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## When Something Wicked This Way Comes: Evolving Standards of Indecency - Thompson and Stanford Revisited

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WHEN SOMETHING WICKED THIS WAY COMES:<sup>1</sup> EVOLVING  
STANDARDS OF INDECENCY—*THOMPSON* AND *STANFORD*  
REVISITED

“The day may come when we must decide whether a legislature may deliberately and unequivocally resolve upon a penalty authorizing capital punishment for crimes committed at the age of 15.”<sup>2</sup>

-Justice O’Connor

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I. INTRODUCTION

From colonial times through the late 1800s, children and adults were tried and sentenced in the same penal system. In 1899, Illinois established the first juvenile justice system in an effort to separate juveniles from adult crimes and punishments.<sup>3</sup> Almost a century later, with all fifty states having implemented a juvenile justice

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<sup>1</sup>William Shakespeare, *Macbeth* (The Three Witches).

<sup>2</sup>*Thompson v. Oklahoma*, 487 U.S. 815, 855 (1988).

<sup>3</sup>Suzanne D. Strater, *The Juvenile Death Penalty: In the Best Interests of the Child?*, 26 LOY. U. CHI. L.J. 147, 162 (1995).

system, the rehabilitative capabilities of such systems have come under attack as the nation is confronted with stories that a fifteen-year-old boy sodomized and murdered an eleven-year-old boy who was selling candy door-to-door.<sup>4</sup> Another fifteen-year-old shot and killed a woman on her way home from work so he could “know what it felt like to kill somebody.”<sup>5</sup>

A fourteen-year-old opened-fire on a morning prayer meeting at a local high school, killing three.<sup>6</sup> A thirteen-year-old sodomized and murdered a four-year-old who was on his way to summer camp.<sup>7</sup> Another thirteen-year-old murdered his friend for his refusal to accept the apology of another child,<sup>8</sup> while a ten- and eleven-year-old pushed a young child fourteen stories to his death for his refusal to steal candy.<sup>9</sup> Most recently, an eleven- and thirteen-year-old evacuated their elementary school by triggering the fire alarm. They opened-fire on the unsuspecting school yard with their stolen hunting rifles, killing five--four students and one teacher.<sup>10</sup>

The issue of whether children as young as these could receive the death penalty was squarely confronted by the United States Supreme Court in *Thompson v. Oklahoma*<sup>11</sup> and *Stanford v. Kentucky*.<sup>12</sup> Under *Thompson*, a fifteen-year-old may not be executed.<sup>13</sup> Under *Stanford*, sixteen-year-olds may be sentenced to death.<sup>14</sup> However, Justice O'Connor warned, in her *Thompson* concurrence, that reliable evidence will one day become available to ascertain the moral and criminal culpabilities of fifteen-year-old murderers.<sup>15</sup> As a result, a national consensus could develop in favor of reducing the minimum age of juvenile death eligibility to fifteen and under.

The standard used to determine whether execution for children is constitutionally permitted is whether such executions comport with the “evolving standards of decency that mark the progress of a maturing society.”<sup>16</sup> That standard remains undefined. The Court instead has relied upon relevant legislative enactments and an analysis of jury behavior as objective indicators of our evolving standards of decency. Thus, the Court, in large part, has placed the power of constitutional

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<sup>4</sup>*Dateline* (NBC television broadcast, Nov. 24, 1997).

<sup>5</sup>*NBC Nightly News* (Dec. 26, 1997).

<sup>6</sup>The *Today Show* (NBC television broadcast, Dec. 2, 1997).

<sup>7</sup>Ben Dobbin, *Parents of Slain 4-Year-Old Still Struggle 4 Years Later*, BUFF. NEWS, Aug. 10, 1997, at A22.

<sup>8</sup>*CBS Evening News* (Sept. 3, 1994).

<sup>9</sup>*CBS Evening News* (Oct. 14, 1994).

<sup>10</sup>*Dateline* (NBC television broadcast, Oct. 27, 1998).

<sup>11</sup>*Thompson v. Oklahoma*, 487 U.S. 815 (1988).

<sup>12</sup>*Stanford v. Kentucky*, 492 U.S. 361 (1989).

<sup>13</sup>*Thompson*, 487 U.S. at 838.

<sup>14</sup>*Stanford*, 492 U.S. at 380.

<sup>15</sup>*Thompson*, 487 U.S. at 855.

<sup>16</sup>*Trop v. Dulles*, 356 U.S. 86, 101 (1958).

interpretation in the hands of legislators. Politicians, not the judiciary, will ultimately determine what punishments are cruel and unusual under the Eighth Amendment. If, as a society, we allow for a reduction in the minimum age of death-eligibility and the resulting executions of children ages fifteen and younger, the end result is that our standards of decency will become indecent. If the death penalty becomes an option for children under sixteen, the unavoidable conclusion must be that we have reverted back to colonial theories of punishment. Therefore, children between the ages of seven and fourteen will be subjected to execution. The issue facing the nation will again become at what age to draw the line. In this article I argue that, as a society, we must prevent such executions and refute claims that, as a result of the failure of the juvenile justice system to rehabilitate killers before they kill, a consensus in favor of reducing the minimum age of execution has evolved. Otherwise, our “standards of indecency” will have become wicked.

Part II of this note presents the theories of colonial crime and punishment, which ultimately led to the creation and waiver of juvenile jurisdiction. Parts III and IV discuss the history of the United States capital punishment system, with an emphasis on its application to juveniles through the landmark United States Supreme Court decisions in *Thompson v. Oklahoma* and *Stanford v. Kentucky*. Part V examines the impact of recent juvenile murders on our evolving standards of decency, in light of the political manipulation of the dual misperceptions that juvenile crime is on the rise and that juvenile murderers are not amenable to rehabilitation. Finally, I conclude by warning against a reversion back to colonial theories of punishment by imposing death upon children under sixteen.

## II. HISTORY OF CRIME AND PUNISHMENT

From the seventeenth- through nineteenth-centuries, children and adults were tried for their crimes in the same criminal justice system. Children found guilty of their offenses were subjected to adult punishments, including execution. In 1899, Illinois created the first juvenile justice system to remedy the injustice of trying and punishing children as adults.<sup>17</sup> The juvenile justice system emphasizes treatment and rehabilitation as opposed to punishment.

### A. Colonial Crime and Punishment

Prior to the creation of the juvenile justice system, colonial courts relied on Blackstone’s Commentaries, which were published in 1768 and established the common law principles of both criminal and moral culpability for children.<sup>18</sup> According to Blackstone, children under the age of seven lacked the capacity to formulate criminal intent.<sup>19</sup> A rebuttable presumption of capacity to commit a criminal offense applied to children between the ages of seven and fourteen.<sup>20</sup> If the

<sup>17</sup>Strater, *supra* note 3.

<sup>18</sup>Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DE PAUL L. REV. 1311, 1314 (1993).

<sup>19</sup>Etta J. Mullin, *At What Age Should They Die? The United States Supreme Court Decision with Respect to Juvenile Offenders and the Death Penalty, Stanford v. Kentucky and Wilkins v. Missouri*, 16 T. MARSHALL L. REV. 161, 163 (1990).

<sup>20</sup>*Id.*

presumption of capacity was successfully rebutted, such that the child was found to appreciate the difference between right and wrong, the child could be convicted of a criminal offense and thus subjected to adult punishments, including death.<sup>21</sup>

In accordance with Blackstone's principles, the colonial courts sentenced two boys, ages eight and ten, to death, along with a thirteen-year-old girl who was burned to death.<sup>22</sup> In 1885, a ten-year-old Cherokee Indian was hanged.<sup>23</sup>

### B. Creation of the Juvenile Justice System

A reform movement in the 1890s sparked the creation of a juvenile justice system to protect children from both the adult penal system and execution.<sup>24</sup> The first juvenile justice system was created in Illinois in 1899.<sup>25</sup> The theory behind the juvenile justice system is that juveniles are less criminally and morally responsible than are adults, as they lack the same capacity to commit criminal offenses. Because children are less blameworthy and lack the discipline to exercise self-control, they are likewise more prone to rehabilitation than are adults. Therefore, the theory is that children should be clinically treated as opposed to punished in the adult penal system.<sup>26</sup>

The rehabilitative treatment theory underlying the juvenile justice system has recently come under attack with the increased publicity of brutal murders committed by children. Along with the increased publicity comes the politically-fueled and media-fed misperception that the juvenile justice system's efforts to rehabilitate these children has failed. Thus, the perception is that the only viable alternative is to lower the minimum age of execution.

