., maturity and responsibility) that determine the relative culpability of a juvenile. Consequently, he suggests, by establishing a “bright line” ban on the juvenile death penalty, the Court violates the concept of proportionality, which is necessarily implicated in a moral-culpability interpretation of the Eighth Amendment. *Id.* at 231–34; see generally Streib, *supra* n. 35, at 318–19.

289. *Simmons*, 543 U.S. at 618 (emphasis added).

290. Br. of Sts. of Ala., Del., Okla., Tex., Utah & Va. as Amici Curiae, *supra* n. 285, at 3.

291. *Id.* at 2–4.

292. Streib, *supra* n. 35, at 317 (citing *Atkins*, 536 U.S. at 319–20).

293. *Simmons*, 543 U.S. at 602 (O’Connor, J., dissenting).

VII. OTHER CONSIDERATIONS

A. *Age-Status Statutes*²⁹⁴

Beyond the aforementioned, opponents of the juvenile death penalty also point to statutes specifying minimum ages at which persons may participate in certain activities as further cause to abolish the juvenile death penalty.²⁹⁵ The argument contends that, given the existence of age-status restrictions on juveniles' "privileges to vote, serve on a jury, consume alcohol, marry, enter into contracts, and even watch movies with mature content," the death penalty is obviously not appropriate for adolescents.²⁹⁶ Certainly, the authors of such age-status statutes intended to protect adolescents and society from juveniles' recklessness, imperfect sense of responsibility, and even their vulnerability.²⁹⁷ Furthermore, such restrictions logically result from the commonly recognized fact that adolescents are too vulnerable and immature to enjoy the full panoply of adult freedoms, privileges, and independence.²⁹⁸ Accordingly, to some extent, they must be protected from the realities of the world that they have yet to fully experience.²⁹⁹

Nevertheless, although science and experience indicate juveniles, by their very nature, engage in risky and sometimes antisocial behavior, the dissenting Justices in *Simmons* appropriately argue that murder far transcends the bounds of typical risky adolescent behavior.³⁰⁰ As Chief Justice Rehnquist and Justices Scalia and Thomas note in their dissent from the *Simmons* majority,

[I]t is "absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards." Serving on a jury or entering into marriage also involve decisions far more sophisticated than the simple decision not to take another's life.³⁰¹

In fact, legislatures have previously acknowledged that "some minors [are certainly] mature enough to make difficult decisions that involve moral considerations," such as the decision to have an abortion without parental consent.³⁰² "Whether to obtain an abortion," the dissenting Justices continue, "is surely a much more complex decision for

294. Missouri, the originating state for *Simmons*, 543 U.S. 551, has a number of statutes specifying a minimum age for certain activities. For example, children under fourteen cannot generally be employed or work at any occupation (Mo. Rev. Stat. § 294.021 (2005)); children under sixteen cannot obtain a drivers' license (Mo. Rev. Stat. § 302.060 (2005)); intoxicating liquor cannot be sold to or purchased by anyone under twenty-one (Mo. Rev. Stat. §§ 311.310, 311.325 (2005)); persons under the age of eighteen cannot marry without parental consent (Mo. Rev. Stat. § 451.090 (2005)); and persons under the age of twenty-one cannot serve as jurors (Mo. Rev. Stat. § 494.425 (2005)).

295. Hoffmann, *supra* n. 286, at 231.

296. ABA, *supra* n. 250.

297. *Id.*

298. *Id.*

299. See generally Beckman, *supra* n. 42.

300. 543 U.S. at 607-30 (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting).

301. *Id.* at 619 (quoting *Stanford*, 492 U.S. at 374).

302. *Id.* at 620.

a young person than whether to kill an innocent person in cold blood.”³⁰³

While opponents of the juvenile death penalty are quick to point out age-status statutes as further cause to exempt juveniles from execution, previous courts have found that the standards guiding the statutory regulation of civil rights for adolescents are profoundly different from the standards that guide the imposition of the death penalty.³⁰⁴ Establishing a minimum-age requirement for the rights to drive, vote, drink alcohol, and purchase cigarettes, for example, are public policy decisions fundamentally based on categorical determinations that take no consideration of the individual persons affected.³⁰⁵ The criminal justice system, in contrast, does and must take into account an individualized assessment of each criminal actor, particularly in terms of his mental state at the commission of the crime.³⁰⁶ The whole notion of mitigating and aggravating circumstances evidences this desire of the criminal justice system to focus on each particular individual to assure their constitutional rights are honored.³⁰⁷ Age-status statutes “do not represent a social judgment that all persons under the designated ages are not responsible . . . but . . . [only perhaps] that the vast majority are not.”³⁰⁸ Where people might deem such statutes preventative, the nature of the criminal justice system in practice is largely reactive. The criminal system remedies some harm that has already occurred rather than legislating restrictions to prevent or mitigate the potential for future harm. For these reasons, the relevance of age-status statutes to the imposition of the death penalty is largely moot.³⁰⁹

