

# UNITED STATES OF AMERICA

## Indecent and internationally illegal

### The death penalty against child offenders

#### Introduction

"In my view, it's just not proper in a civilized society for the State to be in the business of executing children or those who are mentally retarded." Tennessee Senator, 1990(1)

On 26 June 1989, the United States Supreme Court handed down a pair of shocking decisions on the death penalty. Together, they helped to ensure that the gap between the USA and most other countries on this fundamental human rights issue would continue to widen into the 21st century.

In *Penry v Lynaugh*, the Supreme Court ruled that to execute a prisoner with mental retardation did not violate the US Constitution's Eighth Amendment ban on "cruel and unusual" punishment.(2) The ruling came a month after the United Nations adopted a resolution aimed at eliminating the death penalty for people with mental retardation.(3)

In *Stanford v Kentucky*, the Supreme Court found that the execution of prisoners for crimes committed when they were 16 or 17 years old was also acceptable under the Eighth Amendment.(4) The International Covenant on Civil and Political Rights, prohibiting the imposition of the death penalty for the crimes of under-18-year-olds, had entered into force more than a decade earlier. Five months after the *Stanford* decision, the Convention on the Rights of the Child, with the same prohibition, was opened for signature.(5) Within 10 years, this treaty would be ratified by 191 countries, all but the United States and Somalia. In May 2002, the latter announced its intention to ratify.

The US Supreme Court has long recognized that the definition of "cruel and unusual" punishment is not static, but must move with the times. Almost a century ago, it noted that the Eighth Amendment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice".(6) In 1958, the Court said: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."(7)

In both the *Stanford* and *Penry* decisions, the Supreme Court applied the "evolving standards of decency" test. It found that there was insufficient evidence, in the form of state legislation or the behaviour of prosecutors or juries, from which to conclude that there was a "national consensus" against the execution of child offenders or offenders with mental retardation. In the *Stanford* decision, the majority expressly rejected international standards: "We emphasise that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* that the sentencing practices of other countries are relevant".(8)

In *Penry v Lynaugh*, the Supreme Court noted that "a national consensus against execution of the mentally retarded may someday emerge" as standards of decency evolved in the USA. Thirteen years later, the Court decided that such a consensus had developed. In *Atkins v Virginia* on 20 June 2002, the Court overturned *Penry*, finding by six votes to three that "[e]xecutions of mentally retarded criminals are cruel and unusual punishments prohibited by the Eighth Amendment". This time, the six majority Justices gave a nod towards the relevance of international standards, noting that "within the world community" such executions are "overwhelmingly disapproved".(9)

*Stanford v Kentucky* still stands, however, and children under 18 at the time of the crime remain exposed to the death penalty in the USA. Around 80 people await execution in the United States for crimes committed when they were 16 or 17 years old. Eighteen child offenders have been put to death in the USA since the *Stanford* decision. In the same period in the rest of the world, Amnesty International has documented 14 such executions. It is clear that the United States is the world leader in this violation of international law. Within the USA, the State of Texas is perpetrator-in-chief, accounting for 11 of these 18

post-*Stanford* executions, a third of the known world total since 1990.

Anyone asked to list characteristics associated with childhood would likely include at least one of the following: immaturity, impulsiveness, lack of self-control, poor judgment, an underdeveloped sense of responsibility, and a vulnerability to the domination or example of elders. Common agreement about such attributes lies behind the international prohibition on the imposition of the death penalty for the crimes of children. For such traits render unachievable the would-be goals of deterrence or retribution, given that capital punishment assumes 100 per cent culpability on the part of the condemned. A third goal of capital punishment - incapacitation (the executed prisoner will never kill again) - flies in the face of another attribute of young people, namely their potential for rehabilitation.

Such use of the death penalty also rejects any notion that wider adult society should accept even minimal responsibility in the crime of a child. The profile of the typical condemned teenager is not of a youngster from a stable, supportive background, but rather of a mentally impaired or emotionally disturbed adolescent emerging from a childhood of abuse, deprivation and poverty. A glimpse at the backgrounds of the child offenders executed in the USA suggests that society had failed many of them well before it decided to kill them.

This report looks at the US Supreme Court's *Atkins* decision to exempt prisoners with mental retardation from the death penalty, and applies its reasoning to the issue of the execution of child offenders. It concludes that there is at least as strong a consensus against the latter practice as there is against the former. In some respects, the exemption of under-18-year-olds from the death penalty seems to have been the more firmly grounded of the two issues. It would, therefore, seem somewhat arbitrary if the *Stanford* decision were to remain in force post-*Atkins* when, for example:

- From 1976 to 2001 - a few months short of the entire "modern era" of the US death penalty up to the *Atkins* decision - there were more states that had exempted under-18-year-olds from the death penalty than had banned the execution of people with mental retardation.(10)
- About 58 per cent of the US population live in states that do not use the death penalty against children (abolitionist states plus the retentionist states that have exempted under-18-year-olds). At the time of *Atkins*, the equivalent figure in the case of the mentally retarded was 51 per cent (see appendices for list of states).
- The use of the death penalty against child offenders has been more "unusual" than its use against people with mental retardation. Estimates suggest that there may be 200-300 people with mental retardation on death row in the USA. There are some 80 condemned child offenders. There have been about twice as many executions of people with strong claims of mental retardation than there have of people who were under 18 at the time of the crimes.
- Five states - Texas, South Carolina, Louisiana, Virginia, Oklahoma - which account for 14 per cent of the USA's population, also account for 19 of the 21 executions (90 per cent) of child offenders in the country since 1977. None of these five had passed legislation exempting prisoners with mental retardation from execution by the time of the *Atkins* decision. Although it is largely the same states which are implicated in both practices, the geographical concentration was less pronounced in relation to the execution of mentally retarded inmates. These same five states accounted for about 60 per cent of such executions since 1977.
- Five of the last nine executions of child offenders in the USA took place after the governors of Texas and Oklahoma failed to use their power of reprieve to block them. In 2001 and 2002, these same two governors vetoed legislation in their respective states prohibiting the execution of people with mental retardation. Given the *Atkins* decision, their vetoes came at a time when there presumably was already a "national consensus" against such executions. The approach of such officials should not be taken to represent wider societal opinion on either death penalty issue.

The *Atkins* majority found that there was no need to disagree with the state legislation that exempted people with mental retardation, which "unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the

penological purposes served by the death penalty". This report suggests that the same conclusion can be drawn about under-18-year-olds, whose unfinished brain and emotional development means that they share at least some characteristics with the mentally impaired. This "impairment" also makes children vulnerable to "wrongful execution" in similar ways to those found by the *Atkins* majority in the case of defendants with mental retardation.

The report provides an overview of the international situation on the use of the death penalty against child offenders, a practice now almost solely reserved for US executioners. It reiterates Amnesty International's belief that the prohibition on the imposition of the death penalty on people for crimes committed when they were under 18 years old is, at minimum, a principle of customary international law binding on all countries, regardless of which treaties they have or have not ratified. The "reservation" that the USA filed when it ratified the International Covenant on Civil and Political Rights, purporting to exempt it from the prohibition on such executions, has been widely condemned as invalid, including by the expert body established by the Covenant to oversee implementation of that treaty. The USA's claim to be exempted on the grounds that it has been a "persistent objector" to this principle is not supported by the record. Moreover, there is a strong argument for holding that the prohibition on such use of the death penalty is a peremptory norm of international law, which is binding even on "persistent objectors".

Amnesty International believes that the US Supreme Court should revisit its *Stanford* decision at the earliest opportunity. Until the Court rules that the execution of people who were under 18 at the time of the crime is unconstitutional, the state legislatures in those retentionist states that still allow such executions should pass laws to prohibit them. Finally, clemency authorities must act as the final failsafe against the execution of any more child offenders in the USA and halt such executions in the interest of contemporary standards of justice and decency recognized around the globe.

### **Cruelty, consensus, and the courts**

*"Society breeds a casual attitude toward killing and death when through its government it sanctions the death penalty... With each person executed, society teaches our children that the way to settle scores is through violence, even to the point of taking a human life."* US Senator, 2000(11)

On 3 May 1946, Willie Francis was strapped into Louisiana's electric chair. He had been sentenced to death for a murder committed the previous year when he was 15 years old. The switch was thrown, but the chair malfunctioned and failed to kill him.(12) Francis was taken back to his cell, where he remained for another year while his case was argued in the courts. His lawyers appealed that a second attempt at execution would be cruel and unusual punishment. In a 5-4 vote, the US Supreme Court disagreed. Short of the one vote he needed to be allowed to live, Willie Francis was taken back to the chair and killed on 7 June 1947.

Half a century later, in April 1998, Joseph Cannon was strapped down in the Texas lethal injection chamber to be killed for a murder committed when he was 17 years old. As the lethal solution began to flow, the needle popped out of Cannon's arm after his vein collapsed. A curtain was drawn to block the view of the witnesses, who were led out of the witness room while the needle was reinserted. About 15 minutes later, they were brought back in, including the prisoner's mother who collapsed and had to be hospitalized after seeing her son killed.(13) Thus Joseph Cannon became one of 18 child offenders who have been put to death in the United States since the Supreme Court ruled 5-4 in *Stanford v Kentucky* in 1989 that such killings could proceed. Like Willie Francis, one extra vote would have saved Joseph Cannon and the 17 others from execution. The question for the Supreme Court now is, have standards of decency evolved enough in the USA in the past 13 years to gain at least that one additional vote?

Amnesty International opposes the death penalty unreservedly, regardless of the facts of the crime or the characteristics of the condemned. Every death sentence is an affront to human dignity and every execution a symptom of, not a solution to, a culture of violence. Victims of violent crime and their families deserve respect, compassion and justice. Rather than offering a constructive contribution to these aims, however, the executing state imitates and takes to new heights of calculation what it seeks to condemn - the deliberate taking of human life - and creates another grieving family. A growing number of murder victims' relatives are opposing the death penalty in the USA.(14)

Human rights violations come in many forms. Torture and the death penalty are two close cousins.

"Disappearance", whereby governments or someone acting with their knowledge detain an individual and deny all knowledge of their whereabouts, is another. Families of the "disappeared" are subjected to the anguish of not knowing the fate of their loved ones. Are they being tortured? Will they be killed? The United Nations Declaration on the Protection of All Persons Against Disappearances states that a "disappearance" causes "grave suffering" not only to the victims but also to their families.(15)

Family members of the judicially condemned in the USA know the whereabouts of their loved one, but do not know their fate. All they know is that the government intends to kill him or her. As with "disappearances", the rest is left to the imagination. In 1988, parents of those on South Africa's death row wrote in a petition to the country's president: "To be a mother or father and watch your child going through this living hell is a torment more painful than anyone can imagine".

Kevin Stanford was sentenced to death in the USA in 1982, a year in which South Africa executed more than 100 people. He has been on death row in the United States for 20 years -- more than half of his life. His daughter has only ever known a world in which the government has planned to kill her father. Born two weeks after his arrest, she has remained in contact with him and says that he gives her a "lot of wisdom and guidance". She said recently: "*Growing up without him and being at this age, and knowing what he's faced with, it's very hard for me to understand, and very hard for me to comprehend. And, I want a life with him. And I want to, I guess you can't really make up for lost time, but I want to make the best of the present and the best of the future with him. And, the family definitely needs him also... I can't really see the world going on and existing without him in my life, in my family's life...*".(16)

Kevin Stanford, who is African American, was sentenced to death by an all-white jury for a crime committed when he was 17 years old. His case was at the centre of the *Stanford v Kentucky* decision in 1989, in which the US Supreme Court ruled that the execution of people for crimes committed when they were 16 or 17 years old did not offend contemporary standards of decency. The following year, a moratorium on executions was declared in South Africa. Three months later, Dalton Prejean became the first of 10 child offenders to be executed in the USA in the 1990s. Like Kevin Stanford, Dalton Prejean was an African American teenager sentenced to death by an all-white jury.

"It cannot be gainsaid that poverty, race and chance play a role in the outcome of capital cases", wrote the Chief Justice of South Africa's Constitutional Court in the landmark 1995 decision in which the Court recognized the incompatibility of the death penalty with a constitution that sought to protect human rights and human dignity. A few weeks earlier, Napoleon Beazley, an African American teenager, had been sentenced to death in the USA by an all-white jury for the murder of a wealthy white man committed when Beazley was 17 years old. Citing "substantial contact with the family of the victim", the prosecution had refused to accept a plea arrangement whereby Napoleon Beazley would plead guilty in return for a life sentence. Two years later, the same prosecutor's office accepted just such a plea from a 23-year-old white man who had shot dead a homeless African American man in a racially motivated killing.(17) Napoleon Beazley was executed in 2002 despite widespread international appeals for clemency.

Another of the Justices of the South African Constitutional Court wrote in the 1995 decision: "For many years, South Africa had the doubtful honour of being a world leader in the number of judicial executions carried out".(18) Yet, even at the height of judicial killing under the *apartheid* regime, under-18-year-olds were exempted from the death penalty.(19)

South Africa abolished the death penalty in 1997. Now South Africans find themselves appealing for higher standards of decency in the USA. Former political prisoner Dennis Brutus said in 1997, when Mississippi was seeking a death sentence against 17-year-old South African national Azikiwe Kambule for a car jacking murder: "Once we'd campaign for Nelson Mandela not to face the death penalty in South Africa. Now, here, in the land of the free and the home of the brave, we have a child facing the possibility of the death penalty."(20) In May 2002, Former President of South Africa, F.W. De Klerk, together with Archbishop Desmond Tutu, were among seven Nobel Peace laureates who appealed for Napoleon Beazley's death sentence to be commuted. Their appeals fell on deaf ears and Napoleon Beazley was killed. Earlier that month, the USA had described itself as "the global leader in child protection" at the United Nations General Assembly Special Session on Children.(21)

Today, South Africa is one of 111 countries that have abolished the death penalty in law or practice, not only not using it against children or prisoners with mental retardation, but not using it against anyone.

The international community has ruled out the death penalty as a sentencing option in international courts for even the worst crimes - genocide, war crimes and crimes against humanity. Against such a backdrop, the USA's almost solitary use of the death penalty for the crimes of children stands in stark relief.