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<sup>21</sup>*Id.*

<sup>22</sup>Nanda, *supra* note 18.

<sup>23</sup>Thompson v. Oklahoma, 487 U.S. at 829 n.27.

<sup>24</sup>Sherri Jackson, *Too Young to Die--Juveniles and the Death Penalty--A Better Alternative to Killing our Children: Youth Empowerment*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 391, 394 (1996). See also Glenn M. Bieler, *Death be not Proud: A Note on Juvenile Capital Punishment*, 7 N.Y.L. SCH. J. HUM. RTS. 179, 198 (1990). See also *In Re Gault*, 387 U.S. 1, 14-16 (1967).

<sup>25</sup>Strater, *supra* note 3.

<sup>26</sup>Mullin, *supra* note 19, at 162. See also *In re Gault*, 387 U.S. 1, 15-16 (1967). Robert H. Mnookin et al, *Child, Family, and State* 3 at 1097-98 (1995). According to Anthony M. Platt, there are nine ideal points of a reformatory scheme:

(1) segregation of young deviants from adult deviants; (2) removal of deviant children from unsound environments to reformatories for their own good; (3) denial of the need for trial or due process legal trappings in the removal process because reformatories helped rather than hurt; (4) indeterminate commitments; (5) denial of sentimentality and resort to punishment where it became a necessary means to reform; (6) military drill, physical exercise, labor, and constant supervision to protect reformatory inmates from idleness and indulgence; (7) cottage plan physical plants in rural locations; (8) tripartite school program based on elementary education, industrial and agricultural training, and religious education; and (9) constant training in the value of sobriety, thrift, industry, prudence, realistic ambition, and life adjustment. *Id.*

All fifty states and Puerto Rico now have a juvenile justice system where juveniles are tried separately from adults for their offenses.

As an alternative to adult sanctions, the juvenile “rehabilitation” theory should be re-examined. If the juvenile justice system truly did provide treatment and rehabilitation for children, those same children would be less likely to reappear in juvenile court facing transfer into the adult penal system for subsequent criminal acts. Indeed, the failure of the juvenile justice system to rehabilitate juveniles rests not on the inability of juveniles to be rehabilitated. Instead, the failure lies in the system’s inability to rehabilitate.

### III. HISTORY OF THE DEATH PENALTY AND ITS APPLICATION TO CHILDREN

The United States Supreme Court has held that while youth is a relevant mitigating factor to be considered when assessing a juvenile murderer’s moral and criminal culpability, it is not cruel and unusual punishment to execute sixteen-year-olds who kill. Sixteen-year-olds are presumed to possess the requisite maturity to contemplate and be held accountable for their actions. In *Thompson v. Oklahoma*, the U.S. Supreme Court established that it is unconstitutional to execute children under sixteen years of age.<sup>27</sup> However, Justice O’Connor warned that the day may present itself where we will have to reconsider whether fifteen-year-olds possess the necessary culpability to be worthy of death.<sup>28</sup> Some argue that the dawn of that day has come.

The standard by which the Court determines whether death is constitutionally permissible for children was first articulated in *Trop v. Dulles*.<sup>29</sup> According to the Court, the Eighth Amendment’s prohibition of cruel and unusual punishment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>30</sup> In *Thompson v. Oklahoma*, the Court adopted the standard articulated in *Trop v. Dulles* when determining that executing children fifteen and younger offends our “evolving standards of decency.”<sup>31</sup> However, the Court, instead of defining the contours of “evolving standards of decency,” declared that we determine evolving standards of decency in light of objective indicia such as relevant legislative enactments and jury behavior.<sup>32</sup> Thus, the standard is standardless. In light of the fact that the standard has remained undefined and in light of the recent publicity of juvenile crimes, some legislators are challenging the holding of *Thompson* and are lobbying for a reduction in the minimum age of execution.

In *Thompson v. Oklahoma*, the issue before the Court was whether it is cruel and unusual punishment to execute persons who were fifteen-years of age at the time of their offenses.<sup>33</sup> In the early morning hours of January 23, 1983, William Wayne Thompson, along with three older accomplices, savagely murdered Charles Keene, Thompson’s former brother-in-law.<sup>34</sup> Thompson severely beat Keene before

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<sup>27</sup>487 U.S. 815, 838 (1988).

<sup>28</sup>*Id.* at 855.

<sup>29</sup>*Trop v. Dulles*, 356 U.S. 86 (1958).

<sup>30</sup>*Id.* at 99.

<sup>31</sup>487 U.S. at 821.

<sup>32</sup>*Id.* at 821-22.

<sup>33</sup>*Thompson v. Oklahoma*, 487 U.S. at 815, 818-19 (1988).

<sup>34</sup>*Id.* at 819.

shooting him twice, once in the head and once in the chest, and cut his throat, chest, and abdomen.<sup>35</sup> Keene's leg was broken and he received severe lacerations to the head and face.<sup>36</sup> Thompson and his accomplices then chained Keene to a concrete block and dumped his body in the Washita River, where it was discovered approximately two weeks later.<sup>37</sup> Thompson's alleged motivation for the murder was retaliation for the abuse Keene inflicted on his wife--Thompson's sister.<sup>38</sup> Thompson and his three accomplices were tried separately and each was sentenced to death.<sup>39</sup> William Wayne Thompson was fifteen when he brutally murdered Charles Keene.<sup>40</sup>

The question before the Court was whether Thompson's death sentence was constitutional.<sup>41</sup> In a plurality opinion, with Justice O'Connor concurring in the judgment, the Court concluded that the execution of a capital murderer who was fifteen at the time of his offense was cruel and unusual punishment, as it violated evolving standards of decency.<sup>42</sup> Instead of defining "evolving standards of decency," the Court reasoned that a determination of whether a punishment offends evolving standards of decency requires an analysis of two objective factors: 1) relevant legislative enactments; and 2) the behavior of juries to establish a national consensus.<sup>43</sup>

The plurality considered as relevant legislative enactments, the fact that Oklahoma law forbids voting, participation on a jury, marriage without parental consent, and the purchase of alcohol and cigarettes by minors.<sup>44</sup> Furthermore, Oklahoma's juvenile justice system forbids most offenders under age eighteen to be held criminally liable for their offenses.<sup>45</sup> In fact Oklahoma's civil and penal statutes defined persons under eighteen as "children."<sup>46</sup>

The Court deemed most relevant the fact that all fifty states had enacted legislation setting the maximum age for juvenile jurisdiction at sixteen.<sup>47</sup> The Court reasoned that "all of this legislation is consistent with the experience of mankind, as

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<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>*Id.*

<sup>38</sup>Thompson, 487 U.S. at 819.

<sup>39</sup>*Id.*

<sup>40</sup>*Id.* at 819. See also Dominic J. Ricotta, *Eighth Amendment -- the Death Penalty for Juveniles: A State's Right or a Child's Injustice?* Thompson v. Oklahoma, 79 J. CRIM. L. & CRIMINOLOGY 921, 921-22 (1988).

<sup>41</sup>Thompson, 487 U.S. at 818-19.

<sup>42</sup>*Id.* at 838.

<sup>43</sup>*Id.* at 822.

<sup>44</sup>*Id.* at 823.

<sup>45</sup>*Id.* at 823-824.

<sup>46</sup>Thompson, 487 U.S. at 824.

