After *Roper v. Simmons*: Keeping Kids Out of Adult Criminal Court

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I. INTRODUCTION

The Supreme Court jurisprudence concerning the constitutionality of capital punishment for adolescents is a study in vacillation. In *Thompson v. Oklahoma*,[1] the Court reversed the death penalty imposed on a fifteen-year-old.[2] It was a five-four decision,[3] but only four justices agreed that fifteen-year-olds, across-the-board, were not mature enough to warrant execution.[4] Justice O'Connor's concurrence in the judgment was, however, very narrow. Her concern was that Oklahoma had not made an explicit policy choice that such minors should be executed.[5] She made quite clear that although "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."[6]

A year later, in *Stanford v. Kentucky,*[7] the Supreme Court upheld executions of sixteen- and seventeen-year-olds.[8] The majority noted that the common-law rebuttable presumption of infancy theoretically would have permitted capital punishment to be imposed on those children over the age of seven who demonstrated sufficient mens rea and moral culpability.[9] Since a majority of states in 1989 authorized capital punishment for sixteen-year-olds, the majority concluded that there was no national consensus that executing such minors was inhumane.[10]

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1. 487 U.S. 815. Justice Stevens wrote the plurality opinion which Justices Brennan, Marshall, and Blackmun joined. O'Connor filed an opinion concurring in the judgment. Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist and Justice White joined. Justice Kennedy took no part in the decision of the case. *Id.* at 817.

2. *Id.* at 838.

3. *Id.* at 817.

4. Justices Stevens, Brennan, Marshall, and Blackmun. *Id*. at 815.

5. The defendant had become subject to the death penalty simply because he had been certified as an adult, and in Oklahoma adults were subject to capital punishment. *See id.* at 857-58 (O'Connor, J., concurring in the judgment).

6. *Id*. at 853.

7. 492 U.S. 361 (1989).

8. *Id.* at 380.

9. *Id.* at 368 ("At that time, the common law set the rebuttable presumption of incapacity to commit any felony at the age of 14, and theoretically permitted capital punishment to be imposed on anyone over the age of 7."). The common law also had an irrebuttable presumption of infancy for children under seven. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES 22-24 (stating that the infancy defense was operative as early as the reign of Edward III); *see also* A.W.G. Kean, *The History of the Criminal Liability of Children*, 53 L.Q. REV. 364 (1937) (analyzing the antiquity and evolution of the infancy defense).

10. *See id.* at 370-71 ("This does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual.").

In *Roper v. Simmons*,[11] the Supreme Court, again five-four,[12] created an Eighth Amendment categorical bar to execution of persons who commit capital crimes when they are under the age of eighteen.[13] The decision in *Stanford,* rejecting the identical claim, was held to be "no longer controlling on this issue."[14] Justice Kennedy, writing for the majority, relied heavily on *Atkins v. Virginia*,[15] which prohibited capital punishment for retarded people.[16] He also made clear that the Court had an obligation to make its "own independent judgment" in determining "whether the death penalty is . . . disproportionate" and thus violates the Eighth Amendment.[17]

Although we recognize that capital cases are often sui generis and may not be of strong precedential value in other contexts,[18] we think that the

11. 125 S. Ct. 1183 (2005).

12. Justice Kennedy delivered the opinion in which Justices Stevens, Souter, Ginsburg, and Breyer joined. Justice Stevens filed a concurring opinion in which Justice Ginsburg joined. Justice O'Connor filed a dissenting opinion. Justice Scalia filed a dissenting opinion in which Chief Justice Rehnquist and Justice Thomas joined. *Id.* at 1187.

13. *Id.* at 1200.

14. *Id.* at 1198 ("To the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989 . . . it suffices to note that those indicia have changed.").

15. 536 U.S. 304 (2002).

16. *Id.* at 321 (citing Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

17. *See Simmons*, 125 S. Ct. at 1192.

18. Nancy J. King, *How Different Is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 200 (2004) ("Jury sentences short of death lack the finality that triggers the Eighth Amendment's requirements for guiding jury discretion. . . . The contrast between this affirmative embrace of inconsistency in non-capital jury sentencing and the condemnation of the same in capital sentencing is one of the most striking examples of the difference that death makes."); *see also* Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 119 (2004) ("[T]he Court has insisted that a *sui generis* due process of death is necessary before any particular person can be picked out to die."). *Compare* Rummel v. Estelle, 445 U.S. 263, 266, 272, 285 (1980) (holding that life sentence for a recidivist offender convicted of stealing less than $200 was not barred by the Eighth Amendment and noting that the theme of "the unique nature of the death penalty for purposes of Eighth Amendment analysis, has been repeated time and time again in our opinions"), *with* Solem v. Helm, 463 U.S. 277, 296-97, 303 (1983) (reversing a sentence of life imprisonment without possibility of parole under a recidivist statute where defendant had committed seven relatively minor offenses). *But see* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.1(b), at 1196 (2d ed. 1999) (noting that while the "extensive and complex" procedures for imposing the death penalty "are unique to death sentencing, the Court's efforts to interpret the Constitution's safeguards in this context have influenced the development of procedure in other types of sentencing as well").

developmental and psychological distinctions between adults and adolescents, differences that the *Simmons* Court believed was constitutionally relevant regarding execution,[19] should also be considered in determining the extent of punishment for juveniles who commit serious criminal acts. In particular, we argue that the Court's recognition of the growth capacity of juveniles, and their reduced moral culpability, should weigh heavily in favor of a categorical bar against waiver of children to criminal court. Furthermore, attempts to circumvent such a ruling by defining adults as sixteen or seventeen years of age for purposes of the criminal law should be prohibited.

If these proposals are not accepted, and a child is charged and convicted of a serious crime in criminal court, the kind and extent of punishment imposed should be heavily influenced by the type of evidence relied on by the *Simmons* Court in finding that youths are not death eligible. Either the Court should extend the *Simmons* rationale to prohibit life imprisonment without the possibility of parole or, at the least, create a presumption against such a sentence being imposed on an adolescent. As Justice Kennedy noted, "the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person."[20] Even life imprisonment is rapidly becoming life without possibility of parole. Defendants who use to be paroled in ten or twenty years are now dying in prison of old age.[21]

When children kill, as they always have and probably always will, the state must juggle two distinct and often conflicting concerns: its police power and its parens patriae interest. These concerns are not, however, mutually exclusive.[22] There is a delicate balance that must be maintained.

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19. *See Simmons*, 125 S. Ct. at 1195 (considering three important differences between adults and adolescents).

20. *Id.* at 1196.

21. Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. TIMES, Oct. 2, 2005, at A1. The article describes a man who, at fifteen, killed his girlfriend and was sentenced to life imprisonment. The sentencing judge told the defendant in open court that if he behaved himself he would be paroled after a few years. He has spent thirty-five years in prison so far, and was recently denied parole even though he is a model prisoner and the girl's family requested his parole. This change is "driven by tougher laws and political pressure from governors and parole boards." *Id.*

22. *See* Irene Merker Rosenberg, *Schall v. Martin: A Child Is a Child Is a Child*, 12 AM. J. CRIM. L. 253, 268 (1984) (asserting that in delinquency cases the state has two interests—the state's police power and its *parens patriae* concern and that both interests were "relied upon in upholding the challenged legislation" which permitted pretrial detention of juveniles charged with criminal acts); *cf.* Eric S. Janus, Hendricks *and the Moral Terrain of Police Power Civil Commitment*, 4 PSYCHOL. PUB. POL'Y & L. 297, 303 (1998) ("The state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."); Eric S. Janus, *Toward a Conceptual Framework for Assessing Police Power Commitment Legislation: A Critique of Schopp's*

Even during the more savage common-law era, children's diminished responsibility was reflected by the irrebuttable presumption of incapacity for children under seven, and the rebuttable presumption of incapacity for those between seven and fourteen.[23] But we are not wedded to that more primitive assessment of culpability. Evolving standards of decency require that society takes a more refined approach in allocating responsibility and punishment for juveniles. Clearly, the state must incapacitate and punish children who commit serious criminal acts, but, as *Simmons* says, that does not mean that minors can be executed, nor, as we maintain, be consigned to a living death behind bars without any hope of respite. As the Court has said in another context, the legal system must somehow be adjusted "to account for children's vulnerability and their needs for 'concern, . . . sympathy and . . . paternal attention.'"[24]

II. THE COURT'S OPINION

The facts in *Simmons* were gruesome.[25] The defendant and his two younger friends broke into the victim's home. They then tied and gagged her, drove in her car to a river, and threw her in while she was still alive. This was planned and premeditated.[26] These are the kinds of facts that usually induce the Court to deny relief,[27] and indeed it may well be that the Court selected this case purposefully, to make it clear that no matter how heinous the offense, juveniles could not be considered death eligible.[28]

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and Winick's Explications of Legal Mental Illness, 76 NEB. L. REV. 1, 8 (1997) ("Police power and *parens patriae* considerations are often intertwined in discussions of civil commitment.").

23. *See* BLACKSTONE, *supra* note 9, at 22-24.

24. Bellotti v. Baird, 443 U.S. 622, 635 (1979) (plurality opinion) (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971) (plurality opinion)).

25. *See* Scott R. Chapman, *Juvenile Justice at a Crossroads*, W. MASS. L. TRIB., Dec. 2004, at 11 ("The facts of the underlying crime are, no doubt, horrific. . . . On its face, Simmons does not make a good candidate for the rehabilitative model of the juvenile court.").

26. For the full recital of facts, see *Roper v. Simmons*, 125 S. Ct. 1183, 1187-88 (2005).

27. *See* HUGO ADAM BEDAU, DEATH IS DIFFERENT 138-40 (1987) (noting the generally conservative disposition of the judiciary towards capital cases); *see also* DAVID R. DOW, EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA'S DEATH ROW xxv-xxvi (2005) ("Judges who want to deny a murderer certain constitutional rights deploy the facts of the murder as a distraction, as a justification for ignoring the rule of law.").