B. *Psychological Disorders, Abuse, and Neglect: Beyond Delinquency and Criminality*

Many further acknowledge that juveniles in the juvenile justice system experience various problems and disorders beyond basic aggressiveness and delinquency.³¹⁰ In

303. *Id.*

304. *Stanford*, 492 U.S. at 374–77.

305. *Id.* at 374–75.

306. *Id.* Consider the concept of *mens rea*. Simplistically speaking, a crime is only committed when the requisite *mens rea* (or “guilty mind”) accompanies some conduct which falls below a certain standard of civility. Author Thomas Bernard explains:

If juveniles could not legally form *mens rea* and thus legally could not commit a crime, they still could kill people and force them to have sex, beat people up and break into houses, and knock old ladies down and take their purses. These would not be crimes, but they are “acts that would be a crime if committed by an adult.”

Supra n. 278, at 89. Thus, it all goes back to the concepts of culpability, blameworthiness, and the unstable nature of juveniles. If they are deemed incapable of being aware of their criminal actions or wholly incapable of recognizing the consequences of those actions for their victims, their liability to be treated the same as an adult offender is called into question. *Id.* at 168.

307. Mitigating circumstances tend to compel a more lenient treatment. *Id.* at 28–30. Aggravating circumstances are the opposite—they tend to compel a more harsh treatment (e.g., the death penalty). The requirement of a finding of aggravating circumstances in capital cases may “[provide] an additional safeguard to ensure that a death sentence [is] not imposed capriciously or arbitrarily.” *Br. of Amici Curiae Just. for All Alliance in Support of Petr.* at 6 (footnote omitted).

308. *Stanford*, 492 U.S. at 374.

309. *Id.*

310. Lisa Rapp-Palicchis & Albert R. Roberts, *Mental Illness and Juvenile Offending*, in *Juvenile Justice Sourcebook: Past, Present, and Future* 289, 290 (Albert R. Roberts ed., Oxford U. Press 2004). Note that the figures discussed in the *Juvenile Justice Sourcebook* are based on offenders in the juvenile justice system, not

fact, the statistics on poverty, neglect, abuse, and psychological disorders of juvenile offenders are alarming.³¹¹ Dr. Chris Mallett of the Bellefaire Jewish Children's Bureau in Ohio completed one study touted as "the most comprehensive study of traumatic experiences in the lives of death row juvenile offenders."³¹² In the study, Mallett found seventy-four percent of the juveniles studied experienced family dysfunction; sixty percent were victims of abuse or neglect; forty-three percent had been diagnosed with a psychiatric disorder; and thirty-eight percent were addicted to drugs or alcohol.³¹³ In 2002, other research in North America similarly indicated that at least two-thirds of juvenile detainees suffered at least one or more mental disorders,³¹⁴ and up to twenty percent of those juveniles had a disorder considered severe.³¹⁵ However, as those disorders occasionally go undiagnosed, the numbers cannot tell the entire story.³¹⁶ Nevertheless, research tends to indicate "a strong correlation between violent and homicidal juvenile offenders and psychotic disorders."³¹⁷

Given the Supreme Court's desire to equate juveniles with the mentally retarded, the findings of one study seem particularly pertinent. In 2000, McGarvey and Waite conducted a study that found "[forty percent] of incarcerated youths met the criteria to receive special education, and nearly [fifty percent] of their sample scored [six] years below their chronological age on language achievement scores."³¹⁸ An older investigation yielded similar results, finding all but two of fourteen juveniles studied on death row had IQ scores lower than ninety.³¹⁹ These studies might suggest that, instead

the criminal system. Some of the more frequently encountered psychological conditions are mood disorders, attention-deficit or hyperactivity disorder, conduct disorder, learning disabilities, and posttraumatic stress disorder. *Id.* at 292–95.

311. ABA, *supra* n. 250, at 3 (citing Chris Mallett, *Socio-Historical Analysis of Juvenile Offenders on Death Row*, 3 *Juv. Corr. Mental Health Rpt.* 65 (2003)).