<sup>47</sup>*Id.*

well as the long history of our law, that the normal fifteen-year-old is not prepared to assume the full responsibilities of an adult.”<sup>48</sup>

The Court further noted that the majority of jurisdictions failed to specify a minimum age at which a juvenile is eligible for execution.<sup>49</sup> Eighteen states that had established a minimum age drew the line at sixteen.<sup>50</sup> Therefore, based upon relevant legislative enactments, the plurality concluded that death for children fifteen years of age at the time of the offense violated evolving standards of decency.<sup>51</sup>

The Court next considered the behavior of juries in capital cases and their decisions to impose life or death. Statistics recorded throughout the 1980s and presented to the Court indicated that a disproportionately small number of willful criminal homicide offenders sentenced to death were minors.<sup>52</sup> Out of the 82,094 persons arrested for murder and non-negligent manslaughter, 1,393 were sentenced to death.<sup>53</sup> Only five of those persons, which included William Wayne Thompson, were under sixteen years of age upon commission of the offense.<sup>54</sup> According to the Court, these statistics “suggest that these five young offenders have received sentences that are ‘cruel and unusual in the same way that being struck by lightning is cruel and unusual.’”<sup>55</sup>

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<sup>48</sup>*Id.* at 824-25.

<sup>49</sup>*Id.* at 826.

<sup>50</sup>*Id.* at 829 n.30. 1) California (age 18); 2) Colorado (age 18); 3) Connecticut (age 18); 4) Georgia (age 17); 5) Illinois (age 18); 6) Indiana (age 16); 7) Kentucky (age 16); 8) Maryland (age 18); 9) Nebraska (age 18); 10) Nevada (age 16); 11) New Hampshire (age 17); 12) New Jersey (age 18); 13) New Mexico (age 18); 14) North Carolina (age 17); 15) Ohio (age 18); 16) Oregon (age 18); Tennessee (age 18); and Texas (age 17).

<sup>51</sup>*Thompson*, 487 U.S. at 838.

<sup>52</sup>*Id.* at 832.

<sup>53</sup>*Id.* at 832.

<sup>54</sup>*Id.* at 832-33.

<sup>55</sup>*Id.* at 833 (citing *Furman*, 408 U.S. at 309). See also *Thompson*, 487 U.S. at 837. See also *Gregg*, 428 U.S. at 835. The *Thompson* plurality next turned to a discussion of the goals of capital punishment as announced in *Gregg* -- deterrence and retribution.

#### Deterrence

The plurality reasoned that specific and general deterrence goals are not met with the infliction of death upon children who are fifteen at the time of their offense because children are less blameworthy and responsible than are adults. The likelihood that teenagers, being less rational than adults, will engage in a “cost-benefit analysis” is “so remote as to be virtually nonexistent.” *Thompson*, 487 U.S. at 837. Even if a fifteen-year-old would balance the pros against the cons before committing murder, he or she would very doubtfully consider the death penalty as a possible sanction based on the small number of executions during the twentieth-century. *Id.* Therefore, the juvenile death penalty for offenders under age sixteen fails to serve as a deterrent. *Id.*

#### Retribution

In *Gregg*, the Court announced that the test for determining whether a punishment serves retributive ends turns on whether “an expression of society’s moral outrage at particularly offensive conduct” was “inconsistent with our respect for the dignity of man.” *Id.* at 836 (quoting *Gregg*, 428 U.S. at 183). According to the plurality, the execution of fifteen-year-old

In her concurrence, Justice O'Connor also considered both relevant legislative enactments and jury behavior to identify a national consensus in opposition to executing children who were fifteen years of age at the time of their crimes.<sup>56</sup> Most relevant to Justice O'Connor was the fact that every legislature allowing for juvenile executions that established a minimum age for execution had set the minimum age at sixteen.<sup>57</sup> Adding to those states the fourteen states that prohibit capital punishment all together, it appeared that approximately two-thirds of state legislatures refuse to execute fifteen-year-olds.<sup>58</sup> Justice O'Connor explained that, in light of the legislation, "strong counter-evidence would be required to persuade me that a national consensus against this practice does not exist."<sup>59</sup>

When examining the behavior of juries, Justice O'Connor noted that the last time a juvenile younger than sixteen years of age was executed occurred more than four decades before.<sup>60</sup> Only five out of 1,393 criminal homicide offenders under sixteen were sentenced to death, leading to the inference that a national consensus exists against executing persons fifteen years of age at the time of their offenses.<sup>61</sup> Justice O'Connor did note, however, that those statistics are not dispositive.<sup>62</sup> For example, the statistics did not provide the number of times juries were asked to sentence a capital defendant under sixteen to death. The statistics also failed to establish the number of times prosecutors refrained from seeking death sentences for those persons under age sixteen who were otherwise eligible for death.

The lynchpin for Justice O'Connor, however, was the fact that nineteen states, including Oklahoma, failed to establish a minimum age for death eligibility.<sup>63</sup> O'Connor was unwilling to accept the dissent's theory that those nineteen states deliberately refused to establish a minimum age, thus allowing for the executions of fifteen-year-old offenders.<sup>64</sup> In light of the fact that every state that had expressly established a minimum age for death eligibility set that age at sixteen or older,

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minors fails to meet that test. Therefore, based on relevant legislative enactments and the behavior of juries, along with an examination of the goals of capital punishment, the execution of a juvenile fifteen years of age at the time of the crime offends evolving standards of decency. *Id.* at 838. In fact, such executions are "nothing more than the purposeless and needless imposition of pain and suffering" and are thus unconstitutional under the Eighth Amendment. *Thompson*, 487 U.S. 815 at 838.

<sup>56</sup>*Id.* at 365.

<sup>57</sup>*Thompson*, 487 U.S. at 849.

<sup>58</sup>*See also Id.* at 829 n.25. The fourteen states which prohibit capital punishment include: 1) Alaska; 2) District of Columbia; 3) Hawaii; 4) Iowa; 5) Kansas; 6) Maine; 7) Massachusetts; 8) Michigan; 9) Minnesota; 10) New York; 11) North Dakota; 12) Rhode Island; 13) West Virginia; and 14) Wisconsin.

<sup>59</sup>*Id.* at 849.

<sup>60</sup>*Id.* at 852.

<sup>61</sup>*Id.* at 848.

<sup>62</sup>*Thompson*, 487 U.S. at 853.

<sup>63</sup>*Id.*

<sup>64</sup>*Id.* at 850.

O'Connor was unwilling to infer a deliberate intent by those nineteen states to provide execution for children under sixteen.<sup>65</sup>

Most important, O'Connor left the door open for the future when stating "adolescents are generally less blameworthy than adults who commit similar crimes—it does not necessarily follow that all fifteen-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment."<sup>66</sup> O'Connor further opined that the plurality failed to produce conclusive evidence that fifteen-year-olds, as a class, could never be deterred from committing capital offenses by the prospect of death.<sup>67</sup> In conclusion, O'Connor warned:

The day may come when we must decide whether a legislature may deliberately and unequivocally resolve upon a penalty authorizing capital punishment for crimes committed at the age of 15. In that event . . . we shall have to evaluate the evidence of societal standards of decency that is available to us at the time.<sup>68</sup>

Thus, according to Justice O'Connor, a time may present itself where current legislative enactments indicate a national consensus in favor of executing fifteen-year-olds. The shift in the national consensus will arise if society regards the fifteen-year-old child as morally and criminally blameworthy and thus eligible for death.

The dissent also analyzed the statistical evidence relied upon by the plurality and concurrence relating to the number of states allowing executions and those that define a minimum age versus those states that prohibit the death penalty under all circumstances. The dissent primarily focused on the fact that nineteen states had not defined a minimum age for execution, suggesting that the appropriate age for death

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<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup>*Thompson*, 487 U.S. at 850.