28. *See* Chapman, *supra* note 25, at 11 (asking whether the execution of a more sympathetic teenager would offend our sense of decency, and whether we have "reached

The impetus for overruling *Stanford* was clearly *Atkins*.[29] In *Penry v. Lynaugh*,[30] decided the same day as *Stanford*,[31] the Court held that there was no national consensus against executing the mentally retarded.[32] In 2002, the *Atkins* Court reconsidered *Penry* and concluded that evolving standards of decency required a categorical bar against execution of the mentally retarded.[33] The Court looked to legislation and state practice,[34] and concluded that mental retardation "diminishes personal culpability even if the defendant can distinguish between right and wrong. . . . The impairments of mentally retarded defendants make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect."[35]

Just as in *Atkins*, the Court in *Simmons* counted jurisdictions to determine if there was a national consensus against the death penalty for juveniles.[36] Thirty states prohibited capital punishment for the mentally

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the place and time in our society where we need to 'draw a line in the sand' sending the message that age is not relevant when you commit a horrific crime"); *see also* Carrie Martin, *Spare the Death Penalty, Spoil the Child: How the Execution of Juveniles Violates the Eighth Amendment's Ban on Cruel and Unusual Punishment in 2005*, 46 S. TEX. L. REV. 695, 696 (2005) ("Do you believe that a teenager should be eligible for execution? . . . [I]f the teenager, after a botched robbery attempt, kidnapped a woman, threw her off a bridge with her hands tied behind her back and watched her drown. . . . Does your answer change?").

29. Atkins v. Virginia, 536 U.S. 304 (2002). After *Atkins* was decided, a number of commentators predicted that the juvenile death penalty would be next on the chopping block. *See, e.g.*, Jamie Hughes, *For Mice or Men or Children? Will The Expansion of the Eighth Amendment in* Atkins v. Virginia *Force The Supreme Court to Re-Examine The Minimum Age For The Death Penalty?*, 93 J. CRIM. L. & CRIMINOLOGY 973, 1007-08 (2003) (stating that the *Atkins* Court had "redefined the term 'national consensus' within their Eighth Amendment jurisprudence" and that "[w]ith this opinion as precedent, the Court should examine age-related death penalty legislation and overturn *Stanford v. Kentucky*").

30. 492 U.S. 302 (1989).

31. The cases were decided on June 26, 1989. *See id.* at 302; Stanford v. Kentucky, 492 U.S. 361, 361 (1989).

32. *Penry*, 492 U.S. at 334-35 ("[T]here is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment.").

33. *Atkins*, 536 U.S. at 321 ("[O]ur 'evolving standards of decency,' . . . conclude that such punishment is excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender.") (citation omitted).

34. *Id.* at 313-16 (noting a consistent shift against application of the death penalty to the mentally retarded and stating "[t]he practice . . . has become truly unusual, and it is fair to say that a national consensus has developed against it"); *see also* Roper v. Simmons, 125 S. Ct. 1183, 1191 (2005) (referring to the above language in *Atkins*).

35. *Simmons*, 125 S. Ct. at 1192 (summarizing the reasoning in *Atkins* which assumed that the mentally retarded could not engage in what the *Atkins* Court called the "cold calculus that precedes the decision" to murder) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

36. *Simmons*, 125 S. Ct. at 1192. The Court explicitly noted the parallel to the methodology employed in *Atkins*, stating that "[t]he evidence of national consensus

retarded at the time of the *Atkins* decision[37] and the same number prohibited the death penalty for juveniles at the time of *Simmons*.[38] A major difference between *Stanford*, on the one hand, and *Simmons* and *Atkins*, on the other, was that the Court was now counting the states that rejected the death penalty for all persons.[39] Justice Kennedy also stressed that several states had abolished capital punishment for juveniles in the interim between *Stanford* and *Simmons*,[40] that very few states that permitted the death penalty for juveniles actually executed them,[41] that Congress had excluded juveniles under the Death Penalty Act of 1994,[42] and pointed to the practices of other countries and treaties that prohibited capital punishment for juveniles under eighteen.[43] Indeed, the "United

against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded." *Id.*

37. *Id.* ("When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded.").

38. *Id*. (asserting that "30 States prohibit the juvenile death penalty").

39. Of the thirty states Justice Kennedy counted as having abolished the death penalty for juveniles, twelve did not have any death penalty. *Id.* Had the *Stanford* Court used the *Simmons* methodology in 1989, it would have counted twenty-five states as having abolished the death penalty for juveniles (thirteen states had completely abolished the death penalty and twelve states had abolished it for sixteen- and seventeen-year-olds). *Id*. at 1208 (O'Connor, J., dissenting); Stanford v. Kentucky, 492 U.S. 361, 370 (1989) ("Of the 37 states whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders."). The Court in *Atkins* only referred to eighteen states as having abolished the death penalty for mental retardation. *Atkins*, 536 U.S. at 322 (Rehnquist, C.J., dissenting).

40. *Simmons*, 125 S. Ct. at 1193. Four states and the federal government abandoned the practice by legislation, one by judicial fiat. *Id.* at 1211 (O'Connor, J., dissenting).

41. The *Simmons* Court counted six states that had executed juveniles in the sixteen intervening years between *Stanford* and *Simmons*. *Id.* at 1192. The Court also noted, anecdotally, that Kentucky had pardoned Kevin Stanford, the offender whose sentence had been upheld in *Stanford. Id.* The Court in *Simmons* cited to Professor Victor Streib's research on the subject. *Id.* at 1192. In addition to the statistics quoted by the *Simmons* Court, Streib's research shows, among other things, that only twenty-two juvenile offenders had been executed since 1973 (roughly one execution every seventeen months), whereas at least 922 juvenile executions were recorded between 1642 and 1972 (or about one every four months). These twenty-two post-1972 juvenile offender executions represented 2.3% of all executions, and two-thirds of them were carried out by the state of Texas. VICTOR L. STREIB, THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY 1, 1973—DECEMBER 31, 2004 3 (2005), http://www.law.onu.edu/faculty/streib/documents/JuvDeathDec2004.pdf. Only one of the twenty-two executed offenders had been younger than seventeen at the time of the crime. *Id.* at 5.

42. "[N]o person may be sentenced to death who was less than 18 years of age at the time of the offense." 18 U.S.C. § 3591 (2000).

43. *Simmons*, 125 S. Ct. at 1194, 1198-1200.

States is the only country in the world that continues to give official sanction to the juvenile death penalty."[44]

As the Court has noted, the death penalty is reserved for the worst of the worst, both in terms of offense and offender.[45] Applying that concept, the *Simmons* Court noted three major differences between juveniles under eighteen and adults—immaturity and recklessness,[46] susceptibility to external influences,[47] and growth capacity.[48] Although the Court conceded that there might be some adolescents who were as culpable as adults, it believed that there was "an unacceptable likelihood . . . that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth."[49] In support of this belief, the Court cited the prosecutor's argument to the jury in the case at bar that the defendant's youth was aggravating rather than mitigating.[50] Thus, the Court was concerned that the cruelty of a particular murder would overcome the lesser culpability of an adolescent. This possibility is not fanciful. In a study, social scientists concluded that "when heinousness increases, it exerts a more powerful effect than age."[51] Based on these

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44. *Id*. at 1198.

45. *See, e.g.*, *Atkins*, 536 U.S. at 319 (asserting that capital punishment should be limited to a narrow category of the most serious crimes and those most deserving of death due to extreme culpability).

46. *Simmons*, 125 S. Ct. at 1195 ("'A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'") (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)); *see also* Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (holding that the courts must consider all relevant mitigating factors including age, background, and mental and emotional development in death penalty cases, and that "minors, especially in their earlier years, generally are less mature and responsible than adults. . . . minors often lack the experience, perspective, and judgment expected of adults").

47. *Simmons*, 125 S. Ct. at 1195 ("[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."); *see also Eddings*, 455 U.S. at 115 ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.").

48. *Simmons*, 125 S. Ct. at 1195 ("[T]he character of a juvenile is not as well formed as that of an adult."); *see also* Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion) (holding that the execution of a person under 16 years is unconstitutional and noting that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is more apt to be motivated by mere emotion or peer pressure than is an adult").

49. *Simmons*, 125 S. Ct. at 1197.

50. *Id.* at 1189 ("In rebuttal, the prosecutor gave the following response: 'Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.'").

51. Norma J. Finkel, *Prestidigitation, Statistical Magic, and Supreme Court Numerology in Juvenile Death Penalty Cases*, 1 PSYCHOL. PUB. POL'Y. & L. 612, 636 (1995).

considerations, the majority opted for a per se rule rather than a standard allowing juries to weigh the mitigating and aggravating factors.[52]

Justice Scalia, joined by then Chief Justice Rehnquist and Justice Thomas, dissented. He took issue with every aspect of the majority opinion. In his view, states that had no death penalty were saying nothing special about executing juveniles.[53] He likened the majority's reliance on scientific and sociological studies to "look[ing] over the heads of the crowd and picking out its friends."[54] In other words, there were conflicting studies,[55] and in such a situation, he argued, the legislature is best equipped to

52. *See generally* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (discussing the differences between interpreting law using a rule based approach which leaves out subjective factors and a standard based approach that incorporates various subjective factors).

53. *Simmons*, 125 S. Ct. at 1219 (Scalia, J., dissenting) ("[T]hose 12 States considered *none* of the factors . . . before us today—lower culpability of the young, inherent recklessness, lack of capacity for considered judgment, etc.").

54. *Id.* at 1222-23 (Scalia, J., dissenting) (applying a metaphor to illustrate the point that "[e]verything from variations in the survey methodology, such as the choice of the target population, the sampling design used, the questions asked, and the statistical analyses used to interpret the data can skew the results").

55. *Id.* at 1223 (Scalia, J., dissenting) ("[T]he American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In its brief in *Hodgson v. Minnesota*, 497 U.S. 417 . . . (1990), the APA found a 'rich body of research' showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement."); *see* Bruce Ambuel & Julian Rappaport, *Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion*, 16 LAW & HUM. BEHAV. 129, 129-30 (1992) (conducting a study on 75 adolescent women and finding that the cognition level of adolescents 15 and older were similar to adults). *Compare* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective On Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 159-60, 165 (1997) ("[S]cientific research and theory support the claim that adolescents are more competent decision-makers than has been presumed under paternalistic policies, but the scientific evidence for the claim that their cognitive decision-making capacity is comparable to that of adults is unclear," particularly in stressful situations and on "the street . . . . Thus, adolescents on the street, who are making choices that lead to criminal conduct, may be less able than adults to consider alternative options that could extricate them from a precarious situation."), *with* Barry C. Feld, *Competence, Culpability, and Punishment: Implications of* Atkins *for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 515-21 (2003) (noting that adolescents are less capable of controlling their impulsive behavior than adults are because the pre-frontal cortex of the frontal lobe is not fully developed). During adolescence, the brain goes through a process of myelination where the brain matter shifts from gray to white. This process starts in the back of the brain. Therefore, the frontal cortex develops last. During this time, adolescents rely on the amygdala to make decisions. This part of the brain is the "gut reaction" part. Therefore, adolescents act on impulse when making decisions. *Id*.

decide "which view of science is the right one."[56] The Court's consideration of foreign law he asserted, "ought to be rejected out of hand."[57] Perhaps what disturbed him the most was that the Court used its "own judgment" in deciding whether the death penalty for adolescents was proportional.[58] As always, he yearns for an "originalist" approach to Eighth Amendment analysis, just as he does in other areas of constitutional law.[59]

Justice O'Connor dissented in a separate opinion. She agreed with much of the majority's reasoning, including the need for the Court to use its own independent judgment.[60] Her concern was application of the law.[61] In her view there was simply insufficient evidence of a national consensus, unlike the situation in *Atkins*, and sparse empirical evidence

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56. *Simmons*, 125 S. Ct. at 1223 (Scalia, J., dissenting) (asserting that the courts may only consider the "limited evidence on the record before them," whereas the legislature may "'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts'") (citations omitted).