Respect for fundamental human rights should not be dependent on opinion polls or other indicators of public sentiment. The executive, legislative and judicial branches of government all have roles to play in promoting and protecting progressive standards of decency and adherence to human rights norms. The history of the progress towards worldwide abolition reveals that governments have not waited for perceived public opinion to turn against the death penalty. In some cases, it has been the judiciary that has led the way, such as in Hungary in 1990 and South Africa in 1995. Sixty years ago, the US Supreme Court wrote that the purpose of the Bill of Rights, the first 10 Amendments to the US Constitution adopted in 1791, was "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials... [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections".(22) In 1972, the Chief Justice of the California Supreme Court wrote in an opinion finding the state's death penalty unconstitutional: "Public acceptance of capital punishment is a relevant but not controlling factor in assessing whether it is consonant with contemporary standards of decency. But public acceptance cannot be measured by the existence of death penalty statutes or by the fact that some juries impose death on criminal defendants".(23) At some point, judges bring their own informed judgment to an issue.

In an exercise which has sharply divided its Justices over the years, the US Supreme Court has sought, in effect, to gauge public opinion on aspects of the death penalty by assessing various types of "objective" evidence in order to determine contemporary "standards of decency". The four dissenting Justices in *Stanford v Kentucky* feared that the majority's over-reliance on state legislation as such an indicator would "largely return the task of defining the contours of Eighth Amendment protection to political majorities." The plurality rejected this, arguing that the dissenters were suggesting instead an over-reliance on the subjective opinion of the Justices, which would "replace judges of the law with a committee of philosopher-kings".

Not only did the *Stanford* decision refuse to give any weight to international trends, the opinion of professional organizations or socioscientific evidence opposing the use of the death penalty against under-18-year-olds, it also "emphatically" rejected the suggestion that the Justices should apply their "own informed judgment". This switched in *Atkins v Virginia* in 2002, when the six Justices in the majority brought their "own judgment to bear". The three *Atkins* dissenters accused the six of excessive subjectivity in finding that there was a "national consensus" against executing people with mental retardation. Perhaps another interpretation could be to conclude that "standards of decency" are evolving on the Court itself.

Now, having done the right thing by overturning *Penry v Lynaugh*, it is time that the Court found at least that one extra vote that was missing in *Stanford v Kentucky*.

### **From *Penry* to *Atkins* - a "national consensus" evolves**

When the US Supreme Court handed down *Penry v Lynaugh* on 26 June 1989, only one US state, Georgia, had legislation in force prohibiting the use of capital punishment against people with mental retardation. Similar legislation was about to take effect in Maryland a few days later. In addition, the US Government had re-introduced the federal death penalty in 1988, and had exempted prisoners with mental retardation from its reach.(24) The *Penry* court ruled that this limited legislative activity and a lack of conclusive evidence of "the general behavior of juries in this regard" was insufficient to make a finding of a national consensus.

By 2002, 16 more of the USA's 38 death penalty states prohibited the execution of prisoners with mental retardation (see appendix). The *Atkins* majority noted, however, that:

*It is not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known fact that anti-crime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our*

society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition. Moreover, even in those States that allow the execution of mentally retarded offenders, the practice is uncommon. Some States, for example New Hampshire and New Jersey, continue to authorize executions, but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States. And it appears that even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry*. The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.

### **Time for the US Supreme Court to revisit *Stanford v Kentucky***

"Since that opinion [*Stanford v Kentucky*, 1989] was written, the issue has been the subject of further debate and discussion both in this country and in other civilized nations. Given the apparent consensus that exists both among the States and in the international community against the execution of a capital sentence imposed on a juvenile offender, I think it would be appropriate for the Court to revisit the issue at the earliest opportunity." US Supreme Court Justice, 28 August 2002.(25)

On 15 September 2000, the Virginia Supreme Court upheld the death sentence of Daryl Atkins, the prisoner with an IQ of 59 at the centre of the *Atkins v Virginia* case. Two of the Justices had dissented. One concluded that "the imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive..."(26) The other Justice added: "it is indefensible to conclude that individuals who are mentally retarded are not to some degree less culpable for their criminal acts. By definition, such individuals have substantial limitations not shared by the general population. A moral and civilized society diminishes itself if its system of justice does not afford recognition and consideration of those limitations in a meaningful way."(27)

The US Supreme Court explained that it had decided to take the *Atkins* case, and thereby revisit the issue it had first addressed in *Penry* in 1989, "[b]ecause of the gravity of the concerns expressed by the dissenters [on the Virginia Supreme Court], and in light of the dramatic shift in the state legislative landscape that has occurred in the past 13 years".(28)

The Court could have used similar reasoning in 1999 to revisit the *Stanford v Kentucky* decision, but failed to do so. In 1998, the Nevada Supreme Court had upheld the death sentence of Michael Domingues, on death row in Nevada for a crime committed when he was 16 years old. His appeal had raised the illegality of his death sentence under international law. As in the *Atkins* case, two of the state Supreme Court Justices dissented. Justice Rose believed that "this complicated issue deserved a full hearing, evidentiary if necessary", and expressed the opinion that a "federal court that deals with federal law on a daily basis might be better equipped to address these issues". The other dissenter was the Chief Justice of the Court. He wrote: "The International Covenant on Civil and Political Rights, to which the United States is a 'party', forbids imposing the death penalty on children under the age of eighteen. International treaties of this kind ordinarily become the 'supreme law of the land'. Under the majority's interpretation of the treaty, the United States, at least with regard to executing children, is a 'party' to the treaty, while at the same time rejecting one of its most vital terms. Under Nevada's interpretation of the treaty, the United States will be joining hands with such countries as Iran, Iraq, Bangladesh, Nigeria and Pakistan in approving death sentences for children. I withhold my approval of the court's judgment in this regard".(29)

Despite (a) the gravity of the concerns expressed by the dissenters, (b) the fact that at that time 14 states prohibited the execution of child offenders - one more than had legislated against the execution of people with mental retardation when the US Supreme Court first announced that it would revisit its *Penry* decision(30), and (c) the "dramatic shift" in the *international* landscape with the almost universal ratification of the Convention on the Rights of the Child since *Stanford v Kentucky* - the Supreme Court passed up the opportunity provided by the *Domingues* appeal. In June 1999 it asked the executive for its opinion on the issue. In October, the Clinton administration urged the Court not to review the *Domingues* claim.(31) On 1 November 1999, the Supreme Court obliged and announced that it would not take the case.(32) Eight child offenders have been put to death in the USA since that decision, over 60 per cent of the known world total of such executions in that period.

Since the two Nevada Supreme Court Justices dissented in the *Domingues* case, other judges around the country have expressed concern about the imposition of the death penalty against under-18-year-olds. For example, at a pre-sentencing hearing in June 2000 in the case of James Edward Davolt for a crime committed when he was 16, the Arizona trial judge said that in the absence of substantial mitigating evidence (which the defendant refused to have presented, see page 71), he was leaning towards imposing the death penalty. He added: "*This is placing us in the company of nations which I don't even want to be associated with who impose capital punishment on children*".(33) The judge who oversaw Napoleon Beazley's 1995 trial, and set his execution date, made an appeal in 2001 for executive clemency on the grounds of the defendant's young age, 17, at the time of the crime. She subsequently explained that she had done so as a matter of principle, and added that she was "*mindful looking back in history about judges that blindly followed the law when the law was so fundamentally inappropriate. Shall we go to Nazi Germany? Shall we talk about judges in and around that country that enforced and followed laws that were so atrocious? And in retrospect we are appalled. And I struggle with that issue on select cases and this is one of them*".(34)

Alabama lies behind only Texas in the number of child offenders it currently has on its death row. In January 2000, Justice J. Gorman Houston of the Alabama Supreme Court, voting to uphold the death sentences of Roy Burgess and Marcus Pressley for crimes committed at the age of 16, wrote in each decision: "Before I voted in this case, knowing that the State of Alabama is going to be named in a list with such countries as Iran, Iraq, Bangladesh, Nigeria, and Pakistan, as jurisdictions approving death sentences for persons under age 18, I re-read Clarence Darrow's summation in the Leopold and Loeb case.(35) Like Darrow I wonder if [*w*]e are turning our faces backward toward the barbarism which once possessed the world. If Your Honor can hang a boy of eighteen, some other judge can hang him at seventeen, or sixteen, or fourteen. Someday, if there is any such thing as progress in the world, if there is any spirit of humanity that is working in the hearts of men, someday men would look back upon this as a barbarous age which deliberately set itself in the way of progress, humanity and sympathy, and committed an unforgivable act." Justice Houston concurred with the Court's upholding the Burgess and Pressley death sentences, but added: "I pray that in doing so I am not committing 'an unforgivable act'".(36)

The trial judge in the Leopold and Loeb case in 1924 chose life rather than death. At the sentencing, he said: "It would have been the task of least resistance to impose the extreme penalty of the law. In choosing imprisonment instead of death, the court is moved chiefly by the consideration of the age of the defendants, boys of eighteen and nineteen years... This determination appears to be in accordance with the progress of criminal law all over the world and with the dictates of enlightened humanity."

Eight decades on, it is to the shame of the United States that some 80 people await execution there for crimes committed when they were 16 or 17 years old. The US Supreme Court should revisit its 1989 *Stanford* decision at the first possible opportunity, to survey both the national and international legal landscape on this issue. The only "decent" conclusion that could be drawn from such a review is that the execution of child offenders is in breach of contemporary standards of justice.

### **Determining national standards of decency on the juvenile question**

"*I find it deeply disturbing that the life of a youth should be taken in punishment for his crime....*" Chief Justice, Mississippi Supreme Court, 1 June 1983.(37)

The legislative numbers on the two issues in the USA are similar - 18 states and the federal government banned the execution of some or all prisoners with mental retardation at the time of the *Atkins* decision, compared to a prohibition in 16 states and at federal level on the use of the death penalty against anyone who was under 18 years old at the time of the crime. On these figures alone, it would seem somewhat arbitrary if the Court found a "national consensus" on one issue but failed to do so on the other.(38) The 18 "mental retardation" states account for 37 per cent of the nationwide population. The 16 "juvenile" states account for 45 per cent.(39)

The US Supreme Court first decided to revisit the *Penry* decision in March 2001, at a time when only 13 states had enacted legislation against the execution of people with mental retardation (see footnote 30). Between then and the *Atkins* decision 15 months later, a further five states had passed such legislation. If they had not done so, would the *Atkins* Court still have ruled as it did? If not, at what point

did the "national consensus" emerge? When the 14th state passed its legislation? Or the 16th? The 18th? For 25 years, from 1976 to 2001 - a few months short of the entire "modern era" of the US death penalty - there were more states that had exempted under-18-year-olds from the death penalty than had banned the execution of people with mental retardation. Again, it would seem somewhat arbitrary if only the latter practice was ruled unconstitutional.

Amnesty International believes that the United States Supreme Court should have prohibited the execution of people with mental retardation in 1989 when it first addressed the issue. However, late is better than never, and the organization welcomes the *Atkins* decision. Now, 13 years after the Court should have outlawed the death penalty for the crimes of under-18-year-olds, its reasoning in *Atkins* clearly justifies a finding that this practice, too, is unconstitutional in 2002. Under 10 overlapping headings, the following section examines the issues that could guide such a finding: (1) consistency of the direction of legislative change; (2) the absence of reinstating legislation; (3) the question of the non-death penalty states; (4) the federal death penalty; (5) the rareness of executions of child offenders among the retentionist US states that allow this practice; (6) the views of national organizations, religious communities and as reflected in opinion polls; (7) the more "unusual" occurrence of the death penalty against juveniles; (8) prosecutor and juror behaviour as indicators of "standards of decency"; (9) the geographic concentration of juvenile executions; and (10) the distorting effect of Texas.

### **(1) Consistency of the direction of change**

In *Furman v Georgia* in 1972, the US Supreme Court found that the arbitrary manner in which the death penalty was then being applied violated the Constitution.(40) All existing death sentences were overturned. The country's legislators set about rewriting their capital statutes to take account of the *Furman* decision. In 1976, in *Gregg v Georgia*, the Supreme Court accepted the constitutionality of the new laws.(41) The first execution of the "modern" era took place on 17 January 1977.

Since the *Furman* decision, legislation has been passed in a number of states which exempts the use of the death penalty against people for crimes committed when they were under 18. Such prohibitions, in Supreme Court parlance, are an indication of "evolving standards of decency". This is particularly so given that at least some of these states had executed child offenders during their pre-*Furman* use of the death penalty, and some prosecutors had initially continued to pursue death sentences, and juries pass them, against under-18-year-olds in the post-*Furman* period.

The American Law Institute's Model Penal Code of 1962 recommended exemption from the death penalty of people who were under 18 at the time of the crime. There was no equivalent exemption expressly recommended in the case of people with mental retardation. In 1983, the American Bar Association (ABA), which takes no position on the death penalty *per se*, adopted a resolution at its Annual General Meeting calling for the abolition of the death penalty against people for crimes committed when they were under 18 years old. This was the first time that the ABA had taken any position on any aspect of the death penalty. It took the equivalent position on defendants with mental retardation six years later in 1989.

State legislatures began to pass laws on the juvenile issue earlier than they did on the mental retardation issue. Only one US state had a law against executing prisoners with mental retardation in force at the time of the *Penry* decision in 1989: Georgia, which introduced its law in 1988. As outlined below, several states had already legislated by then on the issue of children and the death penalty.

**1973 Connecticut** re-enacted the death penalty and exempted under-18-year-olds from its scope. Twenty-eight years later, in 2001, it legislated to prohibit the imposition of a death sentence on any defendant found to have mental retardation. Connecticut has not executed a prisoner for a crime committed when under 18 since 1900.(42)

**1977 Illinois** passed a new death penalty law in 1977, after its post-*Furman* statute of 1973 was found to be unconstitutional by the state Supreme Court in 1975.(43) The 1977 statute prohibited the imposition of the death penalty on anyone who was under 18 at the time of the offence. Twenty-five years later, at the time of *Atkins*, Illinois had not legislated to prohibit the execution of people with mental retardation.(44) While it has retained its ban on the execution of child offenders, it has continued to sentence to death people with claims of mental retardation.(45)

Despite an aggressive expansion of the death penalty over the years - the state added more than a dozen "aggravating factors", and as of July 2002 had the eighth largest death row population in the USA - Illinois retained the ban on the execution of child offenders. In 2001, the legislature passed a bill to create an additional aggravating factor, namely to make a person eligible for the death penalty where the murder was committed as part of gang activities. Despite the fact that this proposed legislation was in effect aimed mainly at young offenders, it would not have reduced the minimum age for death penalty eligibility below 18. The bill was vetoed by the governor, who in recent years has begun to question the use of the death penalty against *anyone* because of the risk of executing the innocent.