<sup>68</sup>*Id.* at 855. See also Seung Oh Kang, *The Efficacy of Youth as a Mitigating Circumstance: Preservation of the Capital Defendant's Constitutional Rights Pursuant to Traditional Eighth Amendment Jurisprudence*, 28 SUFFOLK L. REV. 747, 776-77 (1994). Kang reasons:

Examination of a youth's culpability discloses a generalization that all juveniles are less blameworthy than adults who commit similar crimes, triggering an assumption that age disqualifies the youth from death eligibility. A bright-line test excluding the entire class of youths from the death penalty, however, would negate an individualized examination of the proportionality of capital punishment to the defendant's culpability and the goals of retribution and deterrence, thus conflicting with the traditional fundamental values of the Eighth Amendment. Age instead serves as a "proxy," which, when analyzed with other factors such as immaturity, lack of sound judgment and responsibility, and the inability to properly assess the ramifications of one's conduct, may render the death penalty inappropriate. Notwithstanding the criticisms surrounding youth as a mitigating circumstance, youth constitutes a tenet of individualized consideration in the assessment of the capital defendant's culpability and also serves to mitigate the defendant's actions, not to categorically exempt all juvenile defendants from capital punishment. The utilization of youth as a mitigating force to establish automatic diminished culpability of the juvenile defendant would offend the precept of the dignity of man and undermine traditional Eighth Amendment jurisprudence.

eligibility should be determined on an individualized basis.<sup>69</sup> According to the dissent, the relevant legislative enactments, along with the behavior of juries suggest a national consensus that executing persons fifteen years of age at the time of their offenses is both acceptable and rare.<sup>70</sup> The dissent reasoned it is absurd to suggest a cold-blooded-killer one day under age sixteen can never be eligible for execution.<sup>71</sup> Instead, once a juvenile is transferred to the adult penal system, all of the applicable adult penalties, including death, should attach.<sup>72</sup>

The question of at what age juveniles become eligible for death was squarely presented to the Court one year following *Thompson*, in the consolidated cases of *Stanford v. Kentucky* and *Wilkins v. Missouri*.<sup>73</sup> The issue before the Court in both cases was whether executing juveniles sixteen and seventeen years of age at the time of their offenses constitutes cruel and unusual punishment.<sup>74</sup> The Court, using the objective factors relied upon in *Thompson*, held the executions of persons sixteen and seventeen years of age at the time of their offenses did not offend evolving standards of decency and was thus not violative of the Eighth Amendment proscription against cruel and unusual punishment.<sup>75</sup>

On January 7, 1981 Kevin Stanford and an accomplice robbed a gas station where twenty-year-old Baerbel Poore was working. After recovering 300 cartons of cigarettes, two gallons of fuel, and a small amount of cash, Stanford and friend repeatedly raped and sodomized Baerbel. With their goods secured, Stanford and his accomplice kidnapped Baerbel from the premises and drove her to an isolated area. Stanford shot her twice, once in the face with the fatal wound to the back of her head.<sup>76</sup> Stanford was seventeen. He was ultimately sentenced to death.<sup>77</sup>

In the companion case, Heath Wilkins, age sixteen, was convicted and sentenced to death for felony murder.<sup>78</sup> On July 27, 1985, after approximately two weeks of extensive planning, Heath Wilkins, Patrick Stevens, and their other accomplices robbed Linda's Liquor and Deli, a small convenience store owned and operated by Nancy Allen and her husband.<sup>79</sup> Before committing the robbery, the group stalked the deli through the bushes until the remaining customers left.<sup>80</sup> Finally, carrying

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<sup>69</sup>*Thompson*, 487 U.S. at 868.

<sup>70</sup>*Id.* at 870.

<sup>71</sup>*Id.* at 857.

<sup>72</sup>*Id.* at 863-64.

<sup>73</sup>*Stanford v. Kentucky*, 492 U.S. 361 (1989).

<sup>74</sup>*Id.* at 364-365.

<sup>75</sup>*Id.* at 379.

<sup>76</sup>*Id.* at 365.

<sup>77</sup>*Id.*

<sup>78</sup>*Stanford*, 492 U.S. at 367.

<sup>79</sup>*Id.* at 366.

<sup>80</sup>*Id.*

bags stolen from a nearby hospital just minutes before, the group approached the deli.<sup>81</sup> One of the store's owners, Nancy Allen, was working that night.<sup>82</sup>

In accordance with their premeditated plan, Wilkins approached the counter to order a sandwich as Stevens sought refuge in the bathroom directly behind the counter.<sup>83</sup> When Wilkins ordered the sandwich, Stevens pounced from the bathroom and grabbed Nancy.<sup>84</sup> Wilkins drove a knife into her back.<sup>85</sup> Nancy collapsed on the floor, face down where she rolled into a spread eagle position with her back to the floor.<sup>86</sup> Stevens focused his attention on the cash register, where he quickly encountered problems.<sup>87</sup> In an effort to help, Nancy spoke.<sup>88</sup> Wilkins responded by plunging a knife into her chest three more times.<sup>89</sup> While she was begging for her life, Wilkins stabbed Nancy four more times in the neck.<sup>90</sup> The proceeds of the robbery consisted of liquor, cigarettes, rolling papers, and approximately \$450 in cash and checks.<sup>91</sup> Nancy Allen was a twenty-six-year-old wife and mother of two small children when Wilkins slaughtered her and left her on the deli floor to die.<sup>92</sup>

In a five-to-four decision, with Justice O'Connor concurring, the Court held that the imposition of death on a capital offender sixteen or seventeen at the time of the offense is not cruel and unusual punishment.<sup>93</sup> In reaching this conclusion, the plurality again considered relevant legislative enactments and jury behavior as objective indicia of evolving standards of decency.

The plurality noted that, at common law and according to Blackstone's Commentaries, theoretically, a child as young as seven can be executed.<sup>94</sup> The Court further noted that fifteen of the thirty-seven states permitting the death penalty refuse to impose death upon sixteen-year-old capital offenders and twelve of the thirty-seven states refuse to impose death on seventeen-year-old capital offenders.<sup>95</sup> According to the plurality, this indicated a majority consensus that executing sixteen and seventeen-year-olds is permissible.<sup>96</sup>

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<sup>81</sup>*Id.*

<sup>82</sup>*Id.*

<sup>83</sup>*Stanford*, 492 U.S. at 366.

<sup>84</sup>*Id.*

<sup>85</sup>*Id.*

<sup>86</sup>*Id.*

<sup>87</sup>*Id.*

<sup>88</sup>*Stanford*, 492 U.S. at 366.

<sup>89</sup>*Id.*

<sup>90</sup>*Id.*

<sup>91</sup>*Id.*

<sup>92</sup>*Id.* at 366.

<sup>93</sup>*Stanford*, 492 U.S. at 380.

<sup>94</sup>*Id.* at 368.

<sup>95</sup>*Id.* at 373.

<sup>96</sup>*Id.*

The plurality also considered statistics gathered from 1982 through 1988 which indicated that only fifteen out of the 2,106 death sentences rendered were imposed on offenders under sixteen, while thirty death sentences were imposed on seventeen-year-old capital offenders.<sup>97</sup> The plurality opined that these statistics could be regarded not as establishing a national consensus against the death penalty for sixteen and seventeen-year-old offenders, as defendants argued, but instead as evidence of a national consensus in favor of such executions in rare circumstances.<sup>98</sup>

The plurality explained that the burden rested with the condemned defendant to prove a national consensus against the death penalty for persons sixteen and seventeen years of age.<sup>99</sup> In order to satisfy that burden, defendants must show “not that 17 or 18 is the age at which most persons or even almost all persons achieve sufficient maturity to be held fully responsible for murder, but that 17 or 18 is the age before which no one can be held fully responsible.”<sup>100</sup> Because the majority of states who permit capital punishment set the minimum age for death eligibility at sixteen, the defendants failed to meet their required burden.

Finding that defendants, using legislative enactments, failed to prove a national consensus against executing sixteen and seventeen-year-old offenders, the plurality turned to the behavior of juries. The statistics indicated that from 1982 through 1988 only fifteen out of a total of 2,106 death sentences were imposed on defendants who were sixteen or younger at the time of their offenses.<sup>101</sup> Only thirty death sentences were imposed on children under seventeen at the time of the crime.<sup>102</sup> In fact, the last person younger than seventeen to have been executed was killed in 1959.<sup>103</sup> While Stanford and Wilkins argued that the statistics indicated a consensus against executing persons under eighteen, the plurality argued the contrary; executing persons under eighteen is permissible, but should be, and is, only rarely imposed.<sup>104</sup>

The plurality also explained that judges are not the appropriate audience for determining the existence of a national consensus in favor of or opposition to executing sixteen- and seventeen-year-old capital offenders.<sup>105</sup> Instead, defendants must appeal to and persuade the state citizens.<sup>106</sup> Because of their failure to meet their respective burdens, Stanford’s and Wilkins’s death sentences were affirmed.