57. *Id.* at 1226 (Scalia, J., dissenting) ("[I]n many significant respects the laws of most other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself.").

58. *Id.* at 1221-22 (Scalia, J., dissenting) (noting that the rule allowing the Court to use its own judgment was rejected in *Stanford*).

59. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 371-72, 378 (1995) (Scalia, J., dissenting) (discussing the originalist approach in an anonymous electioneering case, stating that "[t]he question posed by the present case is not the easiest sort to answer for those who adhere to the Court's (and the society's) traditional view that the Constitution bears its original meaning and is unchanging." He later clarifies the difficulty of an originalist view by noting "[w]here the meaning of a constitutional text (such as 'the freedom of speech') is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852-62 (1989) (discussing the differences between originalism and non-originalism and stating "I prefer . . . originalism"); *see, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (arguing that the most specific, rather than general historical traditions relating to a person's rights should be looked at and finding no constitutional violation when a biological father is denied visitation rights to see his child when the mother is married to another man at the time of the child's birth because it is the marital family, not the "adulterous natural father" that has been traditionally protected) (no other justice joined Justice Scalia's conclusion in note 6); *see also, e.g.*, Printz v. United States, 521 U.S. 898, 935 (1997) (holding that the federal government may not require the state's executives to conduct background checks on prospective handgun purchasers under the Brady Handgun Violence Prevention Act because there is a lack of historical evidence that the early Congresses commanded the state's officers to perform certain functions and therefore the law violates the dual sovereignty that the Framers of the Constitution designed).

60. *Simmons*, 125 S. Ct. at 1207 (O'Connor, J., dissenting) ("[W]e . . . have a 'constitutional obligation' to judge for ourselves whether the death penalty is excessive punishment for a particular offense or class of offenders.").

61. *Id.* at 1209 (O'Connor, J., dissenting) ("[A]lthough the general principles that guide our Eighth Amendment jurisprudence afford some common ground, I part ways with the Court in applying them to the case before us.").

of the differences between adults and older adolescents.[62] She differentiated the characteristics of mentally retarded persons and adolescents. The former have an impairment that makes it "highly unlikely"[63] they could be deserving of the death penalty, a status that she thought was different from chronological age.[64]

III. IMMATURITY, PEER PRESSURE, AND BRAIN DEVELOPMENT

There has been an angry response to *Simmons*, at least in certain quarters. Families of victims were outraged by the decision, arguing that the Court did not understand the number and dangerousness of violent teenagers.[65] The intensity of anti-*Simmons* sentiment can also be seen in the stance taken by some states, at least those in which criminal defendants are deemed adult at the age of seventeen. The most vociferous voices were those from Texas, the state which has consistently executed

62. *Id.* at 1213 (O'Connor, J., dissenting) ("[T]he Court's proportionality argument . . . fails to establish that the differences in maturity between 17-year-olds and young 'adults' are both universal enough and significant enough to justify a bright-line prophylactic rule against capital punishment of the former").

63. *Id.* at 1209 (O'Connor, J., dissenting).

64. *Id.* at 1214 (O'Connor, J., dissenting) ("[I]t defies common sense to suggest that 17-year-olds as a class are somehow equivalent to mentally retarded persons with regard to culpability or susceptibility to deterrence. Seventeen-year-olds may, on average, be less mature than adults, but that lesser maturity simply cannot be equated with the major, lifelong impairments suffered by the mentally retarded.").

65. Among them was Elaine Wild, whose sister was Simmons's victim. The St. Louis Post-Dispatch reported the following several months after the *Simmons* ruling:

> She couldn't believe the verdict. She didn't buy the underdeveloped brain defense. "He knew what he was doing the whole time," she said. In fact, Simmons had talked about killing someone in the days leading up to the murder. And the world consensus just didn't make sense to her. Couldn't those justices in Washington understand? He didn't give Shirley [Crook] a chance. Why should he get a chance?
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> March 1, 2005, the day the Supreme Court handed down its ruling, was a day of tears.
>
> "I don't know what to do," Elaine said through big sniffles that day. Every short phrase was punctuated with a pause to catch her breath. "That was it. There's nothing else to do. And it tears my heart out."

James Carlson, *Victim's Sister Tries to Live On*, ST. LOUIS POST-DISPATCH, July 24, 2005, at B1; *see also* Jon Sawyer, *Court Bars Juvenile Executions*, ST. LOUIS POST-DISPATCH, March 2, 2005, at A1 (quoting a leader of the pro-capital punishment advocacy group Justice For All).

more people than any other jurisdiction.[66] Texas also housed more juveniles on death row than any other state.[67]

After the *Simmons* decision came down, some judges and prosecutors in Texas took the position that *Simmons* was a narrow opinion that would not apply to the execution of seventeen-year-olds in the state.[68] They reasoned that under Texas law seventeen-year-olds are considered adults for purposes of the criminal law,[69] and the state penal code explicitly allows seventeen-year-olds to be death eligible.[70] Evidently such commentators did not understand that the majority opinion made it very clear that it was chronological, not legal, age that was relevant.[71]

The *Simmons* majority looked at "scientific and sociological studies"[72] to establish "that juvenile offenders cannot with reliability be classified among the worst offenders."[73] The first trait differentiating juveniles from adults is immaturity and "an underdeveloped sense of responsibility."[74] The Court cited and quoted from an article showing that "adolescents are overrepresented statistically in virtually every category of reckless behavior."[75] The states recognize this fact, and limit ages at which

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66. *See* Death Penalty Information Center, Number of Executions by State Since 1976, http://www.deathpenaltyinfo.org/article.php?scid= 8&did=186 (last visited Oct 29, 2005).

67. *See* STREIB, *supra* note 41, at 3, 11 ("Almost two-thirds of the current-era executions of juvenile offenders have occurred in Texas" and between the years 1973 and 2004, "Texas (58 sentences) [was] the clear leader in this practice, followed at quite a distance by Florida (32 sentences) and then Alabama (25 sentences). These 3 states together account for over half (115/228) of all juvenile death sentences. Only 7 states have imposed 10 or more such sentences.").

68. The Abilene Reporter-News quoted opinions from a local judge and a county district attorney that the *Simmons* "ruling doesn't mean prosecutors will not be allowed to seek the death penalty for offenders younger than 18 in Texas." Jason Sheehan, *Death Penalty Ruling to Have Only Limited Effect Here*, ABILENE REPORTER-NEWS, Mar. 5, 2005 (Local).

69. TEX. FAM. CODE ANN. § 51.02 (Vernon 2004) ("'[C]hild' means a person who is: (A) ten years of age or older and under 17 years of age.").

70. TEX. PENAL CODE ANN. § 8.07 (Vernon 2004) ("[N]o person may, in any case, be punished by death for an offense committed while he was younger than 17 years.").

71. In addition, Appendix A of the Court's opinion listed the twenty states that permitted the death penalty for those under eighteen, and Texas was of course one of those jurisdictions. The governor of Texas subsequently and reluctantly commuted the death sentences of the twenty-eight death row inmates affected by the *Simmons* ruling. Lisa Falkenberg, *Perry Spares Juvenile Killers*, HOUSTON CHRON., June 23, 2005, at B1. The commuted sentence was life imprisonment, which, at the time the minors were sentenced, was the only alternative to execution. *Id.* Texas subsequently amended the penal code to permit life imprisonment without possibility of parole. 2005 TEX. SESS. LAW SERV. 2707 (West) (to be codified as Tex. Penal Code § 12.31, effective Sept. 1, 2005).

72. *Roper v. Simmons*, 125 S. Ct. 1183, 1195 (2005).

73. *Id.*

74. *Id.*

75. *Id.* (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992)).

people can marry, serve on juries, vote, drink alcohol, and contract.[76] Juveniles act impulsively, and therefore cannot accurately assess the consequences of their behavior.[77] Impulsivity means that even "good kids, who know right from wrong sometimes do stupid things."[78] They engage in unprotected sex which often results in out of wedlock pregnancies and disease;[79] they "do drugs;"[80] drink enough to die from alcohol poisoning, even in college;[81] drive recklessly causing their own death and that of others;[82] and are at serious risk of committing suicide.[83]

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76. *Id.* ("[A]lmost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent."); see also Appendices B, C, and D of the Court's opinion illustrating that the majority of states have set the age limit for voting, serving on a jury, and marrying without parental consent at eighteen. *Id.* at 1202-04.

77. *See* Colin P. Mahon, *Balance Between Strictly Obeying Supreme Court Precedent and Overruling Outmoded Concepts of Capital Punishment*, 23 QUINNIPIAC L. REV. 937, 967-68 (2004) ("[O]ne researcher said that 'the human brain is not fully mature before reaching adulthood, and that furthermore the brain regions that are the most important for regulating impulse control, planning, consideration or consequences, abstract reasoning and most probably, moral judgment are the very regions that mature last.'") (quoting Ruben C. Gur, Declaration of Ruben C. Gur, Ph.D., http://www.abanet.org/crimjust/juvjus/Gur%20affidavit.pdf); *see also* Jeffrey Fagan, Atkins, *Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles From Capital Punishment*, 33 N.M. L. REV. 207, 207 (2003) (comparing the "limitations in developmental capacities that characterize mentally retarded defendants" with those that "characterize a significant proportion of adolescent offenders").

78. Paul Raeburn, *Too Immature for the Death Penalty?*, N.Y. TIMES MAG., Oct. 17, 2004, at 26, 29.

79. "Today, nearly 70 percent of all high school seniors engage in sexual intercourse before graduating, one in eight contracts a sexually transmitted disease (STD) each year and more than 80 percent of all STD cases occur among those under 29." Pamela Peeke, *Sex & Your Teen; What Parents & Health Care Professionals Should Know*, NAT'L WOMEN'S HEALTH REP., June 2002, at 8. Although teen pregnancy rates have fallen in the last decade, most of this decrease is a result of increased contraceptive use. About one third of teen pregnancies end in abortion. *Teen Pregnancy, Abortion Rates Continue Decline*, ST. GOV'T NEWS, Apr. 2004, at 10.