**1978** Capital punishment was re-enacted in 1977 by the **California** legislature. The following year, on 7 November 1978, California voters approved a broader death penalty law which superseded the 1977 statute and is the statute under which California operates today. At the same time, the electorate approved a measure exempting people who were under 18 at the time of the crime from execution. Today, California has the country's largest death row population.(46) At the time of *Atkins v Virginia* in 2002, California had not legislated to prohibit the execution of people with mental retardation. Some estimates suggest that as many 60 California death row inmates might have claims of mental retardation.(47) The state has not executed a child offender since 1923.

In an indication of contemporary "standards of decency" in the country's most populous state, the California legislature has resisted downward pressure on the minimum age for death penalty eligibility. In the 1990s, Governor Gray Davis professed his support for a lowering of the age. In 1999 a bill was introduced in the legislature to reduce the age for death penalty eligibility from 18 to 16.(48) Among its opponents was the USA's largest statewide organization of criminal defence lawyers, California Attorneys for Criminal Justice, which held that "the execution of juveniles and those whose crimes were committed as juveniles is a barbaric notion that has been rejected throughout the world, with the exception of the United States. The death penalty for juvenile offenders is an almost uniquely American pastime. This practice appears to have been abandoned everywhere else in large part due to the express provisions of the United Nations Convention on the Rights of the Child and of several other international treaties and agreements".(49) The bill failed.

**1979** Re-enacting the death penalty 10 years after it abolished it, **New Mexico** prohibited the use of the death penalty against under-18-year-olds. This was 12 years before it legislated to exempt prisoners with mental retardation from capital punishment.

New Mexico has retained its exemption on child offenders, despite Governor Johnson proposing in 1996 that children as young as 13 years old should be eligible for execution.(50) In an indication of "evolving standards of decency", five years later Governor Johnson suggested he may be ready to support abolition of the death penalty because of the risk of irrevocable error.(51) In 2001, the New Mexico Senate came within one vote of passing a bill to repeal the death penalty.

**1981** **Ohio** prohibited the death penalty for crimes committed by people under aged 18. Five of the last 100 executions Ohio carried out in the pre-*Furman* era were of people convicted of crimes committed when they were 16 or 17. Between 1974 and 1977, before the Ohio capital statute was found unconstitutional by the US Supreme Court(52) and the state's new law written, at least six people were sentenced to death in Ohio for crimes committed when they were 16 or 17.(53)

Today, Ohio remains an active death penalty state, with the country's sixth largest death row. Yet it retains its ban on the use of the death penalty for children. By the time of *Atkins*, Ohio had not legislated against the execution of people with mental retardation, and there were believed to be several such inmates on death row in the state.(54)

**1982** **Nebraska** legislated to prohibit the death penalty for under-18-year-olds, 16 years before it exempted the mentally retarded from execution. As far as Amnesty International is aware, Nebraska had not executed a child offender in the 20th century.

However, Nebraska did sentence a child offender to death in its post-*Furman* use of the death penalty, prior to its 1982 prohibition on such use of the death penalty. In 1977, the Nebraska Supreme Court overturned the death sentence of Rodney Stewart, convicted in 1975 of a murder committed when

he was 16 years old: "After weighing the aggravating and mitigating circumstances in this case we conclude that the defendant's age at the time of the crime and the absence of any significant criminal record mitigate strongly against the imposition of the death penalty upon Rodney Stewart; and that the public will be served and justice done by sentencing him to a term of life imprisonment." In its opinion, the Court noted that the trial judge had cited "the growing tendency of persons under 17 years of age to commit crimes". The Supreme Court asked "Are we to say that because of the increase of juvenile crime, every 16-year-old person who has been found guilty of murder is not to have his age considered in the weighing and balancing of the aggravating and mitigating circumstances? We believe not". The Nebraska Supreme Court also noted that "reputable" authorities such as the American Law Institute and the National Commission on Reform of Federal Criminal Laws recommended abolishing the death penalty for under-18-year-olds.(55)

Nebraska's 1982 prohibition on the age issue remains in force two decades later. The state's position on not executing the mentally retarded appeared less firmly grounded and has required judicial intervention. Two people were spared from execution under the 1998 legislation, Jerry Simpson and Clarence Victor. After Victor, a 66-year-old man with an IQ of 65, was removed from death row by a judge, the state prosecution argued that the law was not meant to be retroactive and attempted to have the death sentence reinstated. In June 2000, the Nebraska Supreme Court upheld the lower court's decision.

**1984 Tennessee** set 18 as the minimum age for death penalty eligibility in 1984, six years before it exempted the mentally retarded from capital punishment. One of the last 20 pre-*Furman* executions in Tennessee was of a prisoner for a crime committed when he was 16.

Tennessee currently has the 12th largest death row in the USA and in 2000 carried out its first execution since 1960, but still retains its ban on the execution of child offenders. In an indication of a less principled stance on the mental retardation issue, the state pursued the execution of Heck Van Tran into the new century despite evidence that he was mentally retarded and had an IQ of 65.(56) Van Tran was sentenced to death in 1989, the year before Tennessee outlawed the execution of people with mental retardation. The state argued that the legislature had not meant the law to be retroactive. In December 2001, the Tennessee Supreme Court held that irrespective of the question of retroactivity (the court found no clear evidence that the state had intended the law to be retroactive), such an execution would violate state and national "standards of decency". The Court was sharply divided. Two of the five Justices dissented: "With its decision today, a majority of this Court has effectively permitted a defendant...an opportunity to escape the ultimate punishment for his actions solely because he has managed to obtain a lower score on a revised IQ test than he was previously able to do." The dissent continued that there was not "sufficient evidence to suggest that the public judgment in Tennessee is categorically against the execution of individuals, who, while possessing mild mental retardation, also possess the cognitive, moral, and volitional capacities to commit first degree murder." The dissenters also disagreed with the majority that a national consensus had emerged.(57)

**1985 Colorado and Oregon** both set 18 as the minimum age for death penalty eligibility in 1985. One of the last 15 pre-*Furman* executions in Oregon was of a prisoner for a crime committed when he was 16. At the time of *Atkins v Virginia*, Oregon did not prohibit the execution of prisoners with mental retardation. Colorado exempted the mentally retarded from the death penalty in 1993, eight years after it did so for under-18-year-olds.

**1986 New Jersey** passed legislation raising the minimum age for death penalty eligibility from 14 to 18. At the time of *Atkins v Virginia* in 2002, New Jersey did not prohibit the execution of prisoners with mental retardation.

**1987** Two years before **Maryland** became the second US death penalty state to exempt the mentally retarded from execution, it became the 11th to prohibit the use of the death penalty against people who were under 18 at the time of the crime. Until then, Maryland had no age limit. In 1982 and 1984, Maryland had passed death sentences against James Trimble and Lawrence Johnson for crimes committed when they were 17.(58) Two of Maryland's last 15 pre-*Furman* executions were of child offenders, for crimes committed when they were 16.

**1988** The **US Government** reintroduced the federal death penalty on 18 November 1988, when President Ronald Reagan signed the Anti-Drug Abuse Act. The legislation stated: "A sentence of

death shall not be carried out upon a person who is under 18 years of age at the time the crime was committed."(59)

Thus, by the time the US Supreme Court handed down the decision in *Stanford v Kentucky* on 26 June 1989, eleven states and the federal government prohibited the use of the death penalty against people who were under 18 at the time of the crime. This was only two fewer jurisdictions than had legislated against the execution of prisoners with mental retardation at the time the Supreme Court first announced that it would revisit its *Penry* decision in March 2001, by agreeing to hear the appeal of Ernest McCarver in North Carolina (see footnote 30).

In explaining its finding of a "national consensus" against the execution of people with mental retardation in a situation where 18 states had legislated against that practice, the US Supreme Court said in *Atkins v Virginia* on 20 June 2002 that: "*It is not so much the number of these States that is significant, but the consistency of the direction of change*". The Court footnoted this explanation with the following: "A comparison to *Stanford v Kentucky*, in which we held that there was no national consensus prohibiting the execution of juvenile offenders over age 15, is telling. Although we decided *Stanford* on the same day as *Penry*, apparently only two state legislatures have raised the threshold age for imposition of the death penalty."

Perhaps this footnote was a hint that the Supreme Court is reluctant to revisit *Stanford v Kentucky*, or was included to bring certain Justices into the majority decision on the mental retardation issue.(60) Amnesty International hopes not, as this would suggest a willingness of the Court to tolerate arbitrariness in the capital justice system. In any event, the footnote is not a fair description. Since *Stanford*, five more states have been added to the list of those which prohibit the imposition of the death penalty against people who were under 18 years old at the time of the crime: Washington, Kansas, New York, Montana and Indiana.

**1993** In the same year that the **Washington State** legislature exempted prisoners with mental retardation from the death penalty, the Washington Supreme Court effectively set 18 as the state's minimum age at which people could face the death penalty.

Faced with an appeal by Michael Furman, sentenced to death in 1990 for a crime committed in 1989 when he was 17 years old, the Washington Supreme Court noted that the state's criminal laws applied to children as young as eight years old, and that the juvenile courts could transfer any case to adult court. At the same time, the law did not set any minimum age for imposition of the death penalty. Therefore, the Court wrote, it was theoretically possible for the state to pursue a death sentence against children as young as eight. The Court concluded that it could not itself rewrite either the juvenile statute or the death penalty statute to comply with US Supreme Court precedent. The Washington court held, 8-0, that "the statutes therefore cannot be construed to authorize imposition of the death penalty for crimes committed by juveniles. Absent such authorization, [Michael Furman's] death sentence cannot stand".(61)

One of the Justices, in a concurring opinion, went further: "First, juveniles in our state receive different treatment than adults across a broad range of legal categories. It is, in my view, wholly inappropriate to suspend this treatment for the purpose of imposing the most severe penalty available under our criminal system. Second, there is no evidence of community standards in our state to support the execution of a person who was a juvenile at the time of the offense. Finally, I believe Washington should join the emerging national trend of legislatures recognizing that it is improper to execute persons who were juveniles at the time the crime was committed." The Justice pointed out that Michael Furman was one of eight juveniles convicted of aggravated first degree murder in Washington State between 1981 and 1992. Three were 17 at time of the crime, three were 16, one was 15 and one was 13 years old. Only Michael Furman received a death sentence.(62) The Washington Supreme Court Justice concluded that "even if there were express legislative authorization to execute persons who were juveniles at the time of the crime, such punishment would be disproportionate".(63)

Currently in Washington State there is no specific statute that says death penalty sentences for juveniles are prohibited. The fact that Washington prosecutors have not sought death sentences against under 18-year-olds since the 1993 *Furman* decision, and the fact that the state legislature has not amended the capital statute, in line with *Thompson v Oklahoma* and *Stanford v Kentucky*, to allow 16 and/or 17 year olds to be sentenced to death, is further compelling evidence of contemporary "standards

of decency", and the principled role the judiciary can play in their evolution.

**1994 Kansas** became the 37th US state to reintroduce the death penalty after *Furman v Georgia*. It excluded defendants who were under 18 years old at the time of the crime.

**1995 New York** reinstated the death penalty in 1995, 32 years after the state's last execution. The law provided for the death penalty against defendants who were "more than 18 years old at the time of the commission of the crime". For New York, this exemption for child offenders is a distinct sign of an "evolving standard of decency". In its earlier use of the death penalty - New York executed more people than any other state in the 20th century prior to 1972 - under-18-year-olds were not exempted from execution. Indeed, two of the last 30 people executed in New York before it abolished the death penalty in 1965 were put to death for crimes committed when they were 16 and 17.(64)

The legislation enacted in Kansas and New York also provided some protection to defendants with mental retardation. However, unlike the age issue it was not unconditional protection. The Kansas law defined "mentally retarded" as "significantly subaverage general intellectual functioning, to an extent which substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law."(65) This, in effect, is the standard for an insanity defence, and could allow people with mild mental retardation to be sentenced to death.(66)

Like Kansas, the New York statute offered only partial protection to defendants with mental retardation. If a defendant in New York was convicted of first-degree murder and sentenced to death, the trial judge had to set that death sentence aside and substitute a life sentence if the defendant was found to have mental retardation. However, if the defendant was convicted and sentenced to death for a murder committed in prison or jail, the judge could not overturn the death sentence on the grounds of mental retardation.(67)

Despite the qualified nature of the legislation protecting the mentally retarded from execution in Kansas and New York, the two states were nevertheless counted as indicators of the "national consensus" by the US Supreme Court in *Atkins*. Amnesty International does not dispute their inclusion, but suggests that the legislation *unconditionally* exempting under-18-year-olds from execution should carry even greater weight in the determination of whether a "national consensus" exists on the juvenile issue.

**1999 Montana** legislated to exempt people from the death penalty who were under 18 at the time of the crime. Prior to this, the state had not set a minimum age. By the time of *Atkins*, Montana had not legislated to prohibit the death penalty against people with mental retardation.

**2002 Indiana** prohibited the imposition of the death penalty for those who were under 18 at the time of the crime, raising it from the previous minimum of 16. It had raised the minimum age from 10 years to 16 in 1986. Indiana legislated against the death penalty for people with mental retardation in 1994, although it was not retroactive. In a sign that the principle of exempting children from the death penalty is a firmly held standard of decency, Indiana's move on the juvenile issue came despite recent high-profile crimes involving juvenile defendants. For example, St Joseph County prosecutors had sought a death sentence against Gregory Dickens at his 1999 trial for the murder of a police officer committed when he was 16 years old.(68) In September 2000, Madison County prosecutors filed notice of intent to seek a death sentence against Joshua Davies, accused of the murder of a 13-year-old girl when he also was 16. The County subsequently dropped this pursuit in exchange for a guilty plea and Davies was sentenced to life imprisonment.(69)

The *Atkins* majority added that the evidence of the existence of a consensus against the execution of people with mental retardation "*carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition.*" With this in mind, it should be noted that the Montana legislation to prohibit the execution of people who were under 18 at the time of the crime passed by a margin of 44-5 in the state Senate and 85-15 in the House of Representatives. Similarly, the Indiana legislation to abolish the juvenile death penalty passed by a vote of 44-3 in the Senate and 83-10 in the House of Representatives.