In her concurrence, Justice O’Connor applied the same two-part test she established in *Thompson*: the constitutionality of the imposition of death on juveniles depends upon whether: 1) the state has established a minimum age for death eligibility; and 2) whether a national consensus against the death penalty exists.

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<sup>97</sup>*Id.* at 373.

<sup>98</sup>*Stanford*, 492 U.S. at 374.

<sup>99</sup>*Id.* at 373.

<sup>100</sup>*Id.* at 375.

<sup>101</sup>*Id.* at 373.

<sup>102</sup>*Id.*

<sup>103</sup>*Stanford*, 492 U.S. at 374.

<sup>104</sup>*Id.*

<sup>105</sup>*Id.* at 378.

<sup>106</sup>*Id.*

Because the majority of states established a minimum age of death eligibility at sixteen and because the relevant legislative enactments and sentencing behavior of juries were consistent with evolving standards of decency, O'Connor reasoned that executing sixteen and seventeen-year-old capital offenders is not unconstitutional.<sup>107</sup> Justice O'Connor again warned, however, that "the day may come when there is such general legislative rejection of the execution of 16-or 17-year-old capital murderers that a national consensus can be said to have developed."<sup>108</sup>

The dissent declared that the imposition of death upon sixteen and seventeen-year-old offenders is cruel and unusual punishment and unconstitutional per se<sup>109</sup> based on a different interpretation of relevant legislative enactments and jury behavior. In reaching their conclusion, the dissent pointed to the fact that twelve of the states permitting capital punishment forbid the imposition of death for persons under eighteen.<sup>110</sup> When viewed in conjunction with the fifteen states prohibiting capital punishment under all circumstances, it appears that twenty-seven states agree that persons under eighteen should not be executed.<sup>111</sup> Nineteen states do not even establish a minimum age, indicating that they "have not squarely faced the question."<sup>112</sup>

The dissent acknowledged the plurality's contention that jury decisions to impose death on sixteen- and seventeen year-old capital murderers are rare. However, that fact alone is not conclusive evidence of a national consensus in favor of such executions. In fact:

Just as we have never insisted that a punishment have been rejected unanimously by the states before we may judge it cruel and unusual, so we have never adopted the extraordinary view that a punishment is beyond the Eighth Amendment challenge if it is sometimes handed down by a jury.<sup>113</sup>

Consequently, the dissent concluded that the imposition of death on sixteen and seventeen-year-old offenders is cruel and unusual punishment.

As a result of *Thompson* and *Stanford*, a bright line has been drawn with regard to the minimum age for death eligibility; it is unconstitutional to execute children who were fifteen at the time of their crimes, but it is constitutional to execute sixteen-year-old offenders. However, Justice O'Connor concluded the day may

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<sup>107</sup>*Id.* at 380-81.

<sup>108</sup>*Stanford*, 492 U.S. at 381.

<sup>109</sup>*Id.* at 382.

<sup>110</sup>*Id.* at 371 n.2.

<sup>111</sup>See *Thompson v. Oklahoma*, 487 U.S. at 822-23 (1988); *Stanford*, 492 U.S. at 384 n.1. The fifteenth state to abolish capital punishment was Vermont.

<sup>112</sup>*Stanford*, 492 U.S. at 385. See also *Thompson*, 487 U.S. at 829 n.26. The nineteen states failing to establish a minimum age for death eligibility include: 1) Alabama; 2) Arizona; 3) Arkansas; 4) Delaware; 5) Florida; 6) Idaho; 7) Louisiana; 8) Mississippi; 9) Missouri; 10) Montana; 11) Oklahoma; 12) Pennsylvania; 13) South Carolina; 14) South Dakota; 15) Utah; 16) Vermont; 17) Virginia; 18) Washington; and 19) Wyoming.

<sup>113</sup>*Stanford*, 492 U.S. at 386.

arrive where our legislative enactments indicate a national consensus that fifteen-year-olds are both morally and criminally responsible for their acts and thus eligible for death.

The common link between the two cases is the Court's reliance on "evolving standards of decency" for determining death-eligibility. That standard, however, remains undefined and thus standardless. Instead, the Court has determined that relevant legislative enactments and an analysis of past jury behavior are reliable indicators of what is decent. Thus, the Court places the power of constitutional interpretation in the hands of politicians. The reliance on politicians to determine the contours of the Eighth Amendment's proscription against cruel and unusual punishment not only destroys the basic American promise and ideal of separation of powers, but it is also simply indecent.

#### IV. EFFECT OF *THOMPSON* AND *STANFORD*: MODERN DAY NOTIONS OF EVOLVING STANDARDS OF INDECENCY

In light of the increase in publicity surrounding recent brutal murders committed by children, the issue facing the nation is whether *Thompson* will be revisited. The increase in publicity surrounding recent juvenile crimes has led to the dual misperceptions that there has been an increase in juvenile crimes and that the juvenile justice system has failed in its attempt to rehabilitate violent juvenile offenders.<sup>114</sup> As a result of both misperceptions, state legislators are lobbying for

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<sup>114</sup>See *Dateline* (NBC television broadcast, Oct. 13, 1997) In October of 1997, Luke Woodham brutally stabbed his mother to death before heading to Pearl High School, in Pearl, Mississippi, with a hunting rifle in tow. Woodham entered the school and "pulled the rifle from under his coat, walked up to his former girlfriend and shot her to death. Then . . . he sprayed the crowded school commons with gunfire." *Id.* Woodham killed two girls and injured seven others. According to his letter, also known as his "manifesto," Woodham embarked on his hunting excursion because "people like me are mistreated every day. I do this to show society – push us and we will push back." *Id.* Luke Woodham is sixteen.

See also *Dateline* (NBC television broadcast, Nov. 24, 1997). In November, 1997, an effort to raise money for the PTA and possibly win the grand prize pair of walkie-talkies led eleven-year-old Eddie Werner on a door-to-door mission in suburban New Jersey, with candy for sale. By the time Eddie knocked on Sam Manzie's door, he had sold approximately \$200 worth of candy. Forty-Eight hours later, the police discovered Eddie's body in woods across the street from Manzie's home. According to authorities, "Manzie sexually assaulted and strangled Eddie, robbed him of his sales money, then hid the body in a suitcase before disposing of it in a wooded lot near by." *Id.* Sam Manzie was fifteen.

See also *NBC Nightly News* (Dec. 26, 1997). Vincente Guevara had been guzzling a few beers with his friends when a twenty-three-year-old mother of two crossed his path. She was on her way home from working a double shift at the local 7-11. Guevara shot her in the back of the head. He "wanted to know what it felt like to kill somebody." Guevara was fifteen.

See also *The Today Show* (NBC television broadcast, Dec. 2, 1997). In December, 1997, Michael Carneal entered his Heath High School prayer meeting, in Paducah, Kentucky, after kindly warning his friend not to be present that day. Carneal calmly inserted ear plugs into his ears, removed the shotgun he had stolen on Thanksgiving day and showered the prayer group with bullets. Carneal killed three girls. Carneal was fourteen.

See Ben Dobbin, Parents of Slain 4-Year-Old Still Struggle 4 Years Later, *BUFF. NEWS*, August 10, 1997 at A22. See also Teenage Murder Denied New Trial, *BUFF. NEWS*, August 17, 1997, at A14. See also Judge Refuses New Trial for Convicted Killer, 17 Eric Smith Could be Transferred to an Adult Prison Next Year, *SYRACUSE NEWSPAPERS*, August 17, 1997, at B1. In 1993, Eric Smith lured four-year-old Derrick Robie into the woods while Robie was

reducing the minimum age for waiver of juvenile jurisdiction to provide for adult punishments at younger ages. The logical result of reducing the minimum age for transfer eligibility is reducing the minimum age for death eligibility.

In her *Thompson* concurrence, O'Connor stated that although most juveniles are less criminally blameworthy and less morally culpable than adults "it does not necessarily follow that all fifteen-year-olds are incapable of the moral culpability that would justify the imposition of capital punishment."<sup>115</sup> O'Connor warned, therefore, that the day could come where the evidence would have to be reexamined in order to determine a minimum age for death eligibility that is in accordance with the national consensus and thus evolving standards of decency.