80. *See* Erik Goldman, *Teen Drug Use Has Changed Little Since 1970s*, FAM. PRACTICE NEWS, Mar. 15, 2005, at 11 (stating that recreational use of marijuana today is as common among teens as it was during the height of the drug culture). *But see* Michael J. Stoil, *Teen Drug Use's Changing Profile: The Bush Administration Claims a Victory in Reducing Teen Drug Abuse, But the Data Also Show Some Disturbing Trends*, BEHAV. HEALTH MGMT., May-June 2005, at 9 (reporting a government survey indicating that past-month illegal drug use among teens had fallen in recent years).

81. An estimated 1400 college students die as a direct or indirect result of alcohol consumption each year. Robert Davis, *Five Binge-Drinking Deaths 'Just the Tip of the Iceberg*,' USA TODAY, Oct. 7, 2004, at 11D.

82. "Nationwide, young drivers make up 6 percent of the driving population, yet are involved in nearly 20 percent of all fatal motor vehicle crashes—about one in five." Lisa Rosetta, *Utah's Teen Drivers are Safer than Most*, SALT LAKE TRIB., July 1, 2005,

All parents of teenagers have to contend with the problem of impulsivity and have greater or lesser success in helping their children to think before acting. It is true that there are adults who continue to engage in reckless and impulsive behavior, but this conduct is much more common in children and much less prevalent in adults.[84]

The second characteristic the Court focused on in differentiating juveniles from adults was the effect of outside influences on the child's behavior.[85] Indeed, adolescence and peer pressure are inextricably linked—from clothing fads[86] to antisocial behavior.[87] "To be different" is to be an outcast and excluded from the "in cliques." Street gangs, with their colors and their initiation rites, exemplify the power of peer

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at A1. "Adolescent drivers tend to engage in numerous risky behaviors including speeding which has been found to significantly correlate with a greater risk for accidents." Sheila Sarkar & Marie Andreas, *Acceptance of and Engagement in Risky Driving Behaviors by Teenagers*, 39 ADOLESCENCE 687, 687-88 (2004).

83. *See* Richard Fossey & Perry A. Zirkel, *Liability for Student Society in the Wake of Eisel*, 10 TEX. WESLYAN L. REV. 403, 403-04 (2004) ("[S]uicide is the second leading cause of death for teenagers."). While the suicide mortality rate for youth is comparable to the population rate, the percentage of youth who attempt suicide is believed to be considerably greater than the attempt rate for adults. The American Association of Suicidology (AAS) estimates that for every successful teen suicide attempt, there are between 100 and 200 abortive attempts and that 8.8% (nearly one in eleven) high school-aged youth attempted suicide annually. American ASSOCIATION OF SUICIDOLOGY, YOUTH SUICIDE FACT SHEET (Mar. 19, 2004), http://www.suicidology.org/associations/1045/files/YouthSuicide.pdf. However, the AAS estimates that the general population attempts-to-suicides ratio is only twenty-five to one and as low as four to one for the elderly, with an estimated 790,000 suicide attempts for the general population in 2002. AMERICAN ASSOCIATION OF SUICIDOLOGY, U.S.A. SUICIDE: 2002 OFFICIAL FINAL DATA, Oct. 16, 2004, *available at* http://www.suicidology.org/associations/1045/files/2002FinalData.pdf.

84. Jeffrey Arnett, *The Young and the Reckless: Adolescent Reckless Behavior*, 4 CURRENT DIRECTIONS IN PSYCHOL. SCI. 67, 67 (1995) (noting that adolescents are more likely to engage in sensation-seeking, egocentric and aggressive behaviors than are adults, and that biology and social values conspire to promote reckless behavior among adolescents).

85. *Roper v. Simmons*, 125 S. Ct. 1183, 1195 (2005).

86. *See* Michael S. Jellinek, *Flexibility Buffers Shock of Teen Fads*, PEDIATRIC NEWS, Nov. 2003, at 16 (arguing that adolescent faddish behavior and teenage rebelliousness is normal, developmentally-appropriate behavior which helps form a bridge from childhood to adulthood); s*ee also* Michael K. Meyerhoff, *The Rule of Uncle Harry's Funeral (Dealing with Teenage Fads & Rebellion)*, PEDIATRICS FOR PARENTS, Aug. 1997, at 8 ("It is painfully clear that adolescents are characterized more by impulsiveness, recklessness, and susceptibility to peer pressure than they are by sensitivity, forethought, and compassion for their families.").

87. Christopher Slobogin et. al., *A Prevention Model of Juvenile Justice: The Promise of* Kansas v. Hendricks *for Children*, 1999 WIS. L. REV. 185, 198 ("[A]dolescents are more likely than adults to be influenced by others, both in terms of how they evaluate their own behavior and in the sense of conforming to what peers are doing.").

pressure.[88] This susceptibility is magnified by the impulsive behavior of adolescents.[89] For example, when teenagers are invited to play "chicken," they will often do it because they want to be part of the group and because they do not think anything can happen to them.[90] Children's understanding of death is intellectual, not emotional.[91]

The most telling and objective difference between adults and adolescents is in brain development. Abigail Baird, a developmental neuroscientist at Dartmouth, conducted a study that highlights these differences.[92] In Baird's study, adults, as well as children aged twelve through seventeen, were asked to identify emotions on faces in photographs.[93] As they observed the faces their brain functions were monitored by a MRI scanner that enabled scientists to determine which parts of the brain were being used.[94] When adults viewed the faces, the amygdala section of the brain activated, alerting the person that the image was important,[95] then the frontal lobe assessed the situation, checking the person's memory and other parts of the brain so as to "coordinate a response."[96] Almost uniformly, adults were able to identify the emotions being displayed accurately.[97] Teenagers, on the

88. Geoffrey P. Hunt & Karen Joe Laidler, *Alcohol and Violence in the Lives of Gang Members*, 25 ALCOHOL RES. & HEALTH 66, 67-68 (2001) (discussing gang rituals, including colors, violence, and "symbolic drinking").

89. *See* Slobogin, *supra* note 87, at 197 ("[A]dolescents tend to focus more on short-term consequences and less on the long-term impact of a decision or behavior.").

90. "Often, traffic officers say, crashes happen after teenagers dare each other to drive as fast as possible. Or they run red lights. They race and play chicken. They sit on each other's laps, trying to see how many friends they can jam into one car and block the driver's view. Sometimes, they're drunk or high on drugs." Kristina Sauerwein, *Teens, Cars Can Be Deadly Mix*, ST. LOUIS POST-DISPATCH, July 28, 1996, at 1A (noting further that teens "think they can do anything" and that "nothing will ever happen").

91. *See* Linda Goldman, *Counseling with Children in Contemporary Society*, 26 J. MENTAL HEALTH COUNSELING 168, 169-71 (2004) (detailing Piaget's cognitive stages of development for children and showing that adolescents think about death in logical terms).

92. Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 195 (1999) (scientific journal article describing study); Raeburn, *supra* note 78, at 26-29 (popular news article reporting on the study).

93. Baird, *supra* note 92, at 196. There were twelve children in the study, all of them healthy. The mean age of the sample was 13.9 years. Baird admits the sample is small and she suggests that further studies using a larger sample be conducted. *Id*. at 198.

94. *Id*. at 196-97; Raeburn, *supra* note 78, at 28.

95. Baird, *supra* note 92, at 196; Raeburn, *supra* note 78, at 28.

96. *Id*.

97. *Id.*

other hand, often misidentified the emotions.[98] For example, "when shown a face expressing fear . . . they would identify it as surprise, or even happiness."[99] In this situation, a teen's amygdala, the brain's alarm system, works properly, but the prefrontal cortex, the brain's interpreter, does not.[100] "The amygdala zeroed in on the faces as something important, but the frontal lobes couldn't focus enough to get the identification right."[101]

The American Academy of Child and Adolescent Psychiatry (AACAP) "determined that the brain does not physically stop maturing until a person is about 20 years old."[102] Other studies demonstrate "that the brain continues to develop until the mid-20s, and it does so in an unexpected way."[103] Gray matter and its connections increase until they become excessive. The brain then starts trimming the gray matter and its connections while at the same time reinforcing other connections—"wrapping them with white matter, a heavier layer of insulation also known as myelin. This pruning and reinforcement represents the maturing of the brain. The process continues into the mid-20s."[104] This means that an adolescent's personality and character are not static.[105] The

98. Baird, *supra* note 92, at 196; Raeburn, *supra* note 78, at 28. Baird states "that the subjects were not able to identify consistently the correct facial expression." Baird, *supra* note 92, at 198.

99. Raeburn, *supra* note 78, at 28.

100. Baird, *supra* note 92, at 198; Raeburn, *supra* note 78, at 28.

101. Raeburn, *supra* note 78, at 28 (quoting Dr. Baird).

102. Michael Stark, Editorial, *A Case for Concern*, WASH. POST, June 8, 2003, at B8. The AACAP later joined in several medical associations' amicus brief filed in *Roper v. Simmons*; the brief stated that "[c]utting-edge brain imaging technology reveals that regions of the adolescent brain do not reach a fully mature state until after the age of 18." Brief for the American Medical Association et al. at 2, Roper v. Simmons, 125 S. Ct. 1183 (2005) (No. 03-633), 2004 WL 1633549.

103. Raeburn, *supra* note 78, at 26.

104. *Id.* at 28; *see also* Abigail A. Baird & Jonathan A. Fugelsang, *The Emergence of Consequential Thought: Evidence From Neuroscience*, 359 PHIL. TRANSACTIONS: BIOLOGICAL SCI. 1797 (2004); Mary Beckman, *Crime, Culpability and the Adolescent Brain*, 305 SCI. MAG. 596, 596 (2004); Lee Bowman, *New Research Shows Stark Differences in Teen Brains*, SCRIPPS HOWARD NEWS SERVICE, May 11, 2004, http://www. deathpenaltyinfo.org/article.php?scid=27&did=1000.