To conclude, under the reasoning in *Atkins*, support for a finding of a "national consensus" against the use of the death penalty against child offenders can be found in the consistent progress towards 18 as a minimum age for death penalty eligibility, including in judicial decisions.(70) In some respects, the position regards exempting children from the death penalty seems to have been longer held and more firmly grounded than that relating to the mental retardation issue.

## **(2) The absence of reinstating legislation**

No US state has legislated to make defendants with mental retardation eligible for the death penalty where they were not before. The same holds in the case of children. No state has lowered the age of death penalty eligibility since executions resumed in 1977.

In *Atkins v Virginia* on 20 June 2002, the US Supreme Court said that "*the complete absence of States passing legislation reinstating the power to [execute prisoners with mental retardation] provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.*"

It is difficult to imagine a state legislature overturning an existing ban on the imposition of the death penalty against people with mental retardation. Even the most pro-death penalty politician is unlikely to perceive electoral advantage in seeking to overturn legislation prohibiting such executions. Given, as the *Atkins* majority points out, "*the well-known fact that anti-crime legislation is far more popular than legislation providing protections for persons guilty of violent crime*", it is much easier to imagine politicians calling for a reduction in the age of death penalty eligibility. This is particularly so in view of the increased tendency in recent years in the USA to prosecute and punish children as if they were adults. This approach, inconsistent with international standards, led in the period 1992 to 1995 to 47 states and the District of Columbia introducing laws that increased the eligibility of children to be prosecuted in general criminal courts, to be sentenced as adults and even to be imprisoned in adult correctional facilities.(71)

Noting the professed support by certain Californian politicians for the execution of child offenders as young as 13, a juvenile justice expert wrote in 1997:

*The rapid growth of teenage violence from 1985 to 1990, particularly homicide, occurred among minorities and was tied to poverty among non-white youth. Since 1990, teenage violent crime of all types, especially murder, in California has fallen while adult violent crime continues to rise. The most baffling mystery is why grown-up violence – especially felony assault by middle-aged whites – is mushrooming, while crime is declining among destitute, inner-city teens. But such mysteries are not what politicians seeking easy scapegoats want to emphasize. So politically attuned experts evade basic points, such as surging adult violence or that a youth under 18 is three times more likely to be murdered by an adult than by another youth. Accordingly, politicians extol get-tough panaceas, including executing ever-younger offenders...(72)*

Two other experts on juvenile justice wrote in 2000:

*The late 1980s and early 1990s did see an alarming increase in the number of juveniles charged with murder...This increased violence among urban teens was cause for concern but did not justify the wholesale demonization of America's youth that soon followed. Beginning in late 1995, Princeton professor John Dilulio coined the word "superpredator" to describe a new breed of "remorseless and morally impoverished" juveniles who would soon flood America's streets as projected increases in the youth population came to pass. Politicians seized on this rhetoric, inflamed the public's fear and exploited the gap between public perception and the reality of juvenile crime. Increased press coverage of juvenile violence, making it seem like the norm rather than an aberration, also fanned public hysteria.(73)*

Echoes of Professor Dilulio's vision could be heard in Assemblyman Jim Battin's unsuccessful 1999 attempt to lower the minimum age for death penalty eligibility in California from 18 to 16: "By legislatively ratifying the Governor's pledge to help keep California safe through vigorous law enforcement, [my bill] will provide the much needed deterrent against the gangs terrorizing our cities as never before. It will force them to think twice about their next car jacking, home invasion, or drive by shooting, which could result in

the senseless death of an innocent person."(74) In similar vein, sentencing Michael Lopez to death in 1999 for a murder committed when he was 17 years old, a Texas trial judge told the defendant that he was "a street terrorist... hellbent on destroying America, piece by piece and neighbourhood by neighbourhood."(75) In Nevada in February 2000, calling for a death sentence on Kenshawn Maxey for a murder committed when he was 17, the Clark County prosecutor told the jury that "the portrait of the American killer increasingly bears the face of a young man... Don't let the defendant hide behind his age as an excuse for this horrific murder... The return of a death verdict is society's act of self-defense."(76)

Over the years, a number of politicians across the country have voiced their support for lowering the age of death penalty eligibility in their state to as low as 11.(77) While much of this may have been sheer demagoguery, Amnesty International knows of no equivalent pressure on the mental retardation issue. In 1997 the Los Angeles District Attorney said that he favoured the death penalty for children "no matter what their age".(78) How much less likely would it have been for him to have professed his support for executions of offenders "no matter what their IQ"?

The achievement of progressive legislation on the death penalty has been an uphill struggle for most of the 25 years since executions resumed, with the climate being more favourable to the status quo or expansion of the punishment. Those seeking an end to the use of the death penalty against people with mental retardation have had to overcome this. The juvenile issue has had not only to overcome legislative inertia, but also to resist a certain level of public hysteria about violent juvenile crime. The demonization of youth in the national psyche may explain the slowdown in legislative activity in the 1990s on the juvenile death penalty issue. The fact that the legislatures have rejected regressive pressure should be given weight in a determination of "evolving standards of decency".

### **(3) The non-death penalty states**

The four dissenting Justices in *Stanford v Kentucky* who believed that the execution of people for crimes committed when under 18 years old was already unconstitutional in 1989, took the position that the country's 15 abolitionist jurisdictions (14 states and the District of Columbia) should have been added to the calculation of whether a "national consensus" against the execution of child offenders had been reached. However, the *Stanford* plurality rejected this, stating that the number of abolitionist jurisdictions was irrelevant to the juvenile issue: "The issue in the present case is not whether capital punishment is thought to be desirable but whether persons under 18 are thought to be specially exempt from it."

This is somewhat inconsistent. In the *Penry v Lynaugh* decision, the Court did take account of the abolitionist states in making its "national consensus" calculation: "In our view, the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus" (emphasis added).(79) Furthermore, Justice O'Connor wrote in her concurring opinion in *Thompson v Oklahoma* a year earlier: "When one adds these 18 States [that exempt under-16-year-olds from the death penalty] to the 14 that have rejected capital punishment completely.... strong counterevidence would be required to persuade me that a national consensus against this practice does not exist" (emphasis added).(80) Although the *Atkins* majority did not expressly refer to the non-death penalty states in its decision, during oral argument Justice Ginsberg had described the combination of abolitionist states and retentionist states exempting the mentally retarded as a "super-majority" akin to the percentage required to block a filibuster in the Senate.

Needless to say, a state which does not allow the execution of anyone, juvenile or adult, has by definition taken a stronger stand against the death penalty than by only exempting youthful offenders from it. It may be considered likely that, in the event of a decision to reinstate the death penalty, such a state would exempt children from its scope.

This hypothesis has gained additional credibility from developments since 1989. Both of the states which have reintroduced the death penalty since the *Stanford* decision - Kansas and New York - have done so while at the same time exempting child offenders from its scope. As already noted, the New York and Kansas legislatures offered only limited protection from the death penalty to offenders with mental retardation. No such conditions were attached in the case of offenders who were under 18 years old at the time of their crime. Furthermore the protection provided to child offenders by the Kansas and New York legislatures came despite the fact that the reinstatement of capital punishment in those states occurred at

a time of particular public fear about violent juvenile crime, as already described.

Several attempts have been made to reintroduce the death penalty in the current abolitionist US states. In **Iowa**, for example, such attempts were defeated in 1991, 1995, 1997 and 1998. At the time of writing, there were two bills in the Iowa legislature proposing to reinstate the death penalty. Both exempt from execution those who were under 18 at the time of the crime.(81) The most recent bill to reintroduce the death penalty in **Wisconsin**, in 2001, "authorizes a sentence of death for first-degree intentional homicide with intent to terrorize, if the person who commits the homicide is at least 18 years of age".(82) A bill introduced into the 2001-2002 **Minnesota** legislative session aimed at reinstating the death penalty exempted defendants who were "under 18 years of age at the time of the commission of the crime". It did not expressly exempt people with mental retardation.(83)

The 13 current abolitionist states (including District of Columbia) should be brought into the calculation of "national consensus", as the four *Stanford* dissenters had sought. When added to the 16 retentionist states that have exempted under-18-year-olds from the death penalty, this means that about 58 per cent of the US population live in states that do not use the death penalty against children. The equivalent figure in the case of offenders with mental retardation at the time of the *Atkins* decision was 51 per cent.

#### **(4) Federal death penalty**

On 18 November 1988, President Ronald Reagan signed into law the Anti-Drug Abuse Act, which reintroduced the federal death penalty for the first time since the US Supreme Court's 1972 *Furman v Georgia* decision. The 1988 law provided for the death penalty for murders committed in the context of illegal drug enterprises, but exempted defendants who were under 18 at the time of the crime. The *Stanford v Kentucky* decision rejected this as irrelevant to the question of whether there was a "national consensus" against the execution of young offenders:

*"Petitioners make much of the recently enacted federal statute providing capital punishment for certain drug-related offenses, but limiting that punishment to offenders 18 and over. That reliance is entirely misplaced... [T]he statute in question does not embody a judgment by the Federal Legislature that no murder is heinous enough to warrant the execution of such a youthful offender, but merely that the narrow class of offense it defines is not..."*

Five years later, on 13 September 1994, President Clinton signed into law the Federal Death Penalty Act. The legislation expanded the death penalty under federal civilian law from the "narrow class of offense" defined in the 1988 legislation to more than 50 offences. This expansion occurred during a time of particular fear about juvenile crime. It included making punishable by death the offence of murder related to car jacking - a crime particularly associated with young people.(84) Yet the federal legislation prohibited the death penalty against anyone who was younger than 18 years old at the time of the offence.(85)

The federal government surely has some sort of overarching influence on the country as a whole. In 1928, a US Supreme Court Justice said that the federal government "teaches the whole people by its example."(86) Two Tennessee Supreme Court Justices recently noted that "Congress presumably acts with the full voice and authority of the nation as a whole - and therefore presumably reflects the contemporary values and norms of the nation".(87) As noted above, the US Congress voted to reintroduce the federal death penalty in 1988 and expanded it greatly six years later. Both pieces of legislation exempted people who were under 18 at the time of the crime. The first legislation was signed into law by a Republican President, the second by a Democrat President. In 1934, the Supreme Court wrote that "the vital character of [the Presidency's] relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated."(88) Half a century later, the Court noted that, "the President and Vice President are the only elected officials who represent all the voters in the Nation".(89)

The federal death penalty should be given appropriate weight in determining contemporary "standards of decency" on the execution of under-18-year-old offenders.

#### **(5) Rareness of use among states which allow juvenile executions**

In the *Atkins v Virginia* decision of 20 June 2002, the Supreme Court majority stated, in support of finding a "national consensus" against the execution of people with mental retardation, that "*even in those States that allow the execution of mentally retarded offenders, the practice is uncommon. Some States, for example New Hampshire and New Jersey, continue to authorize executions, but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States.*" Again, the same is true on the issue of child offenders.

To the 31 US jurisdictions prohibiting the death penalty against people who were under 18 at the time of the crime, could be added any states considered to have abolished the death penalty against child offenders in practice, rather than in law.

**Idaho, South Dakota, Utah and Wyoming** rarely use the death penalty. Between them they account for eight executions since 1977, including five "consensual" executions of prisoners who gave up their appeals.<sup>(90)</sup> In April 2002, the four states had 39 people on their death rows, or about one per cent of the national total. All four allow the use of the death penalty against child offenders. Yet in the modern era of the death penalty, they have not, as far as Amnesty International is aware, passed death sentences against anyone for a crime committed when under 18 years old. Between them, the four states have executed only one child offender in over 130 years; Chauncey Millard was put to death in 1869 in Utah for a crime committed when he was 17 years old. This is a similar situation to neighbouring Montana, which finally exempted child offenders from execution in 1999, 121 years after it last carried out such an execution.

**Arkansas** has been a more active death penalty state, executing 24 prisoners since 1990. It currently holds more than 40 prisoners on its death row, none of whom were under 18 at the time of the crime. Arkansas has not executed a child offender since 1927, and has only sentenced two to death in the "modern" era of the US death penalty - Ronald Ward in 1985 for a crime committed when he was 15 (reversed in 1987) and Damond Sanford in 1996 for a crime committed at 16. Sanford's death sentence was reversed by the Arkansas Supreme Court in 2000 on the grounds of ineffective assistance of counsel. His lawyer had failed to present evidence of his client's mental retardation at the sentencing phase. The state decided not to seek another death sentence, and Sanford was sentenced to life imprisonment without the possibility of parole. Arkansas legislated in 1993 to exempt defendants with mental retardation. The legislation was not retroactive and provided weaker protection than in most states that had so legislated, by placing the threshold IQ at 65. This might not have protected Damond Sanford whose lowest IQ score was 67.<sup>(91)</sup> Within the past decade, Arkansas has executed two prisoners with substantial claims of mental retardation: Ricky Ray Rector in 1992 and Barry Fairchild in 1995.

The small state of **Delaware** has the highest per capita rate of execution in the USA<sup>(92)</sup>. It also allows the execution of people for crimes committed when they were under 18. However, it has not carried out such an execution since 1891 nor passed a death sentence against anyone for a crime committed when they were under 18 years old in the post-*Furman* era.<sup>(93)</sup> By the time of the *Atkins v Virginia* decision on 20 June 2002, Delaware had also not legislated to exempt people with mental retardation from execution. Willie Sullivan was put to death in Delaware in September 1999. At his trial, a psychologist testified that Sullivan had mental retardation and the mind of a nine-year-old child. Post-conviction testing in 1995 and 1999 placed Sullivan's IQ at 70-71.<sup>(94)</sup>

**New Hampshire** allows the death penalty for crimes committed at the age of 17. Nevertheless, there is no one of any age on death row in that state, and no executions have been carried out there since 1939. As far as Amnesty International is aware, none of the prisoners executed in New Hampshire between 1869 and 1939 were under 18 at the time of the crime. As the *Atkins* majority opinion suggested, there is little impetus to outlaw death sentences for child offenders under such circumstances, and indeed outright abolition of the death penalty has recently been higher on the legislative agenda than the child offender issue. In 2000 both of the state's legislative chambers voted to abolish the death penalty, but the bill was vetoed by the governor.

In determining the "national consensus" issue, consideration should be given to including the above seven states as abolitionist in practice on the question of the death penalty against under-18-year-olds.