312. *Id.*

313. *Id.*

314. Rapp-Palicchii & Roberts, *supra* n. 310, at 290–91 (citing Karen M. Abram et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 *Archives of Gen. Psych.* 1133–43 (2002)).

315. *Id.* at 291 (citing C. MacKinnon-Lewis, M.C. Kaufman & J.M. Frabutt, *Juvenile Justice and Mental Health: Youth and Families in the Middle*, in 7 *Aggression and Violent Behavior* 353–63 (2002)).

316. *Id.* at 290.

317. *Id.* at 291. In *State v. Simmons*, one doctor determined Christopher Simmons had "borderline traits" and yet another doctor concluded, "Simmons had a borderline personality disorder and a schizotypal personality disorder." 944 S.W.2d at 184. Nevertheless, Simmons' defense counsel made the strategic decision not to use psychological evidence based on the belief that Missouri juries tended not to use such evidence as a mitigating factor. *Id.* at 184–85. Simmons subsequently characterized this strategic decision as ineffective assistance of counsel. *Id.* at 183. The Missouri Supreme Court summarily rejected the ineffective-assistance-of-counsel argument. *Id.* at 185. For a summary of the psychological diagnoses attributed to Simmons, review Sarason & Sarason, *supra* note 217 at 251–52, 255–60. Among other things, persons with schizotypal personality disorder can exhibit "oddities of thinking, perceiving, communicating and behaving," including aloofness or coldness in affect, not arising to the extreme severity of schizophrenia. *Id.* at 251. Persons with borderline personality disorder experience, "unstable personal relationships, threats of self-destructive behavior, a chronic range of cognitive distortions, fears of abandonment, and impulsivity . . . in such areas as sex, substance abuse, [and] crime." *Id.* at 255–56.

318. Rapp-Palicchii & Roberts, *supra* n. 310, at 291 (citing E.L. McGarvey & D. Waite, *Profiles of Incarcerated Adolescents in Virginia Correctional Facilities: Fiscal Years 1993–1998*, (Richmond, Va. Dept. of Crim. J. Servs. 1999)); Off. of Spec. Educ. Programs, *The National Longitudinal Study: A Summary of Findings* (U.S. Dept. of Educ. 1993).

319. ABA, *supra* n. 250, at 3 (citing D.O. Lewis, J.H. Pincus, B. Bard, E. Richardson, L.S. Prichep, M. Feldman & C. Yeager, *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 5 *Am. J. Psychiatry* 145 (1988)).

of making large-scale comparisons between juveniles and the mentally retarded, courts ought to focus on detailed individual assessment of juveniles and, in turn, continue relying on juries to weigh aggravating and mitigating circumstances in the sentencing of juvenile offenders. Instead of regarding juveniles as categorically less culpable, when in fact the class is too diverse to merit such a broad description, the courts ought to focus on particularized findings of substantially low mental age or IQ as a means of preventing unjust capital sentencing. If studies, such as that of McGarvey and Waite, prove to be valid and reliable, the same protective ends (of safeguarding vulnerable and less culpable defendants) would be achieved without the collateral effect of sparing persons who are truly culpable and deserving of our Nation's stiffest penalty.

Although the research on the nexus between juvenile offenders and mental disorders is relatively underdeveloped, evidence suggests that certain juveniles, but by no means all juveniles, are more prone to substance abuse, peer rejection, and engagement in dangerous, impulsive, and illegal activities.³²⁰ Furthermore, this same group of juveniles is more likely to have been physically abused, to have a parent who has had criminal involvement, and to be generally at higher risk for adult criminality.³²¹ This being the case, it seems more appropriate to consider these juvenile offenders individually, based on their individual mental and psychosocial circumstances, rather than to equate them categorically to the mentally retarded—or even to the average juvenile.

VIII. CONCLUSION

The willingness of the Supreme Court to contend that juveniles are like mentally retarded people and, thus, should be treated the same, at the very least begs reproach. Beyond appeasing death penalty opponents, there can be very little benefit from such an insidious comparison. Think back to your teenage years. How would you feel if all of a sudden the world looked at you as mentally retarded, simply because of your age? Imagine people talking to you (or about you), not in the cavalier joking and non-politically correct “Oh, you're so retarded!” sort of way, but in the “Bless his heart” pitiful sort of way. What would that do to your sense of self and independence? By the same token, what if you were mentally retarded or had a close friend or relative that was? Could you even imagine someone suggesting that mental retardation is just like adolescence—as though just growing older could make your retardation go away? Although these examples are admittedly exaggerated, the point is simple: adolescence is a developmental stage that children will learn from and grow out of. Short of tremendous advances in science, however, a mentally retarded person will always be mentally retarded.