105. Moreover, the process of becoming an adult does not follow a linear trajectory. Baird and Fugelsang, *supra* note 104, at 1803, compare the process of adolescent maturation with the process by which infants learn how to walk:

> While an infant is learning to walk, there may be days when they pull themselves up on the furniture or their parents, they may also balance on their feet without holding onto anything. As anyone who has witnessed an infant learning to walk can report, the first few steps are usually followed by a tumble and sporadic reattempts. They may take their first steps one day, and then not walk again for several days following this initial foray. We acknowledge that this process is nonlinear and a result of the interaction of both an immature brain and lack of experience. Within the developing adolescent, the emergence of adult levels of reasoning is no different. An adolescent may demonstrate an

child at sixteen or seventeen is not the adult he or she will be at thirty. Therefore, punishing adolescents the same as adults is akin to punishing them for a developmental lag. Furthermore, even though teenagers may appear to be mature, they are not. "When everything is perfect, they can act like adults. But you add a little bit of stress, and they can break down."[106]

This maturation process "can be severely retarded by abuse and neglect—conditions that affect most juvenile offenders on death row."[107] The American Academy of Pediatrics has identified several risk factors that can incite violence in adolescents, including: exposure to domestic violence and substance abuse within the home, sexual or physical assault, and a lack of adult supervision.[108] A 1987 study of fourteen juveniles sentenced to death (which was forty percent of the total number of juveniles on death row at the time) revealed that nine of them had "major neuropsychological abnormalities" and seven had psychotic disorders since early childhood.[109] Twelve of the juveniles had been "brutally, physically abused and five had been sodomized by older male relatives."[110]

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adult-like ability to reason abstractly, and act in accordance with this advanced cognition on Monday, but behave impulsively and irrationally on Thursday. What these two examples have in common is the idea that the appearance of a behaviour does not indicate its permanence. Adolescence is an awkward time, both in terms of movement and thinking, during which the individual becomes increasingly coordinated.

106. Raeburn, *supra* note 78, at 29.

107. NATIONAL COALITION TO ABOLISH THE DEATH PENALTY, FACT SHEET: JUVENILE DEATH PENALTY, http://www.ncadp.org/fact_sheet1.html (last visited Oct. 9, 2005).

108. American Academy of Pediatrics Task Force on Violence, *The Role of the Pediatrician in Youth Violence Prevention in Clinical Practice and at the Community Level*, 103 PEDIATRICS 173, 174 (1999), *available at* http://aappolicy.aappublications.org/cgi/reprint/pediatrics;103/1/173.pdf (noting eleven risk factors for adolescent violence which pediatricians should be aware of); American Bar Association Juvenile Justice Center, *Cruel and Unusual Punishment: The Juvenile Death Penalty—Adolescence, Brain Development and Legal Culpability*, at 3, http://www.abanet.org/crimjust/juvjus/Adolescence.pdf (2004) (citing policy statement of the American Academy of Pediatrics Task Force).

109. Dorothy Otnow Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584, 584-85 (1988). There were thirty-seven juveniles condemned to death at the time of Lewis's study. *Id.* at 584 ("[W]e welcomed the opportunity to conduct comprehensive assessments of approximately 40% of the 37 juveniles who are currently awaiting execution in the United States.").

110. *Id.* at 586-87. The authors further noted that the juveniles studied—as well as their parents and lawyers—were often hesitant to speak about their broken pasts,

A more recent study examining all the juveniles on death row, and twenty adolescents who had been executed, came to similar conclusions noting that "the mitigating factors [of severe abuse] . . . were not presented at trial."[111] The researcher found that

> [o]n average, . . . twenty executed juvenile offenders suffered from five of the nine traumatic life-determinant factors during childhood, [including] serious physical and/or sexual abuse; and/or regular abuse of drugs or alcohol from an early age; and/or historical family abuse of drugs and/or alcohol; and/or mental illness, brain damage, and mental retardation. . . . Most children and adolescents in society do not experience even one of these life-determinant traumatic factors. The correlative effect of these multiple factors is overwhelming. This was the situation for every juvenile offender, bar one, who has been executed in the United States since 1973.[112]

We are not contending that these differences exculpate minors from punishment. Violent teenagers kill and maim and rape and they must be stopped. If society permitted victims or victims' families to deal with such children, no doubt most people would opt to kill the aggressor. However, once punishment is taken over by the state, the need for vengeance must be curtailed. That is why the courts have created elaborate structures that allow the feelings of retribution to be filtered through the rational process of measuring culpability. The decision whether to inflict the death penalty is not solely rational and not solely irrational; it is an attempt to make a "reasoned moral response" to an inexcusable, but explainable act.[113] If vengeance overrides reason that fine balance is skewed.

As the law now stands, adolescents cannot be sentenced to death. They are, however, subject to adult sanctions which are often very severe. This happens for one of two reasons. One, the state, across the board, defines adults for all criminal law purposes as sixteen or seventeen and older. Two, the children who would ordinarily be within the jurisdiction of the juvenile courts are waived to criminal court to be tried as adults. Very often the deciding factor for the transfer is the

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"systematically conceal[ing] factors in their lives that were most likely to mitigate a death sentence." *Id.* at 588.

111. Chris Mallet, *Socio-Historical Analysis of Juvenile Offenders on Death Row*, 39 CRIM. L. BULL. 445, 452 (2003). The failure of counsel to find and present such mitigating evidence raises Sixth Amendment ineffective assistance of counsel issues. *See* Ellen Marrus and Irene M. Rosenberg, *Roper v. Simmons: Dancing With Death,* CRIM. L. BULL (forthcoming) (claiming that the *Simmons* categorical bar was in part a response to the Court's fuzzy reasonableness standard as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)).

112. *Id*. at 452-53.

113. California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("[T]he sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion.").

severity of the crime. The lesser culpability of the offender gets lost in the shuffle. We argue that just as the differences between adolescents and adults are relevant to capital punishment, they also must be considered in the decision to transfer and in the legislative determination that adolescents are adults.

IV. WAIVER—HOW CHILDREN BECOME ADULTS

Kent v. United States,[114] the first of the Supreme Court cases "domesticating" the theretofore unregulated juvenile courts, involved a judicial waiver law in the District of Columbia.[115] The Court held that the juvenile court judge must hold a hearing and receive evidence regarding the child's amenability to treatment as a juvenile offender.[116] The importance of the waiver decision is reflected in the *Kent* opinion. The Court concluded that determining whether to transfer a juvenile to criminal court was a "critical stage of the proceedings."[117] Due process therefore required that there be a hearing, a right to counsel with access to the probation files, and a statement of reasons for the transfer so as to permit meaningful appellate review.[118]

Many states were apprehensive about the injection of due process into what had been a perfunctory proceeding presided over by a judge whose

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114. 383 U.S. 541 (1966).

115. If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this subchapter in conducting and disposing of such cases.

D.C. Code § 11-1553 (1965) (current version at D.C. Code § 16-2307 (West 2005)).

116. *Kent*, 383 U.S. at 557.

117. *Id.* at 553 ("[T]he statute does not permit the Juvenile Court to determine in isolation and without the participation or any representation of the child the 'critically important' question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act.").

118. *Id.* at 557 ("[A]s a condition to a valid waiver order, petitioner is entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision. We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel.").

discretion was insulated from any challenge.[119] It could be argued that states did not have to create juvenile courts,[120] and therefore due process protection was unnecessary—because if the state had the greater power to charge all juveniles as adults, presumably the state had the lesser power to deny juvenile court protection to certain minors.[121] This argument, however, did not obviate the need for due process. While it is true that the state did not have to create juvenile courts, once it did so, the decision to deprive certain children of the benefits of those courts had to comport with due process fundamental fairness.[122]

Kent prompted states to reexamine their waiver statutes.[123] Most states revised their judicial transfer laws so as to incorporate *Kent's* due process protection in greater or lesser degrees.[124] States unhappy with the *Kent* ruling enacted statutes to overcome the *Kent* judicial waiver requirements.[125] In some jurisdictions, prosecutors were empowered by

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119. Norman Lefstein, Kent v. United States *Supreme Court Juvenile Case*, 17 JUV. CT. JUDGES J. 20, 23 (1967) ("'Several justices appeared deeply disturbed by the Juvenile Court's apparently unlimited power to make the fateful transfer decision from evidence that the youth and his lawyer had no right to see or dispute.'") (quoting John P. MacKenzie, *Justices Grapple With Juvenile Case*, WASH. POST, Jan. 20, 1966, at A3).

120. *See* Woodward v. Wainwright, 556 F.2d 781, 785 (5th Cir. 1977) ("[T]reatment as a juvenile is not an inherent right but one granted by the state legislature, therefore the legislature may restrict or qualify that right as it sees fit, as long as no arbitrary or discriminatory classification is involved."). Irene Merker Rosenberg, *Winship Redux: 1970 to 1990*, 69 TEX. L. REV. 109, 122 (1990).

121. *Cf.* Patterson v. New York, 432 U.S. 197, 205-11 (1977) (holding that since the state had no obligation to permit manslaughter as an affirmative defense, if it did so, it could require the defendant to establish that defense by a preponderance of the evidence).

122. *See* Douglas v. California, 372 U.S. 353, 357 (1963) (discussing the right to counsel on a first appeal and stating that "[b]ut where the merits of the *one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn"); Charles L. Merz, *Representing the Juvenile Defendant in Waiver Proceedings*, 12 ST. LOUIS U. L.J. 424, 429 (1968) ("While at one time it may have been possible for the juvenile court to waive jurisdiction in a summary manner, the *Kent* case has now made it clear that a child is entitled to a fair determination of the question before jurisdiction may be transferred."); *cf.* Evitts v. Lucey, 469 U.S. 387, 400-01 (1985) ("The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms. For instance, although a State may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause.").

123. *See* Sacha M. Coupet, *What to Do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality about Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1314 (2000) ("*Kent v. United States* began a period of re-analysis of the juvenile justice system . . . .").

124. *See* Melissa A. Scott, *The "Critically Important" Decision of Waiving Juvenile Court Jurisdiction: Who Should Decide?*, 50 LOY. L. REV. 711, 729 (2004) ("The factors the *Kent* Court enumerated are not mandatory, but most states that use judicial waiver have incorporated the *Kent* factors into their judicial waiver statute.").