There are positive indicators also in some of the states which have continued to impose death sentences against child offenders. **Arizona** had five child offenders on death row at the time of

writing.(95) In 2001, after a year of study and research, the state Attorney General's Capital Case Commission, consisting of members of the Arizona judiciary and legislature, as well as prosecutors and defence lawyers, issued its Interim Report. The report stated: "After considerable debate, the Commission heard a motion to recommend that the death penalty in Arizona not apply to defendants who were under 18 at the time of the crime. The Commission approved the motion by a vote of 15 to 8."(96) Arizona last executed a child offender in 1934.

Kevin Stanford, whose case led to the *Stanford v Kentucky* decision in 1989, is still on death row in **Kentucky**. He is the only child offender on death row in Kentucky, which has not executed someone for a crime committed when under 18 since 1946. Half a century later, opinion polls in the state indicate around 80 per cent support for abolishing the death penalty for 16- and 17-year-old offenders.(97) Governor Patton said that he would sign such legislation into law if it came to him from the legislature.(98) However, no such bill has come before him. A Kentucky newspaper gave its insight into the legislative process after a bill was introduced in the state legislature in 2002 proposing to exempt under-18-year-olds from the death penalty:

*Most lawmakers favor capital punishment. And they don't want anyone to accuse them of being soft on crime. So here is what they do: They tell the chairmen of the appropriate committees that they don't want the subject even to come up. That way, they can avoid the uncomfortable question of why Kentucky considers it acceptable to execute people for crimes committed when they were 16 or 17 years old. So far the pattern seems to be holding up this year... [Yet] these are issues that need to be debated publicly, first in a committee hearing and then on the House and Senate floors. It's too bad if just talking about this issue makes lawmakers feel uncomfortable and if voting on it exposes them to unpleasantness. This is an important issue. It's time Kentucky faced it.*(99)

The 2002 bill to abolish the juvenile death penalty in Kentucky was killed by the chairpersons of the House and Senate judiciary committees, so it never came to the vote.(100)

A bill proposing to make retroactive the state's 1990 prohibition on the execution of people with mental retardation died in the same way.(101) It would seem that even 12 years after Kentucky legislated against such use of the death penalty, the legislature's position on this issue remains conditional. Despite this, Kentucky was counted by the *Atkins* majority as part of the "national consensus" against the execution of the mentally retarded. Amnesty International does not dispute its inclusion, but suggests that the same leeway should be afforded to the juvenile issue.

## **(6) National organizations, religious communities, and opinion polls**

The *Atkins* majority noted additional evidence that the legislation against the execution of people with mental retardation around the country "reflects a much broader social and professional consensus". For example, "several organizations with germane expertise have adopted official positions opposing the imposition of the death penalty upon a mentally retarded offender. In addition, representatives of widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions, have filed an *amicus curiae* brief explaining that even though their views about the death penalty differ, they all share a conviction that the execution of persons with mental retardation cannot be morally justified... Finally, polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong".

The same is true in the case of child offenders. Various organizations have adopted an official position against the use of the death penalty against people who were under 18 years old at the time of the crime. They include the American Bar Association, the American Psychiatric Association, the American Academy of Child and Adolescent Psychiatry, the American Society for Adolescent Psychiatry, the National Mental Health Association, the Children's Defense Fund, the Center on Juvenile and Criminal Justice, the Coalition for Juvenile Justice, the Child Welfare League of America, the Juvenile Law Center, the Mid-Atlantic Juvenile Defender Center, and the Youth Law Center.

Faith leaders and organizations have also opposed the execution of child offenders, at national and international level. In *Stanford v Kentucky*, a number of religious organizations in the USA filed *amicus curiae* briefs in the US Supreme Court against executing child offenders.(102) More recently, an *amicus curiae* brief was filed in the Texas Court of Criminal Appeals on 16 August 2002 opposing the execution of

Toronto Patterson in Texas for a crime committed when he was 17 years old. The organizations signing on to the brief were the Texas Catholic Conference - the statewide association of the 15 Roman Catholic Dioceses of Texas - and Texas Impact, an interfaith non-partisan statewide social justice advocacy group whose members are the regional governing bodies of mainstream Christian denominations, as well as regional Jewish social action groups and local interfaith organizations.

One of those appealing in May 2002 for Texas not to execute child offender Napoleon Beazley was the Dalai Lama. On the day of Sean Sellers' clemency hearing in 1999, Pope John Paul II challenged the USA to reject the cruelty of the death penalty. Oklahoma's Governor, a Catholic, welcomed the parole board's subsequent rejection of clemency for Sellers, convicted of a crime committed when he was 16 years old, and said that the Pope was "wrong" in his support for abolition of the death penalty. At the time, Governor Keating was reportedly campaigning for a bill which would force 16-year-olds to inform their parents before having an abortion. Sean Sellers was to become the first person for 40 years to be executed in the USA for a crime committed at 16. Asked whether that made him "think twice about" his support for such an execution, Governor Keating replied: "Not at all".(103) In 2002, Governor Keating was apparently out of touch with the "national consensus" subsequently found by the US Supreme Court in *Atkins* when he vetoed legislation which had passed both chambers of the Oklahoma legislature prohibiting the execution of people with mental retardation.(104)

The *Atkins* majority also pointed to polling data supporting the conclusion that there was a consensus against the execution of people with mental retardation. Such polling also supports the same conclusion in relation to child offenders. For example, a study in 2001 concluded that "while 62% back the death penalty in general, just 34% favor it for those committing murder when under the age of 18."(105) Similarly, a Gallup poll in 2002 found that 69 per cent in the USA oppose the practice of executing child offenders.(106)

### **(7) Death penalty more "unusual" on the juvenile issue**

As part of its explanation for finding a "national consensus" against the execution of people with mental retardation, the US Supreme Court said in its *Atkins* decision that "*it appears that even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided Penry. The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.*"

Since the USA resumed executions in 1977, there have been 21 executions of child offenders in seven states (18 in six states since the *Stanford* decision -- two of these have taken place since the *Atkins* decision). The number of such executions in the United States is generally not in dispute. Age is a clear-cut issue - all that is needed is a valid birth certificate.(107) In contrast, mental retardation may more frequently be disputed in the context of an adversarial criminal trial. For example, this has happened in proceedings against both John Penry and Daryl Atkins, the Texas and Virginia death row prisoners whose cases led to the landmark *Penry* and *Atkins* decisions.(108) Nevertheless, Amnesty International believes that a conservative analysis puts the total number of executions since 1977 of prisoners with mental retardation at more than 30 in over 10 states (see table 4).

There are currently some 80 child offenders on death row in the USA, about two per cent of the national condemned population (see appendix.) It is unknown how many people with mental retardation were on death row at the time the Supreme Court handed down its *Atkins v Virginia* decision, but expert estimates have put the total at 200-300 individuals, or five to 10 per cent of the total death row population. Such estimates appear to be supported by evidence from individual states. For example:

- In 2000 there were reported to be 36 prisoners on death row in North Carolina (15 per cent of its death row total) who had IQs of 75 or below, more than 20 of whom had IQs of 70 or less.(109) There are five child offenders on the state's death row.
- There are reported to be at least 20 condemned inmates in Texas, or about five per cent of the state's death row population, who have raised mental retardation as an issue at trial or on appeal.(110) The real figure may be higher.(111)

- Of 44 Mississippi death row inmates assessed in 1997 as part of a study, 14 were found to have IQs of 75 or under, including three below 65.(112) There were six child offenders on death row, at least one of whom has an IQ below 70.
- Amnesty International knows of at least six inmates on Oklahoma's death row in August 2002 whose IQs have been assessed at under 70.(113) This represents five per cent of the state's condemned inmates. There is one child offender, Scott Hain, on death row in Oklahoma.
- By 12 July 2002, at least eight Ohio inmates, or about four per cent of the state's condemned, had appealed against their death sentences on the basis of claims of mental retardation following the *Atkins* decision.(114)
- At least 10 inmates on South Carolina's death row are reported to have raised mental retardation at their trials. This represents about 13 per cent of the current condemned population in the state.(115) There are three inmates on death row in South Carolina whose crimes were committed when they were under 18. Two of them have claims of mental retardation.
- According to the Department of Corrections in Pennsylvania, as of March 2002, there were 26 condemned inmates with mental retardation in the state.(116) This represented more than 10 per cent of the state's death row.(117) Less than two per cent of Pennsylvania's condemned at the time were child offenders.

It would seem that the use of the death penalty against child offenders is at least as "unusual" than it has been against prisoners with mental retardation. Yet currently it is only execution of the latter that violates the Eighth Amendment, while the former is still considered constitutional.

### **(8) Geographical concentration of the juvenile death penalty**

Two thirds (16 out of 24) of the executions of child offenders known worldwide since January 1993 have been carried out in five US states - Texas, Virginia, Georgia, Missouri and Oklahoma. These five states account for about 16 per cent of the USA's population and less than one per cent of the world's population.

Inside the USA, there is a marked geographical concentration in the use of the death penalty against defendants who were under 18 at the time of the crime. The concentration would appear to be more pronounced than on the mental retardation issue, although it is largely the same states which are implicated in both practices. Nine states - Alabama, Louisiana, Mississippi, Nevada, Oklahoma, Pennsylvania, South Carolina, Texas, and Virginia - account for about 80 per cent of prisoners on death row in the United States for crimes committed when they were 16 or 17. At the time of the *Atkins* decision none of these nine had exempted the mentally retarded from the death penalty.

- Three-quarters of the country's executions of child offenders (16 out of 21) have been carried out in Texas and Virginia - states which together account for about 10 per cent of the country's population. Thirty-five per cent of the executions of people with mental retardation occurred in these two states (14 out of 40).
- Five states - Texas, South Carolina, Louisiana, Virginia, Oklahoma - which account for 14 per cent of the USA's population also accounted for 19 of the 21 of the executions (90 per cent) of child offenders in the USA since 1977. None of these five states had passed legislation exempting prisoners with mental retardation from execution by the time that the *Atkins* decision was announced. The geographical concentration was less pronounced in the execution of mentally retarded inmates. These five states accounted for 58 per cent of such executions since 1977 (23 out of 40).

The geographical concentration of the juvenile death penalty may reflect localized death penalty "culture", rather than reflecting a wider societal consensus.

- Virginia and Texas account for 46 per cent of all executions (365 out of 795) between 1977 and 30 August 2002. These two states account for 76 per cent of juvenile executions (16 out of 21).

- As of 29 August 2002, two thirds (54) of the 82 prisoners in the USA condemned to death for crimes committed when they were under 18 years old were on death row in four neighbouring southern states: Texas, Louisiana, Mississippi and Alabama. Eighty-seven per cent (71 out of 82) of the nation's condemned child offenders were on death row in 10 neighbouring states: Texas, Louisiana, Mississippi, Alabama, Georgia, Florida, South Carolina, North Carolina and Virginia.
- Of the 21 federal death row prisoners in July 2000, 14 (66 per cent) were prosecuted in Texas (6), Virginia (4) and Missouri (4), states which account for 53 per cent of US executions between 1977 and 30 August 2002 (423 out of 795). The federal authorities, who had revealed the racial and geographic disparities in federal death sentencing, expressed serious concern at such statistics. President Clinton, for example, referred to the "rather astonishing geographic disparity... since we're supposed to have a uniform law of the land".(118) The geographical concentration is higher in the case of child offenders, with these three states accounting for 80 per cent of executions of child offenders (17 out of 21).
- In 1985, Texas carried out the USA's first execution of a child offender for 21 years (it also accounted for the last pre-*Furman* execution of a child offender, in 1964). Texas has remained the leader in such executions. In 1999, Oklahoma carried out the USA's first, and at the time of writing, only execution since 1959 of a prisoner for a crime committed at the age of 16. In 2001 and 2002, at a time when there presumably was already a "national consensus" against the execution of the mentally retarded, the governors of Texas and Oklahoma vetoed legislation that had passed their state legislatures prohibiting the execution of people with mental retardation. Five of the last nine executions of child offenders in the USA passed these two governors after they failed to use their power of reprieve to block them. The approach of such officials should not be taken to represent wider societal opinion on either death penalty issue.(119)

Localized death penalty "culture" distorts the national picture, a distortion which should be taken into account in any attempt to determine "standards of decency" across wider US society.

### **(9) Prosecutor and juror behaviour as indicators of "standards of decency"**

While the pattern of state legislation has been the primary evidence relied upon by the US Supreme Court in determining whether there is a "national consensus", the Court has also suggested that the behaviour of juries and prosecutors might offer further "objective" evidence. In both the *Penry* and *Stanford* decisions, the Court held that the petitioners had failed to provide evidence that the behaviour of prosecutors or juries supported a finding of a "national consensus" against the execution of either prisoners with mental retardation or those who commit crimes as 16- and 17-year-olds.

In *Atkins v Virginia* in 2002, the majority did not make reference to the behaviour of prosecutors or juries in relation to defendants with mental retardation. Nevertheless, given that the Court has not expressly rejected the use of such evidence, Amnesty International offers the following for consideration.

#### **(a) Prosecutors**

The conduct of some prosecutors in the USA has failed to live up to international standards. The United Nations Guidelines on the Role of Prosecutors, for example, require that prosecutors, "as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession." They "shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system".(120)

During jury selection for the 1998 Louisiana trial of Lawrence Jacobs for a crime committed when he was 16 years old, one of the prosecutors (who at the time was reportedly seeking election as a judge on a campaign platform of "winning prosecutor, winning judge") told the various panels of prospective jurors:

- (i) I'm going to tell you right now, right up front, that the State of Louisiana wants that defendant seated right there dead, Okay?
- (ii) ... we want him to die for what he did.
- (iii) And the first thing that I want you to do is to look right over there at that defendant, and I want to tell you right now... the State of Louisiana wants him to die.

- (iv) The State of Louisiana wants him to die. All right. And I want every one of you to have no question about that.
- (v) So let me start out by saying right now the State of Louisiana wants him put to death. We want him to die. That's what this is all about.(121)

The prosecutor got her wish. Lawrence Jacobs was sentenced to death. The conviction and death sentence were overturned by the Louisiana Supreme Court in June 2001 on the grounds that he had been denied his right to an impartial jury by the inclusion of jurors who showed during questioning a strong predisposition to imposing death sentences on an "eye for an eye" basis. Although the Court did not need to rule on the merits of the many other claims about the fairness of the jury selection, it did note that "the prosecutor's alleged racial discrimination in the selection of jurors... also appears to raise serious questions regarding the propriety of the jury selection process in the case".(122) At the time of writing, Lawrence Jacobs was still being held on Louisiana's death row, awaiting a retrial scheduled to begin on 26 January 2003, at which the prosecution was again planning to seek a death sentence.