A closer look at relevant threatened legislative enactments reveals that perhaps the dawn of that day has come. Society, however, must be weary of *any* available "reliable evidence" of a national consensus in favor of executing fifteen-year-old murderers. The Court has identified legislative enactments as an indicator of a national consensus. Assuming, *arguendo*, that all people vote, the assumption that politicians provide "reliable evidence" of a national consensus is fatally flawed. Indeed, it would be disingenuous to suggest that the information presented to the people by politicians is objectively reliable. Politicians present information necessary for soliciting votes, not for determining a national consensus. Thus, the reliance on legislative enactments as "reliable evidence" of a national consensus is not only misplaced but is dangerous.

#### A. Political Manipulation of Public Misperceptions

##### 1. Recent Lobbying Efforts by State Legislators

In response to societal fear and outrage as a result of violent juvenile crime, some states have enacted legislation which depart from and lower the minimum age of death eligibility established in *Thompson*. For example, in North Carolina, a juvenile

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en route to day camp. According to authorities, "Eric choked the pre-schooler, stuffed a paper towel and a plastic lunch bag in his mouth and crushed his skull with a twenty-six-pound rock. He sodomized the body with a stick." Eric Smith was thirteen.

See also *CBS Evening News* (Sept. 3, 1994); *CBS Evening News* (Sept. 12, 1994); *CBS Evening News* (May 16, 1996); *CBS Evening News* (April 25, 1996); *NBC Nightly News* (May 2, 1996). In High Bridge, New Jersey, eleven-year-old Jacob Tracy was shot in the chest in his bedroom by his own friend. Jacob was killed because he refused to accept an apology from another child. The friend and killer was thirteen.

See also *CBS Evening News* (Oct. 14, 1994). In 1994, five-year-old Eric Morris died after being thrown from a Chicago public housing high rise. He was being beaten while dangling over the edge. Eric's nine-year-old brother attempted to save him; but, the attackers bit Eric's hands until he let go of the edge and fell fourteen stories to his death. Eric died from massive internal injuries. His killers were ten and eleven. They killed Eric because "he had refused to steal candy for them."

See also *Dateline* (NBC television broadcast, Oct. 27, 1998). In 1998, Andrew Golden and Mitch Johnson carried out their plot to activate their school fire alarm and, using deer rifles stolen from one of their grandfathers, opened-fire on the Jonesboro, Arkansas schoolyard. Four students were killed. One teacher was killed. Ten students were injured. Johnson was thirteen. Golden was eleven.

<sup>115</sup>*Thompson v. Oklahoma*, 487 U.S. 815 (1988).

as young as fourteen may be executed if he or she committed murder while being incarcerated for murder.<sup>116</sup>

In Virginia, a juvenile may be executed at age fifteen.<sup>117</sup> Arkansas and Utah provide for death at age fourteen.<sup>118</sup> South Dakota permits the execution of ten-year-old capital offenders, following a transfer hearing and trial as an adult.<sup>119</sup> Support for the death penalty as applied to juveniles under sixteen is further evidenced by the fact that several states--Arizona, Delaware, Florida, Idaho, Montana, South Carolina, and Washington -- have not established a minimum age for death.<sup>120</sup>

Some recent efforts by state legislators to reduce the minimum age for executions include those of California Governor Pete Wilson, who proposed twenty bills before the legislature to overhaul the juvenile justice system and allow a "get tough on crime" approach to juvenile offenders.<sup>121</sup> In a transparent political soundbite, Governor Wilson stated his support for executing thirteen- and fourteen-year-old offenders, by declaring "no longer . . . will the welfare of the young felons be the primary concern of the juvenile system." [Instead], the safety of ordinary, law abiding citizens must be government's top priority."<sup>122</sup>

According to Wilson, the death penalty must be an option for children.<sup>123</sup> In support of Wilson's poitically fueled declaration, Assemblyman Bustamante stated he, too, would "default to say that a hardened criminal is a hardened criminal no matter at what age."<sup>124</sup> "[W]ith a tear in [his] eye,"<sup>125</sup> Bustamante declared he *may* have no other choice but to *support* the death penalty for children as young as thirteen.<sup>126</sup> Quackenbush declared that "the only thing we can do is take these people off the street and put them in cages where they belong."<sup>127</sup>

Likewise, in the wake of the Jonesboro shootings, one Arkansas legislator has proposed a law enabling prosecutors to charge juveniles with capital murder, without regard to age.<sup>128</sup> According to the Arkansas lawmaker "the bottom line is, you

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<sup>116</sup>Nanda, *supra* note 18, at 1313.

<sup>117</sup>*Id.* See also *Capital Punishment*, Bureau of Justice Statistics, 1996 5 T.4 (revised 1/15/98).

<sup>118</sup>Nanda, *supra* note 18, at 1313.

<sup>119</sup>*Id.*

<sup>120</sup>*Id.*

<sup>121</sup>Carl Ingram, *Wilson Proposes Overhaul of Juvenile Justice System Politics: Governor Presents 20 Bills to get Tough with Youth Crime, Including a Suggestion that the Minimum Age for Death Penalty be Lowered to 14*, L.A. TIMES, April 10, 1997, at A3.

<sup>122</sup>*Id.*

<sup>123</sup>Vincent J. Schodolski, *2 California Officials Suggest 13-Year-Olds Face Death Penalty*, CHI. TRIB., April 15, 1997, at 6.

<sup>124</sup>*Id.*

<sup>125</sup>*Id.*

<sup>126</sup>*Id.*

<sup>127</sup>*Id.*

<sup>128</sup>*CBS Evening News* (Jan. 8, 1994).

commit premeditated murder and all the parts of the system say you should be accountable as an adult, you can be held accountable as an adult.”<sup>129</sup> Also as a result of the Jonesboro shootings, a Texas legislator proposed a bill allowing for the imposition of death sentences for children as young as eleven, postponing executions until they reach age seventeen.<sup>130</sup>

## 2. Perceived Increase in Juvenile Crime

State legislators base their political platforms on juvenile crime, rallying around the public misperception that violent juvenile crimes are on the rise. Yet, the most recent report issued by the FBI indicates that the occurrence of juvenile crime has decreased.<sup>131</sup> Furthermore, in 1992, 66% of the crimes committed by juveniles were property offenses, drug offenses, and public order offenses, as opposed to violent acts committed against other persons.<sup>132</sup> The perception that there is an upward trend in juvenile crime is mistaken. Instead, there is an upward trend in waiver of juvenile jurisdiction.<sup>133</sup>

Legislators argue that the failure of the juvenile justice system to rehabilitate juvenile offenders before they kill justifies adult trials and adult punishments, including death. One commentator argues the philosophy on which the juvenile justice system was founded is from a “bygone era.”<sup>134</sup> “Yesterday’s delinquents had fist-fights, shoplifted, and stole bikes and cars; today, they are armed with deadly weapons and devoid of respect for others as they commit burglaries, rapes, and murders.”<sup>135</sup>

These recent lobbying efforts by state legislators, when viewed in conjunction with the states currently allowing the executions of children between ages ten and fourteen indicate a growing national consensus in support of executing children under sixteen. Because of the perceived failure of the juvenile justice system to rehabilitate juvenile offenders before they kill, adult trials and adult punishments may become justified. What remains unsaid and unrecognized, however, is that the failure of the juvenile justice system is the failure to rehabilitate the juvenile—not the failure of the juvenile to be rehabilitated.

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<sup>129</sup>*Dateline* (NBC television broadcast, Mar. 27, 1998)

<sup>130</sup>*Id.*

<sup>131</sup>4/24/98 Agence France-Presse.

<sup>132</sup>Laureen D’Ambra, *A Legal Response to Juvenile Crime: Why Waiver of Juvenile Offenders is not a Panacea*, 2 *ROGER WILLIAMS U. L. REV.* 277, 282 (1997).

<sup>133</sup>Katherine Hunt Federle, *Emancipation & Execution: Transferring Children to Criminal Court in Capital Cases*, 1996 *WIS. L. REV.* 447, 486 (1996).