125. *See* Ed Kinkeade, *Appellate Juvenile Justice in Texas—It's a Crime! Or Should Be*, 51 BAYLOR L. REV. 17, 34-35 (1999) ("[S]tate legislatures have continued to

statute to make the transfer decision without any procedural safeguards.[126] Such statutes were upheld on the theory that the prosecutor's determination was akin to charging decisions over which district attorneys have almost complete discretion.[127] Thus, such laws equated the decision regarding whether to charge a suspect with a misdemeanor or a felony, the same as whether to charge a minor in juvenile or adult court. In either situation, so the courts asserted, the suspect would have a trial at which he or she could be exonerated.[128] However, it is not innocence or guilt that is relevant in these proceedings. Innocence could also be established in juvenile court. States with such statutes failed to see that the charging decision completely determined the sentencing options if the juvenile was ultimately convicted.[129]

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narrow juvenile court jurisdiction and designate more and more waivable offenses."); *see also* Scott, *supra* note 124, at 733-34, 736 (asserting that legislative waivers limit or eliminate the juvenile court jurisdiction by either excluding certain juveniles from the definition of a juvenile or mandating that juveniles of a certain age who committed a certain offense are prosecuted as adults and arguing that prosecutional waivers avoid the juvenile court's jurisdiction because the district attorney decides whether or not to try the individual in criminal court without allowing the juvenile a hearing to prove he or she should not be tried as an adult).

126. *See id*. at 736 ("The district attorney has the discretion to choose if the juvenile shall be adjudicated in juvenile court or tried as an adult in criminal court.").

127. *See* United States v. Bland, 472 F.2d 1329, 1337 (D.C. Cir. 1972) (concluding that due process does not require "an adversary hearing before the prosecutor can exercise his age-old function of deciding what charge to bring against whom"); Scott, *supra* note 124, at 736 ("In making this decision, the district attorney is empowered to exercise his 'age-old function' of prosecutorial decision-making.").

128. *Bland*, 472 F.2d at 1338 ("It in no manner relieves the Government of its obligation to prove appellee's guilt beyond a reasonable doubt. Nor does it remove appellee's right to a jury trial.").

129. *See* Harris v. Procunier, 498 F.2d 576, 581-82 (9th Cir. 1974), *cert denied*, 419 U.S. 970 (1974) (Hufstedler, J., dissenting). The court noted that:

> [t]he fitness hearing has no direct counterpart in the usual adult criminal process. The purpose of the proceeding, unlike an indictment or preliminary hearing, is not to establish probable cause for the initiation of further action. The hearing is designed to determine, based on an evaluation of the youth, his background, and his criminal history, the nature of response the state should make upon a determination of guilt. Thus, to the extent that it can be analogized to a stage in the criminal prosecution, the fitness hearing most nearly resembles a sentencing proceeding by the trial judge. . . . By finding that a youth is not a fit subject for exercise of juvenile court jurisdiction, the court determines that the accused, if found guilty, will be sentenced as an adult rather than receive non-punitive rehabilitation pursuant to the options available to the juvenile court under . . . the [juvenile] [c]ode.

Id.; *see also* Stacey Sabo, *Rights of Passage: An Analysis of Waiver of Juvenile Court Jurisdiction*, 64 FORDHAM L. REV. 2425, 2449-50 (1996) ("[U]nder a system of

Other jurisdictions took a slightly different path, although in essence one similar to prosecutorial waiver. Some legislatures, instead of explicitly giving the district attorney the power to waive, wrote the statute defining a juvenile in such a way as to exclude persons of a certain age who were charged with certain crimes.[130] In those scenarios, at least theoretically, the district attorney has no discretion and has to file charges in adult criminal court because the defendant by definition is not a juvenile.[131] The determination of what charges should be brought, however, is of course up to the prosecutor.[132] The district attorney could circumvent the legislative waiver statute simply by charging the minor with a lesser offense which would keep the youth within the jurisdiction of the juvenile court. They could also do the converse. Therefore, functionally, in many states legislative waiver works much the same as prosecutorial waiver. In neither case is there a judicial proceeding at which relevant facts are explored by a neutral third party whose decision is subject to review. This is to be distinguished from statutes which simply declare that an adult is anyone over the age of sixteen or seventeen. No waiver is involved in such cases and neither a judge nor a prosecutor can make such persons a juvenile regardless of the charge.

Every state has some form of waiver. Some states have more than one type of waiver statute, which gives the prosecutor several options when deciding whether a juvenile should be tried in adult criminal court.

A. Judicial Waiver

More than forty jurisdictions have enacted judicial waiver laws.[133] Typically, the statutes enumerate certain matters the juvenile court judge is required to consider in making this determination. Generally, these factors were derived from the Court's appendix in *Kent*.[134] *Kent* did not mandate the use of these considerations, but nevertheless many states

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concurrent jurisdiction, deciding how to charge the juvenile allows the prosecutor to further choose the forum in which to try her.").

130. *See id.* at 2443-45 ("Legislative waiver . . . categorically excludes from juvenile court jurisdiction certain juveniles or offenses. . . . The rationale behind legislative waiver is simple: charge serious, violent, or persistent juvenile offenders like adult criminals.").

131. *Id.*

132. AMERICAN BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION STANDARDS, standard 3-3.4, 3-3.9 (3d ed. 1993).

133. Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles* 33 WAKE FOREST L. REV. 681, 688 (1998) ("In a three-year period, between 1992 to 1995, forty jurisdictions enacted or expanded provisions for juvenile waiver to adult court.").

134. Kent v. United States, 383 U.S. 541, 566-67 (1966).

incorporated them into their own laws.[135] The following are the eight factors listed in *Kent*: the seriousness of the alleged offense and whether it was committed in an aggressive, violent or premeditated manner; whether the alleged offense was against persons or property, with the weight leaning more toward waiver if it was against a person; the prosecutorial merit of the complaint; the sophistication, maturity and prior record of the offender; the need for public safety; and the chance of rehabilitation of the juvenile through current available treatments.[136] These factors are not dissimilar to those considered by juries when deliberating to determine punishment. The difference is that waiver is always decided by a single judge.

Some states have incorporated the factors exactly as laid out in the *Kent* case. Others have modified or added matters for juvenile court judges to consider. The additional factors may be whether the alleged offense was related to gang activity;[137] if it was committed on school property or at any school-related event and whether other students were put in danger;[138] the alleged offender's relationship to the victim[139] and the impact on him or her;[140] the potential for rehabilitation if the jurisdiction provides parenting or family counseling;[141] whether the juvenile can develop sufficient life skills to become a contributing member of society;[142] whether the child is mentally ill or mentally

135. Scott, *supra* note 124, at 729; *see* PATRICK GRIFFIN ET AL., TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 3 (1998) (describing state transfer procedures for juveniles).

136. Kent, 383 U.S. at 566-67.

137. The courts will consider whether "the juvenile committed the alleged offense while participating in, assisting, promoting or furthering the interests of a criminal street gang, a criminal syndicate or a racketeering enterprise." ARIZ. REV. STAT. ANN. § 8-327 (1999). Stout v. Commonwealth, 44 S.W.3d 781, 786, 786 n.15 (Ky. Ct. App. 2000) ("[T]he factor . . . concerning gang participation, was added to the list effective July 15, 1998.").

138. The courts will consider "[w]hether the alleged offense was committed on school property, public or private, or at any school-sponsored event, and constituted a substantial danger to other students." MISS. CODE ANN. § 43-21-157 (2004).

139. OHIO REV. CODE ANN. § 2152.12(D)(3) (West 2005).

140. ARIZ. REV. STAT. ANN. § 8-327(D)(7) (1999); MD. CODE ANN., CTS. & JUD. PROC. § 3-817 (c)(2)(iii) (Lexis Nexis Supp. 1999); COLO. REV. STAT. ANN. § 19-2-518 (4)(b)(VIII) (West 2005); 42 PA. CONS. STAT. ANN. § 6355(a)(4)(iii)(A) (West 2000).

141. D.C. CODE ANN. § 16-2307(e)(6) (Lexis Nexis 2001).

142. IDAHO CODE ANN. § 20-508(8)(f) (2004).

retarded;[143] and catchall provisions, in which judges must also consider any other relevant factors or evidence that bear on the transfer decision.[144]

The judicial waiver statutes also differ in other ways. Sometimes the law gives the judges complete discretion to transfer, at least as long as the evidence supports the decision.[145] Other statutes require transfer if a certain number of factors weigh in favor of it.[146] Most mandate that juveniles be a certain age and be charged with certain offenses before a judge is allowed to consider transferring a juvenile to adult court.[147] Others use presumptions if certain factors are present or weigh specific factors differently.[148] In Florida a child may choose voluntary waiver to criminal court.[149]

In addition, the states use a wide age range in their judicial waiver statutes. The most common age for transfer seems to be fourteen years old,[150] although several states go below that age and permit transfer for juveniles who are twelve[151] or thirteen years old.[152] Three states—Texas, Indiana, and Vermont—allow juveniles who committed offenses when

143. N.D. CENT. CODE § 27-20-34(1)(c)(4)(c) (Supp. 2005); 42 PA. CONS. STAT. ANN. § 6355(a)(4)(iv) (West 2000).

144. *See, e.g.*, HAW. REV. STAT. § 571-22(c)(8) (LexisNexis 1993 & Supp 2004); N.M. STAT. ANN. 1978 § 32A-2-20(C)(8) (West 2004).

145. *See, e.g.*, ALA. CODE § 12-15-34 (d)-(f) (West 2005) (stating that although a juvenile judge has the discretion whether or not to transfer a child to criminal court, the judge must consider several factors when making this decision and provide written findings including probable cause that the allegations are true). *But see* Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 491 (1987) (positing that the *Kent* guidelines do not really provide objective guidelines for juvenile judges, giving them unlimited discretion in deciding when to transfer juveniles to criminal court).

146. MONT. CODE ANN. § 41-5-1606(2) (1999).

147. 705 ILL. COMP. STAT. ANN. 405/5-805 (2)(3) (2005).

148. It is interesting to note, for example, that the Utah judicial waiver statute initially appears to provide for automatic transfer, however, every juvenile is entitled to a hearing and it is within the judge's discretion to keep him or her in juvenile court. *See* UTAH CODE ANN. § 78-3a-602 (2002 & Supp. 2005).

149. FLA. STAT. ANN. § 985.226 (1) (West 2001). Presumably children choose this option because they believe they would receive a lesser punishment in criminal court. This can occur if the child is charged with a relatively minor offense. In criminal court the statutory limits may be quite low. In juvenile court, however, children can be sent to state training schools for their majority even if the offense is not serious. In *In re* Gault, 387 U.S. 1, 29 (1967), the offense with which the child was charged would have been punishable in criminal court by no more than two months in jail or a fine, whereas in juvenile court he was sentenced to incarceration until the age of majority [twenty-one]. Since Gerald Gault was fifteen, it meant that he received a six year sentence. *Id*.

150. *See, e.g.*, KAN. STAT. ANN. § 38-1636(a)(2) (2000); N.D. CENT. CODE § 27-20-34 (1)(c)(1) (Supp 2005); MINN. STAT. ANN. § 260B.125 (West 2003); MICH. COMP. LAWS ANN. § 712A.4(1) (West 2002); WIS. STAT. ANN. § 938.18(1)(a)(1) (West 2000).