At any particular time, there will likely be prosecutors somewhere in the USA seeking, or threatening to seek, death sentences against defendants who were 16 or 17 years old at the time of their alleged crime. This should not necessarily be taken as a sign of wider standards of decency. After all, prosecutors have sought death sentences against child offenders right up to the time that state legislatures or courts have outlawed such conduct. As already noted, for example, legislatures in Ohio, Maryland and Indiana passed laws banning the death penalty for under-18-year-olds even though state prosecutors had recently sought and obtained death sentences in such cases. The same has been true prior to landmark court decisions. For example, in 1999, the Florida Supreme Court ruled that the imposition of the death penalty against defendants who were 16 years old at the time of the crime violated the state constitution.(123) Not only did the ruling lead to the overturning of existing death sentences imposed on 16-year-old offenders in Florida, it also forced prosecutors in Polk County to drop their pursuit of the death penalty against Curtis Shuler and Sylathum Streeter at their then pending trials for crimes they were accused of committing when they were 16.

The case of Johnny McKnight also illustrates why prosecutor conduct may not be a reliable indicator of contemporary standards of decency. Johnny McKnight, who has an IQ of 51, was accused of a crime committed in 1997 when he was 17 years old. Until September 2001, the Cumberland County District Attorney's Office in North Carolina had pursued a death sentence against him. It continued to do so even in the face of undisputed evidence that the defendant had mental retardation.(124) It was doing so until after the US Supreme Court announced that it would revisit the *Penry* decision,(125) after the state legislature had passed a bill exempting people with mental retardation from the death penalty, and at least up to the time that the North Carolina governor had signed that bill into law in August 2001.(126) This District Attorney's Office was manifestly not in tune with contemporary "standards of decency" on the mental retardation issue, so it should not be assumed that it was so attuned in relation to the juvenile issue.

Indeed, on 23 August 2001, 19 days after the North Carolina governor signed the mental retardation bill into law, a Sampson County prosecutor was urging a North Carolina jury to sentence Antwoun Sims to death for a crime committed when he was 17. Evidence presented at the trial indicated that Sims had an IQ as low as 69, one point below the score of 70 that North Carolina's statute recognizes as an indication of possible retardation. The jury sentenced Sims to life imprisonment without the possibility of parole.

In *Thompson v Oklahoma* in 1988 the Supreme Court found that there was strong evidence of a "national consensus" that the execution of 15-year-old offenders was excessive. This has not stopped various prosecutors pursuing or threatening to pursue death sentences against 15-year-olds. Again, if their behaviour contradicts a "national consensus" on this issue, why should it be taken as an indicator of "standards of decency" in the cases of 16- or 17-year-olds?

- In 1991, the Alabama Court of Criminal Appeals overturned the death sentence of Clayton Joel Flowers, who was 15 years old at the time of the crime. Citing the *Thompson v Oklahoma* (1988), the Alabama court ruled by five votes to nil that Alabama may not execute people for crimes committed when they were younger than 16. The state's prosecutorial system had fought against such an outcome. Alabama's Attorney General responded to the decision: "I think the death penalty is the only appropriate penalty for what he did. I don't know how his age makes any difference".(127)

- On 25 October 1991, three years after *Thompson v Oklahoma*, Jerome Allen was sentenced to death in Florida for a crime committed when he was 15 years old. The prosecutor commented that the death penalty was "the only just sentence Mr Allen should face... He's a juvenile in age only."(128) In 1994, the Florida Supreme Court overturned his death sentence finding that the execution of people for crimes committed when they were 15 violated the state constitutional ban on "cruel or unusual" punishment.
- In late 1996, Tulsa County District Attorney's Office in Oklahoma sought to pursue a death sentence in the retrial of Adriel Simpson, who was 15 years and three months old at the time of the 1990 offence. In January 1997, the state Court of Criminal Appeals intervened and stopped the prosecutor's quest. The ruling also persuaded the Tulsa County District Attorney's Office to drop their pursuit of the death penalty against Courtney Kendricks, accused of a murder in 1996 when he was 15.
- In August 1998 a Tulsa County prosecutor said he would "research the case law" to determine whether he could seek the death penalty against 15-year-old Dylan Shanks, charged with three murders committed on 7 August. He said that the prosecution were "anticipating" pursuing the death penalty, although in the end it did not.
- In 1999, the First Assistant District Attorney of Pontotoc County in Oklahoma said that he was willing to "make new law" in order to obtain a death sentence against Derrick Lester, accused of a murder when he was 15 years old. Following an urgent Amnesty International appeal, the prosecutor informed the organization that he had decided not to seek the death penalty against the teenager.(129)
- On 16 January 2002, the Northumberland County District Attorney in Pennsylvania confirmed to Amnesty International that he intended to seek the death penalty against Brandon Brown for a crime he was accused of committing when he was 15 years old, that he was aware of *Thompson v Oklahoma*, and that he intended to "litigate the issue in the state and federal courts". On 25 January 2002, following an AI Urgent Action appeal, the prosecutor announced that he had changed his mind and would no longer be seeking a death sentence.(130)

In 1972 a US Supreme Court Justice wrote: "At times a cry is heard that morality requires vengeance to evidence society's abhorrence of the act. But the Eighth Amendment is our insulation from our baser selves. The 'cruel and unusual' language limits the avenues through which vengeance can be channelled".(131) The above examples indicate that the baser instincts of some prosecutors have had to be tempered by the courts. The US Supreme Court should remove once and for all from prosecutors the temptation to seek death sentences against 16- and 17-year-old offenders.

### **(b) Juries**

Prosecutorial discretion is one reason why jury sentencing decisions may not be a good indicator of wider societal opinion. Many, if not a majority, of the cases that could be brought before a jury for possible death sentencing are not. In some, the prosecutor has already decided not to seek the death penalty even though the crime is "death-eligible", or has dismissed the death penalty after initially filing his or her intention to seek it. In others, prosecutors will announce their intention to seek death, and then subsequently accept a guilty plea in exchange for a life sentence.(132) This has happened in numerous cases. Cases since 1998 in which the prosecution originally filed its intention to seek the death penalty, but in which that sentencing option was never put before the jury, include:

- Mazer Jean, 17, Florida. Plea bargain to life imprisonment.
- Sean Dixon, 16, Nevada. Plea bargain to life imprisonment.
- Michael Jessup, 17, Arizona. Plea bargain to life imprisonment without the possibility of parole (LWOP).
- Jessica Holtmeyer, 16, Pennsylvania. The prosecutor dropped pursuit of death penalty at the request of the murder victim's family who reportedly believed that life imprisonment would be worse than a death sentence. Holtmeyer was sentenced to LWOP.
- Jason Johnson, 17, Georgia. Plea bargain to LWOP.
- Dorthia Bynum, 17, North Carolina. Plea bargain to LWOP.
- Jeffrey Franklin, 17, Alabama. Plea bargain to life imprisonment.

- Joseph Ward, 17, Louisiana. Prosecutor dropped pursuit of death penalty.
- Donte Jones, 17, Virginia. Plea bargain to LWOP.
- Joshua Davies, 16, Indiana. Plea bargain to life.
- Marcus Moore, 17, Georgia. Plea bargain to LWOP and no right of appeal.
- Tiffanie Imel, 17, Arizona. Prosecution dismissed death penalty. Convicted of second degree murder and sentenced to 25 years.
- Jack Chance, 17, Oklahoma. Plea bargain to LWOP.
- Slint Tate, 16, Oklahoma. Plea bargain to LWOP.
- William Hodges, 17, Texas. Plea bargain to LWOP for at least 60 years.

There is evidence that when death penalty cases do come before juries, they are reluctant to hand down death sentences against people who were under 18 at the time of the crime. In studies, capital jurors have said that youthfulness is a significant mitigating factor.(133) Anecdotal evidence would appear to support this. For example, in 1998 an Oklahoma jury voted to spare Thomas Loveless from execution for a crime committed when he was 16 years old, sentencing him to life imprisonment without parole instead. Afterwards, the prosecutor, who had sought a death sentence, said: "I think his youth was a very significant hurdle for the jury to get over".(134) Similarly, when a South Carolina jury handed down a life without parole sentence against Brett Hollis in 2000 for a crime committed when he was 17, the prosecutor said that he thought his young age was what had persuaded the jury to vote against execution: "Age was a big thing. I wasn't surprised with the verdict".(135)

However, there are several reasons why caution should be exercised in viewing death sentences passed by capital jurors as indicative of a wider societal consensus. Firstly, capital jurors are not representative of the wider community, not least because people who oppose the death penalty are excluded. In his 1998 report on the USA, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions wrote that "while the jury system was intended to represent the community as a whole, the community can hardly be represented when those who oppose the death penalty or have reservations about it seem to be systematically excluded from sitting as jurors."(136)

Secondly, African American jurors have often been removed by prosecutors during jury selection, or are simply under represented in jury pools. For example, Frederick Lynn, black, was sentenced to death for the murder of a white woman committed when Lynn was 16. He was tried in front of an all-white jury after the prosecutor excluded the 11 African Americans in the jury pool (his death sentence was overturned on appeal in 1992). The two Louisiana juries that sentenced Roy Bridgewater and Lawrence Jacobs to death in 1998 for a crime committed when Bridgewater was 17 and Jacobs was 16, consisted of 23 whites and one black. Both defendants were black and the two murder victims were white. Similarly Ryan Matthews, an African American convicted of the murder of a white man committed in 1997 when Matthews was 17, was sentenced to death in 1999 by a jury of 11 whites and one African American in a Louisiana jurisdiction that is 23 per cent African American.

Thirdly, for whatever reason, jurors have been kept in the dark about aspects of the case or the defendant. In a number of cases, jurors have later come forward to say that if they had heard all the evidence they would not have sentenced the defendant to death.

- The US Supreme Court has said that youth is a mitigating factor "of great weight" (*Eddings v Oklahoma*, 1982). At the 1998 trial of Lawrence Jacobs in Louisiana, four jurors were rejected by the state "for cause" because they indicated that although they were supportive of the death penalty, they would give mitigating weight to the defendant's age (16) at the time of the crime. Jacobs was sentenced to death.
- At the 2000 trial of Corey Williams in Louisiana, six jurors were removed by the state "for cause" because they said that they would not be able to vote to execute a defendant who was 16 years old at the time of the crime. The trial court refused to allow the defence to remove "for cause" four jurors who indicated that they would not consider a bad childhood as a mitigating circumstance. The defence was forced to use peremptory challenges to remove three of them, but the fourth was selected and became the foreman. Williams was sentenced to death.
- Dalton Prejean, Curtis Harris, Frederick Lashley, Glen McGinnis, Gerald Mitchell and Napoleon Beazley were all African Americans sentenced to death by all-white juries for crimes committed when they were

17 years old. The jury for the trial of Gary Graham, also for a crime committed when he was 17, had one African American. In total these seven African Americans were tried in front of 84 jurors, 83 of whom were white. All seven have been executed.

- In 2000, five of the surviving eight jurors from Alexander Williams's 1986 trial in Georgia came forward to appeal for clemency, having learned about his history of abuse and mental illness. His death sentence, for a crime committed when he was 17, was commuted in 2002.
- Two jurors from Dwayne Allen Wright's trial in Virginia for a murder committed when he was 17 came forward to say that they would not have voted for death had they been made aware of certain mitigating evidence. Dwayne Wright was executed in 1998.
- Sean Sellers was executed in 1999 for a crime committed when he was 16. At his clemency hearing, one of the trial jurors appealed for mercy. She recalled the jurors had voted for death because they feared that otherwise Sellers would be released from prison within a few years. The trial court had not allowed them to hear expert testimony that the length of a life sentence in Oklahoma meant at least 15 years without parole. The defence had wished to counteract local newspaper articles suggesting that life imprisonment meant release in under half that time.

### **(10) The distorting effect of Texas**

Almost half (eight of 17) of the executions of child offenders known worldwide in the past five years occurred in Texas, a US state which accounts for less than half of one per cent of the world's population. Three of the child offenders executed in the past four years were prosecuted in a single Texas county, Harris County.(137) This is as many such executions as the Islamic Republic of Iran, the next worst perpetrator of this violation of international law outside the United States, is reported to have executed in the same period. Iran has a population about 20 times the size of Harris County.