<sup>134</sup>D’Ambra, *supra* note 132, at 281.

<sup>135</sup>*Id.* at 281-82.

*B. The Failure of the Juvenile Justice System*

1. Failure of the Juvenile Justice System to Rehabilitate

In 1996, a twelve- and thirteen-year-old became the youngest inmates at a maximum security prison.<sup>136</sup> The two children were convicted at ages ten and eleven for the murder of five-year-old Eric Morris. They dropped Eric fourteen stories to his death for his refusal to steal candy for them.<sup>137</sup> The young inmates were sent to prison following a Chicago judge's rejection of the defense claim that the children were in need of psychiatric assistance.<sup>138</sup> Instead, the judge chose to place great weight on the fact that both boys had appeared in court on numerous occasions prior to murdering Eric.<sup>139</sup> Each time they appeared in juvenile court, instead of being given treatment, they were sent back to their debilitated homes in the projects of Chicago.<sup>140</sup> While Eric's murder and the subsequent waiver of jurisdiction over the two young killers can be perceived to be a failure of the juvenile justice system to rehabilitate two "monsters,"<sup>141</sup> it can also be perceived as a failure of the court to provide rehabilitation.

Similarly, three days prior to sodomizing, robbing, and murdering eleven-year-old Eddie Werner on his mission to sell candy door-to-door, Sam Manzie's parents appeared in Judge Citta's family court asking that their son Sam be committed to a twenty-four-hour in-patient psychiatric facility.<sup>142</sup> The Manzies were afraid of their son.<sup>143</sup> Ordinary out-patient counseling was of no avail. Judge Citta responded that the juvenile system lacked funding to provide Manzie with in-patient hospitalization:

I can only tell you, Samuel, that you have got to do the right thing . . . I am also going to assume that you love your parents, and it's obvious to me that they care for you, but they're afraid. And I don't know whether you're a violent guy . . . I'm going to make your parents take you home. You are 15-years-old. You must follow their rules. You're not mentally disturbed in any way. You're not a psychopath. No? Remember the difference between right and wrong and it will be fine. Good luck to you.<sup>144</sup>

Three days later, Eddie Werner knocked on Sam Manzie's door.<sup>145</sup>

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<sup>136</sup>Michelle I. Baird & Mina B. Samuels, *Justice for Youth: Betrayal of Childhood in the United States*, 5 J.L. & POL'Y 177-78 (1996).

<sup>137</sup>*Id.*

<sup>138</sup>*Id.* at 177.

<sup>139</sup>*Id.* at 177-78.

<sup>140</sup>*Id.* at 178.

<sup>141</sup>Baird & Samuels, *supra* note 136, at 178.

<sup>142</sup>*Dateline*, *supra* note 4.

<sup>143</sup>*Id.*

<sup>144</sup>*Id.*

<sup>145</sup>*Id.*

Again, the juvenile justice system denied a juvenile treatment for a lack of resources; the result was murder. Thus, the failure of the juvenile justice system to rehabilitate young felons lies not on the failure of the felon to be rehabilitated. Instead, the failure of the juvenile justice system is the failure to rehabilitate young felons.<sup>146</sup>

#### V. SOCIETAL RESPONSE TO POLITICAL MANIPULATION OF PUBLIC MISPERCEPTIONS

##### A. *A Reversion Back to Colonial Theories of Punishment*

With the misperceptions that violent juvenile crime is on the rise and that juvenile murderers are not amenable to rehabilitation, comes the politically fueled and media-fed misperception that the only viable alternative is to transfer the young killers to adult prison to face execution. Not only does this “solution” ignore the problem of inadequate juvenile “rehabilitation” facilities which serve as a fundamental contributing factor to juvenile violence, but it also represents abandonment of these children.

It is societal frustration and fear that are the vehicles for ultimately redefining our standards of decency. However, society must be weary of political manipulation by legislators when determining that a national consensus exists in favor of executing children who are under the age of sixteen. Fear is leading Americans to call for tougher sanctions for juvenile offenders. Americans want juveniles to be punished and sentenced as adults.<sup>147</sup> A recent survey conducted in response to the highly-

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<sup>146</sup>*Id.* See also *Teen Murder Suspect Confused about Sexuality Parents Say*, REC. N. N. J., October 31, 1997, at AO2.

<sup>147</sup>Disturbingly, the failure to offer rehabilitation extends far beyond merely denying psychiatric assistance to needy children. The failure of treatment has penetrated the walls of juvenile facilities to create deplorable dehumanizing and anti-rehabilitative conditions.

Conditions under which juveniles are confined prior to and following an adjudication of delinquency are harsh and penal in nature. According to one commentator, “while some juvenile institutions may look like ‘home,’ most juvenile facilities resemble adult prisons.” See Baird & Samules, *supra* note 108 at 182-83. Overcrowding is a continuous problem. Some children are forced to sleep on cement floors due to a lack of bedding. *Id.* The confined juveniles are not given adequate supervision due to under-staffing. *Id.* Behavior problems often result, calling for an increase in use of leg shackles and handcuffs, and four-point restraints. *Id.* Furthermore, every year, 11,500 out of 65,000 incarcerated children perform suicidal acts. *Id.* at 198. With the overcrowding, lack of supervision, and increase in use of restraints comes a lack of available treatment and counseling. *Id.* at 182. A recent study of juvenile institutions conducted in New York revealed that the boys’ and girls’ facilities are “characterized by high recidivism, homosexuality, inadequate treatment, poorly trained staff, and numerous other signs of failure.” See Mnookin, *supra* note 26 at 1103-1107.

Several cases have appeared before courts throughout the states challenging the constitutionality of the conditions in juvenile facilities. In an Indiana correctional facility, boys between the ages of twelve and eighteen were being beaten with two inch thick fraternity paddles. One boy, weighing 160 pounds, was beaten with the paddle by a staff member weighing 285 pounds. See *Nelson v. Heyne*, 491 F.2d 352, 354 (1974). The injuries sustained by the beatings were such that one child was forced to sleep on his face for three nights as a result of severe bruising and blistering. *Id.*

In Ohio, two children who were placed under juvenile court jurisdiction following adjudications of delinquency, were transferred to Cleveland’s old County Jail to be “scared straight.” See *Doe v. McFaul*, 599 F.Supp. 1421, 1423 (1984). Judge Leodis Harris instituted

publicized juvenile murders indicates that a majority of Americans are in favor of trying juveniles murderers as adults.<sup>148</sup> Fifty-six percent of Americans believe that children under thirteen should be tried as adults and face adult punishments.<sup>149</sup> However, legislators fail to mention in their efforts to perpetuate and manipulate societal outrage and fear, the cases such as Sam Manzie's where, despite parental pleas of concern, judges refuse to provide the necessary juvenile treatment for lack of financial resources.<sup>150</sup>

Instead, legislators tailor their political platforms on the misperception that the juvenile justice system has failed to rehabilitate these cold-blooded criminals. Legislators depend on the power of public panic and political manipulation of society's misperception that juvenile crimes are on the rise. Politicians feed on and fuel societal fear by advocating a "get-tough" approach to juvenile crime in the aftermath of school-yard shootings and random murders committed to "know what it [feels] like to kill somebody." In the words of one author, "anything less than the

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the program without making arrangements with the jail for handling the juveniles and without regard to warnings by a corrections officer that the jail was unable to accommodate "juvenile guests." *Id.* at 1426. As a result, the two boys fell victim to homosexual rape by inmates awaiting bind over to adult court and inmates who were already bound over for adult punishment. *Id.* at 1427.

In Rhode Island, boys who were deemed delinquent, neglected, dependent and wayward, along with boys who were voluntarily committed to the school by their parents, were subjected to what the court described as "cruelty . . . much more comparable to the Chinese water torture than to such cruelties as breaking on the wheel." *See Inmates of Boys of Boys' Training School v. Affleck*, 346 F. Supp. 1354, 1359-66 (1972). As a result of disciplinary and escape problems, some juveniles were transferred from their cottages to either the wing of an old woman's reformatory or a maximum security wing of the Adult Correctional Institute (ACI). *Id.* at 1359. The boys were placed in cold dark cement cells, containing only a bed, sink, and toilet. *Id.* The windows were barred and the toilets could only be flushed by guards outside the cell. *Id.* at 1359. The juveniles were denied access to medical care, education, artificial lighting, food, exercise, and visitor contacts. *Id.* Some children were housed with adult prisoners, who subjected them to homosexual overtures and physical threats. *Id.* at 1361.