151. *See, e.g.*, MONT. CODE ANN. § 41-5-1602(1)(b)(ii) (2005).

152. MISS. CODE ANN. § 43-21-151(3) (2004); N.C. GEN. STAT. § 7B-2200 (2004); 705 ILL. COMP. STAT. ANN 405/5-805(3)(a) (West 1999 & Supp. 2005).

they were as young as ten to be transferred to adult court under very limited circumstances.[153]

Although the judicial waiver hearing is held prior to the determination of guilt, it is conceptually much like a sentencing hearing.[154] In effect, the juvenile court judge is determining whether the child, if convicted, should receive a sentence under the juvenile code or under the penal code. It is the most critical decision facing a child in juvenile court.

B. Prosecutorial Waiver

A few years after the *Kent* decision, Congress revamped the juvenile code in the District of Columbia. The code defined juvenile offenders as those under eighteen except for those sixteen and older who were charged by the United States Attorney with murder, rape, and other serious offenses.[155] The D.C. Circuit in *United States v. Bland*[156] upheld the statute against both due process and equal protection attacks, and acknowledged that the new law was a response to the "'substantial difficulties in transferring juvenile offenders charged with serious felonies to the jurisdiction of the adult court under present law.'"[157] The dissenters viewed the *Kent* decision as of constitutional proportions, and therefore the government was prohibited from creating "a second parallel waiver procedure" by "definition."[158] Indeed, the dissent argued that "the transfer of the waiver decision from the neutral judge to the partisan prosecutor increases rather than diminishes the need for due process protection for the child."[159]

The *Bland* majority referred to the new code provisions both as a "legislative exclusion"[160] and as an "exercise of prosecutorial discretion."[161]

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153. TEX. FAM. CODE ANN. §54.02(j)(2)(a) (Vernon 2002); IND. CODE ANN. § 31-30-3-4(3) (Lexis Nexis 2003); VT. STAT. ANN. tit. 33, § 5506(a) (2001).

154. *See* Harris v. Procunier, 498 F.2d 576, 581 (1974).

155. D.C. CODE ANN. § 16-2301 (Lexis Nexis 2001).

156. 472 F.2d 1329 (D.C. Cir. 1972).

157. *Id.* at 1333 (quoting the reasoning given by the House committee for excluding those sixteen years and older charged with a serious crime from the Family Division's Jurisdiction).

158. *Id.* at 1340 (Wright, J., dissenting).

159. *Id.* at 1343 (Wright, J., dissenting).

160. *Id*. at 1334. The court recognized that jurisdictions have often excluded certain individuals and crimes from the juvenile justice system. This statute was no different.

161. *Id*. at 1336. "While there may be circumstances in which courts would be entitled to review the exercise of prosecutorial discretion, these circumstances would necessarily include the deliberate presence of such factors as 'race, religion, or other

The dissent also viewed the statute in those two ways, although it emphasized the prosecutorial discretion aspect of the law. The use of both terms interchangeably reflects the difficulty in distinguishing between prosecutorial and legislative waivers.

After the Supreme Court denied certiorari in *Bland*,[162] with three justices dissenting,[163] many states followed suit and allowed prosecutors to file certain cases in either juvenile court or adult court. However, unlike judicial waiver, a juvenile cannot challenge a direct filing in criminal court, and there is no requirement of a hearing before such a decision is made by the prosecutor.[164] About fifteen jurisdictions have procedures whereby prosecuting attorneys can file the indictment or information directly in adult court.[165] Most statutes specify the minimum ages, in some cases as young as twelve,[166] and list the specific charges that will allow a prosecutor to file adult charges,[167] some adding that the prosecutor can charge the child in adult court only if he or she has previously been adjudicated a delinquent and committed to a state institution.[168] Therefore, the statutes are substantively limited, for example, by age, offense, and prior adjudication in juvenile court; however, within those parameters the prosecutors' charging decisions are completely discretionary, unconstrained by procedural due process protections.

Some states have both discretionary and mandatory prosecutorial waiver depending on the age, crime, and previous history of the juvenile.[169] If a juvenile is of a certain age and charged with any one of a litany of felonies, such as arson, robbery, or murder, the prosecutor may file directly in adult court.[170] In these states, prosecutors *are required* to file charges directly in criminal court when the juvenile is sixteen or seventeen, currently being charged with specific felonies, and has

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arbitrary classification,' not found in the case at bar." *Id*. (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962).

162. 412 U.S. 909 (1973).

163. Justices Douglas, Brennan, and Marshall dissented. *Id*.

164. HOWARD N. SNYDER ET. AL, JUVENILE TRANSFERS TO CRIMINAL COURT IN THE 1990'S: LESSONS LEARNED FROM FOUR STUDIES, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION 4 (2000), *available at* http://www.ojjdp.ncjrs.org/publications/PubResults.asp.

165. *Id*. at 48 (Appendix A). Those jurisdictions are Arizona, Arkansas, Colorado, the District of Columbia, Florida, Georgia, Louisiana, Massachusetts, Michigan, Montana, Nebraska, Oklahoma, Vermont, Virginia and Wyoming. *Id*.

166. MONT. CODE ANN. § 41-5-206 (2005).

167. ARIZ. REV. STAT. ANN. § 13-501B (2001 & Supp. 2005); MICH. COMP. LAWS § 769.1 (Supp. 2005).

168. MASS. GEN. LAWS. ANN. ch. 119 § 54 (West Supp. 2005). In Massachusetts, direct filing in criminal court may occur if the juvenile is between fourteen and seventeen.

169. FLA. STAT. ANN. § 985.227 (West Supp. 2005).

170. *Id.*

been previously adjudicated delinquent for committing one of several felonies.[171] However, to the extent that the waiver decision depends on the current charges, the prosecutor is ultimately making the determination of whether to waive regardless of the statutory wording that filing in adult court is mandatory.

C. Legislative Waiver

Judicial waiver requires a case by case analysis of each child. Indeed, most judicial waiver statutes mandate psychological and psychiatric examinations, and a probation investigation of the child's home and background.[172] To some extent that may be true with prosecutorial waiver, that is, presumably conscientious district attorneys weigh all the factors regarding the child and the crime.[173] States, however, do not demand such individualized determinations by the prosecutor, and their decisions are not subject to appellate review.[174] Legislative waiver, also known as statutory exclusion, is somewhat different, although, as noted, it is often difficult to distinguish it from prosecutorial waiver. Indeed, transfer statutes are almost always categorized as being one of three different types of waiver. They can, however, be viewed as merely two—judicial and prosecutorial. For even if the legislature mandates the prosecutor to file charges against the child in criminal court, the prosecutor is the official who determines the actual charges.[175] Thus, if a prosecutor decides that a particular child should not be treated in adult court, he or she may simply bring lesser charges.[176] To the extent that prosecutors

171. *Id.* Juveniles of any age may end up in adult court at the discretion of a prosecutor if the child is alleged to have committed certain crimes. The Florida statute also requires that the state attorneys develop written policies and guidelines to determine when to file charges directly in adult court.

172. *See* ARK. CODE ANN. § 9-27-318(g) (2002 and Supp. 2005); COLO. REV. STAT. § 19-2-518(4)(b) (West 2005); HAW. REV. STAT. § 571-22(b) (1993 & Supp. 2004).

173. *See* Sabo, *supra* note 129, at 2443 ("[T]he prosecutor may . . . consider such factors as the dangerousness of the offense, the juvenile's prior record, her age, and her amenability to juvenile court treatment.").

174. *See* Scott, *supra* note 124, at 736 ("[J]uveniles who are subject to prosecutorial waiver are not granted the opportunity to prove to the prosecuting attorney that they should not be tried as adults. Further, once the district attorney has decided to prosecute the juvenile as an adult, his decision cannot be challenged or appealed.").

175. *See* AMERICAN BAR ASSOCIATION, *supra* note 132, at standard 3-3.4, 3-3.9.

176. Juan Alberto Arteaga, *Juvenile (In)Justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants*, 102 COLUM. L. REV. 1051, 1067 (2002) ("[T]he prosecutor is the one who initially determines whether a juvenile's alleged crime is 'so serious as to warrant transfer or whether . . . the child is amenable to treatment.'

dislike the judicial waiver process because of its due process formality and what is viewed as an excess of judicial sympathy, the likelihood is that prosecutors would lean more toward inflating charges so as to ensure that the child is tried in criminal court.[177]

The legislative waiver statutes purport to exclude children of a certain age charged with certain crimes from juvenile court jurisdiction.[178] As noted above, however, the prosecutor determines the current charges, and thus can over or under charge the offense. Some statutes require a child of a certain age to be tried in criminal court if he or she has previously been adjudicated a delinquent without reference to the current charges. This is a true legislative waiver statute as there is no room for prosecutorial discretion. Currently, at least twenty states allow for legislative waiver. These statutes set the age at which transfer becomes automatic as early as thirteen[179] and as late as seventeen.[180] In Pennsylvania, there is no age minimum; any juvenile charged with murder or criminal homicide is automatically transferred.[181]

Jurisdictions with legislative waiver have effectively created an irrebuttable presumption that children of a certain age who are charged with certain crimes are not really children.[182] Analogously, although not considered a waiver, statutes that define adults for criminal purposes as

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Given the broad discretion already conferred upon prosecutors, one must question whether a child's fate should be placed entirely in the hands of a decisionmaker who is not completely neutral.").

177. *Id.* at 1063 (noting the two responsibilities of prosecutors—prosecuting criminals and shielding juveniles from the penal system). "When asked to weigh one interest against the other, though, prosecutors generally will assume their role as advocates of the state and tend to err on the side of protecting society. Once a flawed decision has been made to transfer a juvenile to criminal court, prosecutors cannot do justice to their second responsibility, given the harshness and length of the potential sentences." *Id*.

178. *See* Scott, *supra* note 124, at 733 ("The legislature generally excludes juveniles from the jurisdiction of the juvenile court based on their age and offense.").

179. Mississippi mandates transfer for juveniles as young as thirteen who are charged with a crime punishable by life or death or for any act attempted or committed with the use of a deadly weapon. MISS. CODE ANN.§ 43-21-151(1) (2004). Maryland also requires transfer of a juvenile who is charged with a crime punishable by life or death, but the minor must be at least fourteen. MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-03 (Lexis Nexis 2002 & Supp. 2004).