Without Texas, the use of the death penalty against under-18-year-olds would be far more "unusual" in the USA. Texas has a distorting effect on the national picture, and this distorting effect is greater than it has been in the case of defendants with mental retardation. Texas accounts for 7.5 per cent of the USA's population and 62 per cent of the executions of child offenders there since 1977 (13 of 21). In comparison, it accounted for about 22 per cent of the executions of people with mental retardation prior to the *Atkins* decision. At the time of writing, 27 prisoners were under a Texas death sentence for crimes committed when they were 17 (see appendices).(138) This is a third of the nationwide total of condemned child offenders. Estimates suggest that Texas may account for five to 10 per cent of the country's condemned inmates with mental retardation. The disproportionate number of child offenders on death row in Texas is likely to become even greater as some benefit from the recent decision in *Ring v Arizona* on the unconstitutionality of judge rather than jury sentencing, as well as from the *Atkins* ruling on mental retardation.(139)

The recent execution of Napoleon Beazley for a murder committed when he was 17 years old illustrates the degree to which Texas is in a world of its own, and of how the behaviour of certain prosecutors is not a reliable indicator of "evolving standards of decency". To be sure, at least some such officials seem rooted in the past.(140)

In 2001, Napoleon Beazley's lawyer filed an appeal asking the Texas Court of Criminal Appeals to stay his client's execution and raising the illegality of the death sentence under international law. The District Attorney's Office in Smith County in East Texas, whose office had obtained the death sentence against Beazley in 1995, filed a response. It said:

*He assumes there is something called international law...*

*Long ago the Texas Legislature passed, and has not changed, the statute that anyone less than 17 years of age at the time of the commission of the offense of capital murder is not subject to execution (see Ex parte Walker... 1890).*

*This Honorable Court should not accept socio-political engineering to be foisted off on it in the form of this subsequent brief ... This subsequent writ is about whether this Honorable Court will state*

*the law as given by the legislature or whether it will allow itself to be made an instrument of social engineering by those who cannot achieve their neo-socialist designs on government through the democratic processes established in our state and federal constitutions.(141)*

Among those who subsequently appealed for clemency for Napoleon Beazley were seven Nobel Peace Prize winners, including Archbishop Desmond Tutu of South Africa. He wrote that the "obstinacy" of the Smith County prosecuting authorities was "something with which I lament that I am all too familiar", noting that the county's District Attorney was not only pursuing Napoleon Beazley's execution, but had also just announced that he would seek a death sentence against another 17-year-old accused of murder.(142) "During the Truth and Reconciliation Commission hearings in my country", Archbishop Tutu continued, "there were members of the apartheid regime who refused to see that the human rights abuses they had committed were wrong or unlawful. The execution of a child offender clearly is such a human rights abuse."(143)

Another of the Nobel laureates who appealed for clemency was the former President of South Africa, F.W. De Klerk. He wrote: "...I am not opposed in principle to the death penalty, which I believe may be justified in certain very restricted cases... Nevertheless, I am opposed to the imposition of the death penalty where the perpetrator was under 18 years old at the time of the crime." Even at the height of judicial killing under the *apartheid* regime, when South Africa was a world leader in the use of the death penalty and expanded its scope greatly, people who were under 18 at the time of the crime remained exempted from execution. The vehemently anti-socialist *apartheid* authorities would presumably not have seen this as their having been made an instrument of "neo-socialist" engineering. Perhaps the Smith County prosecutor was instinctively recalling that the Union of Soviet Socialist Republics, which used to resort to judicial executions, nevertheless did not impose the death penalty on people who were under 18 years old at the time of the crime.(144)

Attached to his response on the Beazley case to the Texas Court of Criminal Appeals (TCCA) in 2001, the Smith County prosecutor included about 15 letters sent to Governor Perry, primarily from East Texas prosecutors and police officials, purporting to show that "commutation is anathema to the majority of Texans and especially East Texans". In contrast to this, over 30,000 appeals for clemency for Napoleon Beazley were eventually sent from Texas, the USA and around the world.(145) Moreover, opinion polls have indicated that a majority of Texans do not support the death penalty for juveniles.(146)

The TCCA, whose nine judges were all elected to office on Republican Party platforms, dismissed Napoleon Beazley's appeal on 17 April 2002.(147) The prosecution then asked the trial judge, Judge Cynthia Kent, to set a date for Napoleon Beazley's execution. A year earlier, when Napoleon Beazley had also faced imminent execution, Judge Kent had taken the highly unusual step of appealing to Governor Rick Perry to intervene and stop the execution, citing the prisoner's young age at the time of the crime.

On 26 April 2002, Judge Kent set a new execution date of 28 May. At the hearing, she referred to her letter in 2001 to the Governor, which had led the Smith County prosecutor to suggest that she should be taken off the case.(148) She said that throughout the Beazley case she had followed the law as established by the Texas legislature, but that:

*The letter to the Governor was based on a principled objection... I am also mindful looking back in history about judges that blindly followed the law when the law was so fundamentally inappropriate. Shall we go to Nazi Germany? Shall we talk about judges in and around that country that enforced and followed laws that were so atrocious? And in retrospect we are appalled. And I struggle with that issue on select cases and this is one of them.(149)*

A year earlier, responding to appeals from people around the world on behalf of Napoleon Beazley, the Smith County Assistant District Attorney had said that he found it "particularly odious that a German should write that we shouldn't execute a child. I don't recall them apologising for Dachau and Auschwitz and all those other places".(150) Such insults betrayed not only ignorance, but an implicit acknowledgement that his state was engaged in a shameful human rights violation. The prosecutor could perhaps also reflect on the fact that in 1945, the occupying authorities had abolished the death penalty in West Germany for most of the large class of crimes for which it could be imposed under the previous National Socialist Government. The death penalty was abolished for all offences in 1949. It was abolished in East Germany in 1987, seven years before the Smith County prosecution obtained a death sentence

against Napoleon Beazley.

In his response to Napoleon Beazley's appeal to the Texas Court of Criminal Appeals in 2001, the same Smith County prosecutor had included a letter opposing clemency from a single legislator, from Smith County. The latter wrote:

*If we are going to have decisions made by juries, as called for in our criminal justice system, then the verdict of the jury in this case should be upheld and the death sentence imposed... Furthermore, nullification of this jury's verdict would send the wrong message to our citizens who serve on juries. If someone can nullify the jury verdict based on personal belief... then our jury system will not work.*(151)

Napoleon Beazley, an African American teenager, was tried by an all-white jury for the murder of a white man. One of the jurors was later shown to harbour severe racial prejudice against blacks. It was also later revealed that another of the jurors routinely flew the confederate flag at her home. There was also evidence that the latter juror was a long-time employee of one of the murder victim's business partners, which had not been made known at jury selection.

In contrast to the legislator's letter obtained by the Smith County prosecution, another 18 legislators had written to Governor Perry calling for clemency:

*We join Judge Kent in her request for a commutation of Napoleon Beazley's death sentence because we are greatly disturbed by the fact that Texas is now almost the sole executioner of child offenders in the world. We desire Texas to be in the lead among states and nations in affording her citizens the protection they deserve to be given under universally-recognized, fundamental, human rights norms.*(152)

In June 2001 Governor Perry had vetoed a bill, which had passed both houses of the legislature, aimed at exempting defendants with mental retardation from the death penalty. The veto occurred at a time when it can be presumed, given the *Atkins* decision, there was already a "national consensus" against the execution of people with mental retardation.

Also in 2001, the Texas House of Representatives passed a bill that would have raised the death penalty eligibility age in the state to 18. It failed in the Senate after high-level political intervention, reportedly from the governor's office.(153) A short while later, as the execution of Napoleon Beazley approached, the Governor said that he supported the imposition of the death penalty on 17-year-old offenders: "My son's 17, and I am comfortable that my son understands right from wrong. Citizens of the state of Texas have sent a clear message that when you reach 17 years of age, you're going to be held responsible for your actions just like you were an adult."(154) Yet opinion polls and the legislative activity suggest that the message is not so clear. What is clear is that there is a lack of respect for international standards of decency in the governor's office on this fundamental human rights issue.

On 28 May 2002, Governor Perry refused to intervene to stop the execution of Napoleon Beazley. The Governor had been informed that, a few hours earlier, the Missouri Supreme Court had granted an indefinite stay of execution to Christopher Simmons, who, like Beazley, had been convicted of a crime committed when he was 17 years old and was scheduled for imminent execution. The Simmons stay was based on the then pending decision in *Atkins v Virginia*. Christopher Simmons's lawyers had argued that, if the US Supreme Court found that there was a national consensus against the execution of people with mental retardation, this would undermine *Stanford v Kentucky*. The Texas courts had refused to grant a stay for Napoleon Beazley on the same argument. In the full knowledge of the Missouri stay, the international legal principle his state was flouting, and the additional twist of cruel arbitrariness that was being inflicted on the Beazley family in light of the Simmons stay, Governor Perry refused to block Napoleon Beazley's execution, stating: "To delay his punishment would be to delay justice".

Following the Supreme Court's decision in *Atkins v Virginia* on 20 June, Governor Perry said: "I think we've got a justice system that works in the state of Texas. The justice system in the state of Texas is basically for Texans. I understand people from other places in the country and the world are always critical of Texas. But the justice system that's put in place in Texas is made for and voted upon by Texans, overseen by the United States Constitution".(155)

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Since *Atkins v Virginia* in June 2002, a Texas jury has resentenced John Penry to death. John Penry was the man at the centre of the *Penry v Lynaugh* decision in 1989, which allowed the execution of the mentally retarded, and which *Atkins* overturned. The overwhelming evidence indicates that John Penry has mental retardation. Texas has been trying to kill him for over two decades, and has already been stopped twice at the last minute by the US Supreme Court. Also since *Atkins*, Texas has executed two child offenders. The "Lone Star State" should be prevented from executing any more.

As the example of Texas indicates, politicization of the death penalty, less-than-fully-informed public opinion, localized culture and tradition, ideology of particular officials, and legislative inertia, can conspire against human rights progress. Principled leadership is needed. It can come from the executive, legislative or judicial branches of government.

### **The Stanford dissenters - right then, right now**

"*The execution of juvenile offenders is a grave miscarriage of justice*". Texas representative, August 2002.(156)

The 1989 *Stanford v Kentucky* decision was one vote short of ruling that the execution of people for crimes they commit as children violates the constitutional ban on cruel and unusual punishment. It would surely be a regrettable state of affairs if the US Supreme Court considers that standards of decency in the USA have not evolved enough in 13 years to gain that one extra vote.

The *Stanford* dissenters wrote: "There are strong indications that the execution of juvenile offenders violates contemporary standards of decency...These indicators serve to confirm...that the Eighth Amendment prohibits the execution of persons for offenses they committed while below the age of 18, because the death penalty is disproportionate when applied to such young offenders and fails measurably to serve the goals of capital punishment". Thirteen years later, the *Atkins* majority wrote: "We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude that such punishment is excessive."

The fact that nine US Supreme Court Justices reached the same conclusion for these two different categories of defendants should not be surprising.(157) Indeed, it is common for children and people with mental retardation to be spoken of in the same breath in the context of the death penalty, a punishment which assumes absolute, 100 per cent, culpability on the part of the condemned. For example, during a debate in the Tennessee Senate in 1990 on a bill to abolish the death penalty for people with mental retardation, one of the Senators said: *Some people are framing the issue on this bill as whether you're for or against the death penalty. And that's not really the issue... I favour the death penalty, but I'm going to vote for [the] bill for this reason: in my view, it's just not proper in a civilized society for the State to be in the business of executing children or those who are mentally retarded.*(158) Tennessee passed the bill in 1990, the first state in the country to do so after the *Penry* decision, and six years after it abolished the death penalty for the crimes of children under 18 years old.

In 2001, in response to the growing national concern about the fairness and reliability of the capital justice system, the bipartisan Constitution Project recommended 18 reforms to the death penalty. Under the title: "Prohibiting Execution in Cases Involving Questionable Categories of Defendants and Homicides", this blue-ribbon committee of death penalty opponents and supporters, including former judges and prosecutors, recommended exempting "persons with mental retardation" and "persons under the age of eighteen at the time the crime was committed".(159)

### **Children share characteristics with the mentally impaired**

Having determined that there was now a "national consensus" against the execution of people with mental retardation, the US Supreme Court majority in *Atkins v Virginia* on 20 June 2002 perceived that this consensus "unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty." The majority continued:

*Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.*

Some of this description applies to young offenders. In the absence of serious mental illness or other impairment, they know the difference between right and wrong, and will be competent to stand trial. Nevertheless, *there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.*

In concluding that the execution of 16- and 17-year-old offenders violated the constitution, the *Stanford* dissenters wrote: *The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult. Adolescents are more vulnerable, more impulsive, and less self-disciplined than adults, and are without the same capacity to control their conduct and to think in long-range terms. They are particularly impressionable and subject to peer pressure, and prone to experiment, risk-taking and bravado. They lack experience, perspective, and judgment.*

- At the trial of James Terry Roach for a murder committed when he was 17 years old, the judge made a finding that Roach had acted under the domination of his adult co-defendant. Nevertheless, the judge sentenced James Roach to death (Roach had pleaded guilty and waived his right to a jury trial). Roach was executed in South Carolina in 1986.
- At the trial of Steven Roach in Virginia for a murder committed when he was 17, a forensic psychologist testified that the defendant was "particularly immature" for his age, had poor "impulse control", and "did not show very good ability in many situations to control his emotions or behaviour". Roach was sentenced to death for the murder, his first recorded act of criminal violence, and executed in 2000.
- At the trial of T.J. Jones, the defence presented a psychologist who had interviewed and tested T.J. Jones over several visits. He found that T.J. Jones had an IQ of 78, in the borderline retardation range, and had begun using drugs and alcohol at age 13, his continuing use of which exacerbated his "grossly poor judgment". The psychologist found that T.J. Jones was "typically a very passive person" and had the emotional and psychological maturity of a 10 to 12 year old. T.J. Jones's 16-year-old girlfriend testified at the trial suggested that "peer pressure" lay behind his crimes - he had fallen in with older people who had a reputation for criminal violence, one of whom gave him the gun. His grandfather stated that T.J. Jones had always been a "follower". T.J. Jones was executed on 8 August 2002.

### ***The immaturity of under-18-year-olds is widely recognized***

*"[W]e can look back objectively to a consistent and abiding recognition that a person only becomes sufficiently mature enough to accept the responsibilities and privileges of adulthood and full citizenship at age eighteen."* Florida Supreme Court Justice(160)

Dissenting in the case of Stephen McGilberry, who is under sentence of death in Mississippi for a crime committed when he was 16 years old, a state Supreme Court Justice wrote: "We continue to cling to the notion that a minor does not possess the sophistication to make informed decisions in civil matters but is intelligent enough to do so in all matters criminal... Our laws would zealously shelter the child who wishes to purchase, perhaps unwisely, an automobile, but provide him none of the protections typically given youths when the same child is accused of murder." Justice McRae points out that a person who is under 18 in Mississippi "cannot legally enter into contracts, buy or sell property, vote, maintain a residence or even choose the parent with whom they wish to live when their parents divorce. Under the age of twenty-one, a person cannot drink alcohol, purchase tobacco, or enter a casino."(161)

The *Stanford* dissenters wrote: *[M]inors are treated differently from adults in our laws, which reflects the simple truth derived from communal experience that juveniles as a class have not the level of maturation and responsibility that we presume in adults and consider desirable for full participation in the rights and duties of modern life.*

- Children under 18 years old cannot vote in the United States. Therefore 16- and 17-year-olds have no electoral say on the very sanction that various state governments in the USA reserve the right to use against them.
- Children under 18 cannot serve as jurors in the USA. Yet 16- and 17-year-old offenders can be sentenced to death by people who are considered by society to be old enough and responsible enough to sit on a jury. Citizens of Missouri cannot serve on a jury until they are 21 years old. At the time of writing, Missouri was planning to kill Antonio Richardson for a crime committed when he was 16, and Christopher Simmons for a crime committed when he was 17.
- Louisiana law states that: "No person under the age of eighteen years shall be allowed within the execution room during the time of execution".(162) Yet people can be taken into that same Louisiana death chamber and killed for crimes committed when they were 16 or 17.(163) Seven such individuals were awaiting that fate at the time of writing.
- When John Castro was executed in Oklahoma on 7 January 1999, his son was not allowed to be present at the execution because the authorities considered him to be too young at 16. Less than a month later, Sean Sellers was put to death in Oklahoma's death chamber for crimes committed when he was 16.
- Any US citizen wishing to apply to become a White House Intern in the administration of President Bush must be at least 18 years old. During his governorship of Texas from 1995 to 2000, George W. Bush refused to intervene to stop the executions of four people for crimes committed when they were under 18 years old. This was more executions of child offenders than occurred in any jurisdiction in the world in that period, and more than had occurred under any other single governorship in the USA in the "modern era" of the death penalty. This has now been equalled under the current Texas governorship of Rick Perry, further evidence of the distorting effect of Texas.