Sure, normal juveniles may do stupid things, get into trouble, make mistakes, and

320. Rapp-Palicchì & Roberts, *supra* n. 310, at 291 (citing Jennifer A. Rosenblatt, Abram Rosenblatt & Edward E. Biggs, *Criminal Behavior and Emotional Disorder: Comparing Youth Served by the Mental Health and Juvenile Justice Systems*, 27 *J. Behavioral Health Servs. & Research* 227–37 (2000); Stephanie H. McConaughy & Russell J. Skiba, *Comorbidity of Externalizing and Internalizing Problems*, 25 *Sch. Psychol. Rev.* 678–91 (1993)).

321. Rapp-Palicchì & Roberts, *supra* n. 310, at 291.

sometimes hurt themselves or others in the process—but taking the life of another willfully, knowingly, and without any sense of apprehension or remorse is simply *not* a normal part of maturation, nor is it in any way characteristic of mental retardation. As Chief Justice Rehnquist and Justices Scalia and Thomas acknowledged in their dissent,

Though [cases of juveniles committing unimaginable murders] are assuredly the exception rather than the rule, the studies the Court cites in no way justify a constitutional imperative that prevents legislatures and juries from treating exceptional cases in an exceptional way—by determining that some murders are not just the acts of happy-go-lucky teenagers, but heinous crimes deserving of death.³²²

Many scientists, whose work seems to have inspired the opinions of the *Simmons* majority, even state that the conclusions about their data are simply unknown.³²³ Neuroscientist Paul Thompson admonished that, while brain studies and research should inform political debates and decisions, the use of scientific evidence “to support essentially moral stances” is dangerous and harmful.³²⁴ Similarly, as Jay Giedd of the National Institute of Mental Health observed, the data that would allow a scientist to testify confidently to a person’s moral or legal culpability is simply not available.³²⁵ Imaging does not supply the information necessary to connect particular behaviors (such as criminality) to the structure of the brain in any kind of diagnostic fashion.³²⁶ Science and medicine should inform the courts; they should not effectively legislate for one cause or another.³²⁷

Ultimately, “[i]t is entirely consistent to believe that young people often act impetuously and lack judgment, but, at the same time, to believe that those who commit premeditated murder are—at least sometimes—just as culpable as adults.”³²⁸ Surely, kids are daring and wild, and they do things people with more age, experience, and wisdom might never do, but to sit down, plot, and plan murder and then actually take another person’s life? Are we as Americans truly prepared to write off cold-blooded murder as just another thing teenagers do because they can’t help themselves?

Once one accepts the argument that sixteen- and seventeen-year-olds should be exempt from the death penalty because, like mentally retarded people, their brains are immature, what makes the execution of an eighteen-, nineteen-, or twenty-year-old any less repugnant to society and the Constitution for the same reason? After all, scientists believe the brain does not *fully* mature until a person is twenty to twenty-five years old.³²⁹ Whether it intended to do so or not, by virtue of its decision in *Simmons*, the Supreme Court has quite possibly kick-started the final push to abolish capital punishment in America altogether.³³⁰ Even more noteworthy than that, however, is the

322. *Simmons*, 543 U.S. at 619 (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting).

323. Frontline & PBS, *supra* n. 252.

324. Beckman, *supra* n. 42, at 596.

325. *Id.* at 599.

326. *Id.*

327. *Id.*

328. *Simmons*, 543 U.S. at 618 (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting).

329. Beckman, *supra* n. 42, at 596.

330. 543 U.S. at 551. As an aside, the decision in *Simmons* affected seventy-two juveniles in twelve states. Death Penalty Information Center, *U.S. Supreme Court: Roper v. Simmons*, <http://>

fact that the Court's rationale has effectively lowered the bar of personal responsibility for our Nation's youth. Though it may be no great tragedy or surprise that the Court has abolished the juvenile death penalty, *per se*, the fact it did so by likening juveniles to the mentally retarded forever tarnishes what should have been a respectable and momentous occasion in American jurisprudence.

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www.deathpenaltyinfo.org/article.php?scid=38&did=885 (accessed Sept. 2, 2006).

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