180. Montana, for example, only allows for automatic transfer if a juvenile is seventeen and is accused of committing one of a long list of offenses, such as rape, murder, assault on a peace officer, aggravated assault, aggravated burglary or robbery, possession of dangerous drugs, or the use of threat to coerce criminal street gang membership. MONT. CODE ANN. § 41-5-206 (2003).

181. 42 PA. CONS. STAT. ANN. § 6355 (West 2000).

182. *See* Sabo, *supra* note 129, at 2452 ("If the legislature has decided that the crime with which the juvenile is charged should be tried in criminal court, this waiver mechanism operates automatically to exclude her from juvenile court jurisdiction, blind to her best interests and in disregard of any mitigating factors.").

persons sixteen or seventeen, raise the same concerns that are presented in true legislative waiver statutes—an irrebuttable presumption of legal capacity. Scientific and sociological studies, however, belie that assumption. At least as measured by brain development, a child is a child is a child until the age of twenty or twenty-five.

It is our view that courts or legislatures should eliminate waiver of children under eighteen regardless of the crime or past history. To deal with the problem of how to treat adolescents nearing eighteen, statutes could allow juvenile courts to maintain jurisdiction over the child until age twenty-five. Such an allowance will eliminate arguments that suggest waiver is necessary because older adolescents could not be treated in the limited time the juvenile courts have jurisdiction.

If legislatures eschew this approach, a more limited change could be considered, such as a presumption against waiver regardless of age, seriousness of crime, and past criminal behavior. Furthermore, the juvenile courts should be able to consider the kind of evidence that the *Simmons* Court relied on to prohibit the execution of adolescents. This will create little difficulty in the judicial waiver context; the studies regarding reduced culpability can be admitted into evidence, as well as testimony from experts regarding the particular child's developmental level. The trial court's decision will then be subject to review on appeal. The jurisdictions that use prosecutorial waiver will face greater obstacles, since traditionally the courts generally designate such a decision as nonreviewable, either substantively[183] or procedurally.[184] To assure that evidence of developmental lag, immaturity, recklessness, and lesser culpability is considered, there must be a list of factors that the district attorney must consider when making the charging decision and some form of review of prosecutorial decisions in this context.[185] Finally, we think there should be no automatic legislative waiver. No two children are the same and should not be treated that way even if they are of the same age and charged with identical crimes. We also do not believe that states should define adults as including adolescents under eighteen.

183. Of course, if the district attorney's charging decision does not meet the substantive requirements for treating a minor as an adult, for example, age, crime, and prior offenses, that waiver would be null and void.

184. *See* Bland v. United States, 412 U.S. 909, 912 (1973) (Douglas, J., dissenting) ("Under the Administrative Procedure Act judicial review of the exercise of executive discretion is the rule and unreviewability is the exception.").

185. *See* Arteaga, *supra* note 176, at 1067-68 (discussing the need for a check on prosecutorial waivers).

V. WHY INFLICTION OF SEVERE CRIMINAL PUNISHMENT OR WAIVER OF MINORS UNDER EIGHTEEN SHOULD BE PROHIBITED

When a child is subject to waiver of any sort, the prominent factors determining whether the child is to be treated as an adult or a juvenile are age, offense, prior adjudications, and, to be frank, the predilections of the juvenile court judge. Except for the latter, those are the same factors that the *Simmons* Court refused to allow a jury to consider in deciding whether an adolescent should be subjected to capital punishment. It is true that the Court reached this conclusion in the context of the death penalty, but conceptually the Court's rationale describing the differences between adults and adolescents and its acceptance of scientific and sociological studies should also apply to decisions regarding whether juveniles should be considered adults for other criminal law purposes. If the child's brain is still growing until either twenty or twenty-five (depending on what study one uses), subjecting a child to adult punishment, especially life without possibility of parole, is irrational. We do not know who that child will be in five years or ten years. Just as teenagers' bodies change as they mature, so do their brains. In effect, waiver constitutes a prediction that the child is not really a child and cannot be helped within the juvenile court system. This prediction, however, is based on factors that may well be different within a few years.

Predicting future criminality is very speculative.[186] The studies show that the measures used to make that determination result in a substantial inclusion of persons who would not, in fact, engage in the predicted criminal behavior.[187] Although the Supreme Court has concluded that "there is nothing inherently unattainable about a prediction of future criminal conduct,"[188] it has also acknowledged that "some in the psychiatric community are of the view that clinical predictions as to whether a person would or would not commit violent acts in the future are 'fundamentally of very low reliability,'"[189] and noted studies showing that "psychiatric predictions of future dangerousness were wrong two out of three times."[190] Thus, one cannot know with a high degree of certainty which children will become violent predators.

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186. JOHN MONAHAN, U.S. DEP'T. OF HEALTH AND HUMAN SERVICES, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 2-3 (Dep't Health & Human Services 1981).

187. Jack F. Williams, *Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325, 343-44 (1994).

188. Schall v. Martin, 467 U.S. 253, 278 (1984) (upholding state law allowing for detention of children charged with delinquency if there was a "serious risk" that the child would commit a criminal act before returning to court).

189. Estelle v. Smith, 451 U.S. 454, 472 (1981) (citations omitted).

190. Barefoot v. Estelle, 463 U.S. 880, 900 n.7 (1983).

It is true that the state has a right to punish those who violate the criminal law, particularly murderers, even if they would not commit crimes in the future. Retribution has a place in the justification of punishment. Retribution principles do not, however, tell us with any specificity how much punishment is necessary for atonement. In *Harmelin v. Michigan*,[191] the Court, five-four,[192] upheld a sentence of life imprisonment without possibility of parole for possession of cocaine as applied to a twenty-one-year-old first offender.[193] Justices Scalia and Rehnquist denied that proportionality analysis had any place in noncapital cases.[194] Four dissenters had the opposite view. Justices Kennedy, O'Connor, and Souter took an intermediate position, requiring that gross disproportionality had to be established.[195] Since the latter is the narrowest opinion it is the appropriate guide for lower courts.[196] Subjecting youths to adult sentences, particularly those which foreclose any possibility of relief, meets that standard of gross disproportionality, regardless of the offense the child has committed.

Nor can such disproportionate punishment be justified on deterrence grounds. As Justice Kennedy noted, "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."[197] Adolescents do not do "cost benefit"

191. 501 U.S. 957 (1991) (plurality opinion).

192. Justice Scalia announced the judgment of the Court and delivered the Court's opinion in part IV in which Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Souter joined, and with respect to parts I, II, and III, in which Chief Justice Rehnquist joined. Justice Kennedy filed an opinion concurring in part and concurring in the judgment in which Justices O'Connor and Souter joined. Justice White filed a dissenting opinion in which Justices Blackmun and Stevens joined. Justice Marshall filed a dissenting opinion and Justice Stevens filed a dissenting opinion in which Justice Blackmun joined. *Id.* at 957, 996, 1009, 1027.

193. *Id.* at 994, 1009, 1021.

194. *Id.* at 957 ("[T]he Eighth Amendment contains no proportionality guarantee.") (plurality opinion).

195. *Id.* at 1005 (Kennedy, J., concurring) ("[I]ntrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.").

196. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 323, 343-44 (2003) (upholding racial diversity admissions program and noting that because of the "Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies").

197. Roper v. Simmons, 125 S. Ct. 1183, 1196 (2005).

analyses. Bentham notwithstanding, they act impulsively, with little thought of consequences.[198]

Determining whether a child should be charged in, or waived to, criminal court and subjected to severe punishment such as life without possibility of parole, requires a value choice.[199] Concededly, opting to keep a child within the juvenile court system with its generally lower sentences risks the possibility of future serious harm to the community. However, studies show that long prison sentences for children result in a greater likelihood of recidivism.[200]

The risks on the other side are very high—the virtual destruction of young people who might benefit society and live productive lives. Since we know that mistakes in predicting future criminality will be made, and that minors have the capacity for growth, which path should we follow? The *Simmons* Court suggests that we err on the side of the child.

VI. CONCLUSION

People imagine that children who kill are irredeemable—a "bad seed." Both of us have represented children in juvenile court who were charged with serious criminal acts, including murder. Our experiences tell us that even children who commit the most heinous offense, such as joining a group of "friends" to stomp an elderly, defenseless person to death, are ultimately capable of understanding what they had really done. After release from incarceration in a secure facility for juveniles, many of them, although not all, were able to turn their lives around, went to school, and found jobs. This also happens with adults who are killers.

198. *Id.* ("'The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.'") (quoting Thompson v. Oklahoma, 487 U.S. 815, 837 (1988)).

199. *Id*. at 1195-96 ("From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."). For a detailed analysis of life without possibility of parole for youthful offenders, see AMNESTY INTERNATIONAL HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES 3 (2005), http://www.amnestyusa.org/countries/usa/clwop/report.pdf (concluding that although "incarceration may be proper for youth convicted of very serious crimes such as murder, . . . a sentence of life without the possibility of parole is never appropriate for youth offenders"); *see also* Adam Liptak, *Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005, at 1 (examining the increase of prisoners who are serving life sentences for crimes committed as teenagers) *and* Adam Liptak, *Serving Life, With No Chance of Redemption*, N.Y. TIMES, Oct. 5, 2005, at 1 (describing inmates serving sentences of life without possibility of parole).

200. IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES 52-53 (1989) (discussing the drop in juvenile recidivism after Massachusetts instituted state wide reform in the juvenile justice system by closing state training schools and instituting community based programs).

When the Supreme Court invalidated the death penalty in 1972,[201] the sentences of many people on death row were commuted to life imprisonment. Some of them were paroled and most refrained from further illegal conduct.[202] Admittedly, some did bear the mark of Cain and went on to kill and kill again. The difficulty is that we do not know how to differentiate among the different types of murderers. What we do know, however, is that children and adolescents are growing and maturing and the chances for them "to make it" are much higher than for adults.[203] Knowing that, we must be very cautious when exposing children to adult punishment. They are not adults; they are children. We need to treat them as such.

201. Furman v. Georgia, 408 U.S. 238, 239-40 (1972).

202. Joan M. Cheever, *A Chance Reprieve, and Another Chance at Life*, N.Y. TIMES, June 29, 2002, at A15 (noting that 125 of the 200 people that she interviewed who had been released on parole after *Furman* were law-abiding citizens).

203. Franklin E. Zimring, *Toward a Jurisprudence of Youth Violence*, 24 CRIME & JUST. 477, 491-92 (1998) (discussing the adolescence stage as a "learning by doing" stage that involves learning from decisions and mistakes and that adolescent's lack of maturity allows for "risk-management strategies" that can be used to reduce the "consequences from youth crime" that cannot be used on adults).