Other children were placed in solitary confinement; the boys were not given toilet paper, soap, sheets, blankets, or a change of clothes. *Id.* at 1362. They were only permitted to wear underwear. *Id.* at 1360. Confinement could last up to seven days. In declaring such conditions unconstitutional, the Rhode Island District Court found the bug-out cells were "similar to those used to test experimentally the effects of sensory deprivation; well-adjusted adult volunteers have been found to hallucinate in such an environment in a matter of hours." *Id.*

The rehabilitative capacities of the juvenile system are hardly conducive to providing effective treatment and rehabilitation. Instead of providing treatment, the system provides overcrowded cells. The overcrowding leads not only to supervisory concerns, but also to safety concerns. Most significantly, juveniles who are incarcerated in adult facilities are more likely to become educated on how to become a polished career criminal than to be educated on how to conform their conduct so as to contribute positively to society. Thus, upon release, the juveniles are likely to continue along the same destructive path. Executions, however, are not the solution. Instead, juvenile facilities must be revamped and restructured so as to accommodate young felons with life sentences.

<sup>148</sup>D' Ambra, *supra* note 132, at 299.

<sup>149</sup>*Dateline* (NBC television broadcast, Mar. 27, 1998).

<sup>150</sup>*Id.*

harshest sentence is seen as ‘coddling’ of a young criminal.”<sup>151</sup> The public is manipulated into believing their hands are tied with regard to juvenile crime and the only viable alternative is to lower the minimum age for execution.

Instead of overhauling the juvenile justice system to provide the necessary treatment and obtain the necessary resources, executions are promised. However, even in the face of transparent political soundbites, the commission of a violent offense, while unacceptable, does not transform the juvenile into an adult.<sup>152</sup> Yet, “get-tough policies try to solve the problem of juvenile crime by lowering the age of adulthood rather than recognizing the problem as a failure of society.”<sup>153</sup> By lowering the minimum age for death eligibility, we will be reverting back to colonial theories of punishment and applying a rebuttable presumption of criminal intent to children between seven and fourteen. The goals of treatment and rehabilitation for juveniles will be forced out the window and the result will be a Seventeenth Century system of punishment.

*B. “Evolving” Standards of Indecency & Constitutional Misinterpretation*

The Court’s past and current reliance on the undefined “standards of decency” has opened the door to severe repercussions. The Court, in focusing on legislation as an indication of our “evolving standards of decency” provides politicians with the power of constitutional interpretation. Courts have the power to interpret the Eighth Amendment. What is cruel and unusual punishment, under the Eighth Amendment, will be determined by the politically-fueled- and media-fed misperceptions that juvenile crimes are on the rise and that juveniles are not capable of rehabilitation if the current system is left untouched. Thus, the contours of the Eighth Amendment will be defined by standards of *indecency*.

“Evolving” standards of decency implies that, with the passage of time, our standards, as Americans, have improved since colonial times, where punishments were nothing less than barbaric.<sup>154</sup> However, if our standards of decency have “evolved” such that we will allow the execution of children under age sixteen and as

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<sup>151</sup>See *supra* note 86 and supporting text.

<sup>152</sup>Baird & Samuels, *supra* note 136, at 181.

<sup>153</sup>Kristina H. Chung, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 IND. L. J. 999, 1012 (1991). See also D’Ambra, *supra* note 132, at 295.

<sup>154</sup>Punishments for crimes in colonial times and 17th century England were nothing less than barbaric. One commentator notes that, upon arrival to North America in the 16th century, Quakers were “whipped, pilloried, stocked, caged, imprisoned, laid neck and heels, and maimed” by New England’s Christians.” See Nanda, *supra* note 18, at 1321. A favorite method of punishment was the “ducking stool,” where a woman was tied to a chair and “plung[ed]. . . under water ‘ as often as the sentence direct[ed] in order to cool her immoderate heat.” *Id.*

Common methods of execution included death by hanging, burning, and breaking on the wheel. *Id.* The United States Supreme Court, in *Wilkerson v. Utah*, referred to cases where prisoners accused of treason were drawn or dragged to their executions, or, in cases of high treason, where prisoners were embowelled alive, beheaded and quartered. See *Wilkerson v. Utah*, 99 U.S. 130 (1878). Women accused of treason were commonly burned alive. Nanda, *supra* note 18, at 1321. Prisoners convicted of murder faced public dissection, regardless of their age. *Id.*

young as ten, the inescapable truth is that we have traded our standards of decency with a rebuttable presumption of intent and thus reverted back to colonial theories of punishment.<sup>155</sup>

If juveniles were provided with the necessary treatment—or any treatment—upon first entering the system, these children would likely not reappear to face transfer proceedings following a later and possibly preventable commission of a brutal murder.<sup>156</sup> While it may appear that a civilized society is incapable of committing uncivilized crimes, the events surrounding the 1944 execution of the youngest child this century stand as a reminder not only of the possibilities, but of our capabilities.<sup>157</sup> On June 16, 1944, George Stinney Jr. was executed by electrocution approximately two months following his conviction for murdering an 11-year-old white South Carolina girl.<sup>158</sup> The trial occurred amidst a political election. The jury deliberated for five minutes. It recommended death without mercy. George Stinney was fourteen.

Stinney, five feet and one inch tall, weighing ninety-five pounds, began his walk to the death chamber, despite public appeals, including those from the victim's family, to spare his life. One commentator reports:

A bible — a gift from the sheriff — was tucked under his arm when he entered the room . . . the 'guards had difficulty strapping the boy's slight form into the wooden chair built for adults' . . . young Stinney was such as small boy that it was difficult to attach the electrode to his right leg.' Stinney said nothing before the mask was lowered over his face. The Record reporter observed that after the first 2,400 volts passed through the boy's body, 'the death mask slipped from his face and his eyes were open when two additional shots of 1,200 and 500 volts followed.' James Gamble . . . remembers . . . 'his head went up and the mask came off his face . . . and saliva and all was coming out of his mouth and tears from his eyes.'<sup>159</sup>

If today's children were to face the same fate, our "standards of decency" will have become wicked.

## VI. CONCLUSION

Prosecutors are actively seeking the death penalty for children under sixteen arguing the law is unsettled as a result of the plurality opinion in *Thompson*.<sup>160</sup> It follows that there has been an increase in publicity of recent juvenile crimes, with a special focus on those children fifteen and younger. As an alternative to reducing the minimum age of execution, the goals of treatment and rehabilitation should be re-

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<sup>155</sup>See *supra* note 126.

<sup>156</sup>See *supra* note 114 and supporting text.

<sup>157</sup>David I. Bruck, *Executing Teen Killers Again. The 14-Year-Old Who, in Many Ways, was too Small for the Chair*, WASH. POST, September 15, 1985, at D01.

<sup>158</sup>*Id.*

<sup>159</sup>*Id.*

<sup>160</sup>Strater, *supra* note 3, at 156.

examined and revitalized. While proponents rely on the apparent inability of the juvenile justice system to rehabilitate juveniles when they first enter the system, the actions of judges make clear that the juvenile system is often robbed of the opportunity to treat and rehabilitate at-risk juveniles.<sup>161</sup> The result is often murder. Instead of executing children, society must recognize that the failure of the juvenile justice system is the failure to rehabilitate the child--not the child's failure to be rehabilitated.

If society does, in fact, determine that the minimum age of execution should be reduced, the dilemma again will be where to draw the line. Using our evolving standards of *indecency*, we will inevitably revert back to colonial theories of punishment by applying a rebuttable presumption of culpability to children between seven and fourteen. Under the guise of a national consensus, we will create child-sized death chambers to accommodate the tiny frames of children smaller and younger than Stinney. In the end, our standards will have "evolved" to become wicked.

JENNIFER L. WHITNEY<sup>162</sup>

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<sup>161</sup>See *supra* note 116 and supporting text.

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