### ***Eighteen is a minimum age***

The *Stanford* dissenters continued: *18 is the dividing line that society has generally drawn, the point at which it is thought reasonable to assume that persons have an ability to make, and a duty to bear responsibility for their judgments. Insofar as age 18 is a necessarily arbitrary social choice as a point at which to acknowledge a person's maturity and responsibility, given the different developmental rates of individuals, it is in fact a conservative estimate of the dividing line between adolescence and adulthood. Many of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s.*

Evidence is still emerging that brain development continues beyond 18. According to the National Institute of Mental Health, "studies have suggested that gray matter maturation flows in the opposite direction, with the frontal lobes not fully maturing until young adulthood. To confirm this in living humans, the UCLA researchers compared [Magnetic Resonance Imaging] scans of young adults, 23-30, with those of teens, 12-16. They looked for signs of myelin, which would imply more mature, efficient connections, within gray matter. As expected, areas of the frontal lobe showed the largest differences between young adults and teens. This increased myelination in the adult frontal cortex likely relates to the maturation of cognitive processing and other 'executive' functions."(164)

A study of the death penalty in the 1960s found that out of 101 countries which set a minimum age for the death penalty, 17 set that minimum age at 18 years, and 77 set it at age 20.(165) Paraguay, for example, set its minimum age at 22, Greece 21, Hungary and Bulgaria 20, and Greece 21.(166) All have now abolished the death penalty. Cuba retains capital punishment, but also restricts it to offenders over 20 years old. In addition to the execution of people under 18 at the time of the crime, numerous individuals have been put to death in the United States for crimes committed when they were 18 or 19.(167)

## **Failure of wider society**

"It should be an embarrassment to every American that we execute children... We don't take care of children in our country the way we should, and then when they get in trouble, we punish them severely."  
Former first lady, Rosalynn Carter, 12 August 2002(168)

Again, the death penalty is a punishment that assumes absolute culpability on the part of the condemned prisoner. The *Stanford* dissenters noted that *the very paternalism that our society shows toward youths and the dependency it forces upon them mean that society bears a responsibility for the actions of juveniles that it does not for the actions of adults who are at least theoretically free to make their own choices: youth crime . . . is not exclusively the offender's fault; offenses by the young represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.*(169)

- In 2001 Joseph Ward was facing a death penalty trial for a murder committed in 2000 when he was 17. He and his co-defendant Robert Smith, who was 18 at the time of the crime, met in the privately-operated Tallulah Correctional Center for Youth (TCCY), one of four Louisiana juvenile facilities investigated in the late 1990s by the Civil Rights Division of the US Department of Justice. The investigation found "systemic life-threatening staff abuse and juvenile-on-juvenile violence" in each of the facilities. In September 1999, TCCY was taken back into state control following the revelations of routine physical, sexual and psychological abuse of inmates. Joe Ward, who was held in TCCY for about a year for joyriding in his mother's car, was released about six months before the murder of Christina Smith. Robert Smith was released a few days before the crime. Both teenagers were among those allegedly subjected to serious ill-treatment in the facility. Both are reported to suffer from mental problems. The Civil Rights Division singled out TCCY as having "the most egregious deficiencies in mental health care" of the four facilities, and found that this "complete denial of necessary care" was "causing great harm". It also found that the education and rehabilitative services were inadequate or non-existent. The prosecutor in 2002 dropped pursuit of the death penalty in the case, which had generated hundreds of national and international appeals.(170) A number of "graduates" of the TCCY have been charged with capital crimes committed after their release from the juvenile center. They include Corey Williams, Lawrence Jacobs, and Ryan Matthews (see below) who have been sentenced to death for murders committed when they were 16, 16, and 17 respectively.
- Corey Williams is on death row in Louisiana, having been sentenced to death in 2000 for a murder committed in 1998 when he was 22 days past his 16th birthday. As a very young child, Williams ingested paint flakes from the crumbling walls of his home. At only 15 months old he was diagnosed with severe lead poisoning. He received some treatment for it, but only sporadically, because his mother, who worked as a prostitute to support her crack cocaine addiction, could not accompany him to the hospital or was in jail. At three years old, social workers found that he was still ingesting the flaking lead paint, and wrote "there is no way to tell what [lead poisoning] has done to his mental capabilities. Despite a Department of Health report that he was suffering from poor nutrition, parental neglect, and was living in vermin-infested squalor, he remained in the home. At school, he was put in special education classes, and his IQ was assessed at 69. He was made fun of by other children and, after he was expelled from the school for fighting, he tried to commit suicide. After that, he was in and out of mental institutions and juvenile facilities (which included TCCY, see above). Despite a diagnosis in 1995 that he was a danger to himself and others, was "gravely disabled", had adult role models who "create[d] an environment where there is an acceptance of criminal and anti-social behavior", and that his continued involvement with "marijuana and gangs would result in jail or death", he was released from hospital without treatment. His grandmother tried to have him readmitted, but he was not provided any more treatment. At the sentencing, defence witnesses repeatedly described Williams as a "follower". A minister from a local church who had known Corey Williams since he was a small boy, described him as a "slow learner" and "a follower" easily influenced by others.
- As a child, Glen McGinnis lived with his mother, who worked as a prostitute out of the one-bedroom apartment that they shared. She was addicted to crack cocaine and she spent several periods in jail on drug possession charges. The young boy would often be left alone to fend for himself. He suffered abuse, including beating with an electric cord, at the hands of his stepfather, who lived in the apartment for about two years. The state Child Protective Services (CPS) intervened on three occasions, once after the boy was raped by his stepfather when he was about nine or 10 years old, a

second time when he was beaten on the head with a baseball bat, and thirdly after his mother and stepfather burned his stomach with hot sausage grease. Each time the CPS returned him to his mother's home after he had been treated for his injuries, and each time he ran away, only to be caught shoplifting and returned home again by the authorities. He ran away from home for good when he was 11, and his formal schooling ended around this time. He alternated between the streets of Houston and state juvenile facilities, where he was sent when he was caught stealing cars. During his time on the streets, he lived in cars and empty apartments, and sometimes with adult friends. He continued to shoplift clothing and food. He was executed in 2000 for shooting an attendant at a laundry he was trying to rob when he was 17.

- In 1974, at the age of 14, Dalton Prejean (IQ 71 and diagnosed with mental illness) was committed to an institution after killing a taxi driver (a crime in which an older man was also involved). Medical specialists said that he would require "long-term medical in-patient hospitalization" under strict supervision and that he would benefit from a secure and controlled environment. Despite their finding that Dalton Prejean was "a definite danger to himself and others", he was released from the institution without supervision because no more funding was available for his care. Six months later, at the age of 17, he shot a police officer, the crime for which he was executed in 1990.
- At the trial of T.J. Jones for a murder committed when he was 17, his mother testified that she had sought official help with her son when he quit school at 15 and began to stay away from home and come into conflict with the law. She was unsuccessful. A psychologist testified at the trial that T.J. Jones could now be offered rehabilitative treatment, as he could have been if the authorities had offered appropriate intervention when he had come into contact with the juvenile justice system as a younger teenager. However, T.J. Jones was sentenced to death and executed on 8 August 2002.

The Director of the Clinical Brain Disorders Laboratory at the National Institute of Health wrote following a school shooting in California in March 2001: "It takes at least two decades to form a fully functional prefrontal cortex. Scientists have shown that the pace of the biological refinements quickens considerably in late adolescence, as the brain makes a final maturational push to tackle the exigencies of independent adult life... This is why it is important for adults to help children make plans and set rules, and why institutions are created to impose limits on behavior that children are incapable of limiting... This brief lesson in brain development is not meant to absolve criminal behavior or make the horrors any less unconscionable. But the shooter at Santana High, like other adolescents, needed people or institutions to prevent him from being in a potentially deadly situation where his immature brain was left to its own devices."(171)

William Holly is on death row in Mississippi for a shooting murder committed in 1992 when he was 17 years old. At the sentencing phase of his trial, his mother was the only witness presented on his behalf. She endured a difficult cross-examination by the state prosecutor, not least on the fact that it had been she that had bought her son the guns that he was allegedly carrying at the time of the crime in question.(172) Since April 1998, 12 people have been executed in the USA for crimes committed when they were under 18 years old. In all these cases, the murder victims were shot dead. Given that the death penalty assumes absolute culpability on the part of the defendant, should society not ask itself if it should bear any responsibility for the apparent ease with which these teenagers obtained lethal firearms?

- To bolster the state's argument that Steve Roach should be executed, the prosecution presented Steve Roach's probation officer who testified that the teenager had violated the terms of his probation (for joyriding and burglary) by possessing a shotgun. However, the police had allowed him to keep the gun when the teenager had taken it in to the Greene County Sheriff's Office days before the shooting because he had wanted to scotch rumours in the community that it was a stolen weapon. The day before the shooting, Steve Roach and two friends had used the gun in a neighbour's back yard for target practice. It seems that guns were such a natural part of life in Greene County that no adult saw Steve Roach's possession of one as any more than a technical violation of probation. His mother told the sentencing phase of the trial that she had not realised that possessing a gun violated the terms of her son's probation because the probation papers did not explicitly state this fact.(173) Steve Roach shot his neighbour, in an apparently impulsive crime, but one for which he was executed in January 2000.

- Christopher Thomas, a 17-year-old immature for his age, took his grandfather's shotgun. He was

executed in 2000 in Virginia for the subsequent crime committed with that firearm.

- On 1 August 1990, the 17-year-old Glen McGinnis decided to rob a laundry, apparently on the encouragement of a neighbour. McGinnis twice entered the laundry, but hesitated and left. He then fetched his aunt's gun to "scare" the attendant, and brought some clothes with him in order to pretend to be engaged in legitimate business at the laundry. A few minutes later the attendant was shot dead. Glen McGinnis left the premises, leaving a bag of clothes marked "McGinnis" behind. A little after 7am on the following morning, he was arrested at his aunt's house and charged with capital murder. He was executed in January 2000.
- One of Napoleon Beazley's teenage co-defendants signed a post-conviction affidavit in which he recalled: "We all had guns back then because the kids our age in [the neighbouring town] had guns... [They] would threaten us with their guns and we'd show them our guns...". Napoleon Beazley was executed in 2002 for a shooting murder committed when he was 17.
- Not long before the shooting for which he was condemned to die, T.J. Jones had been living in a house used by alleged gang members, who had access to guns and were allegedly involved in criminal violence. T.J. Jones was the youngest male in the house. The gun used in both offences was given to him by one of the others in the house, a 22-year-old, who allegedly participated in the planning of the crime, but not in its execution. T.J. Jones was executed on 8 August 2002.

### ***The would-be goals of deterrence and retribution fail***

The *Atkins* majority determined that penological goals of retribution of deterrence are not furthered by executing people with mental retardation. The six Justices wrote: "With respect to retribution - the interest in seeing that the offender gets his just deserts - the severity of the appropriate punishment necessarily depends on the culpability of the offender". The death penalty assumes absolute, 100 per cent culpability, on the part of the condemned. If there is any diminished culpability, then the retributive goal fails, as the punishment becomes disproportionate.(174) On deterrence, the *Atkins* majority wrote:

*The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make these defendants less morally culpable – for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses – that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. Nor will exempting the mentally retarded from execution lessen the deterrent effect of the death penalty with respect to offenders who are not mentally retarded. Such individuals are unprotected by the exemption and will continue to face the threat of execution. Thus, executing the mentally retarded will not measurably further the goal of deterrence.*

In January 2000, then Attorney General Janet Reno said: "I have inquired for most of my adult life about studies that might show that the death penalty is a deterrent, and I have not seen any research that would substantiate that point".(175) In a recent opinion, a US Supreme Court Justice noted: "I note the continued difficulty of justifying capital punishment in terms of its ability to deter crime... Studies of deterrence are, at most, inconclusive".(176) If this is the case for any offender, how much more so for children?

Yet politicians continue to justify the death penalty on its deterrent effect, without citing any evidence to support it. In seeking to reduce the age of death penalty eligibility from 18 to 16 in California, a legislator referred to his proposal as one that would "provide the maximum deterrent against the taking of human life."(177)

### ***Incapacitation v rehabilitation***

"The line we have drawn between children and adults also represents our determination not to give up on our children, a determination that is obviously at odds with the death penalty, a penalty that totally rejects any value in the continuation of life for a convicted defendant." Florida Supreme Court Justice(178)

A third goal of the death penalty, not mentioned by the *Atkins* majority, is incapacitation: the person who is executed is forever prevented from killing again (this presumes that the state convicted the person who committed the crime). US Supreme Court Justice Breyer noted recently: "As to incapacitation, few offenders sentenced to life without parole (as an alternative to death) commit further crimes."(179) What is more, the incapacitation argument directly contradicts one of the fundamental reasons behind the international consensus against executing young offenders, namely their capacity for rehabilitation.

Arguing for juries to vote for the execution of child offenders, state prosecutors are, in effect, saying that the defendant is "beyond the pale". Some say so expressly. At the trial of James Bonifay for a crime committed when he was 17 years old, the prosecutor argued to the jury that the defendant "doesn't need education, he doesn't need rehabilitation. He needs extermination, ladies and gentlemen."(180) James Bonifay remains on death row in Florida. At the trial of Stephen McGilberry for a crime committed when he was 16, the Mississippi prosecutor argued that "some people...are bad to the bone. They're not crazy... they're bad to the bone... [Stephen McGilberry] is not normal. I'll give you that. He is not normal. But he's responsible. He's cold-blooded. Bad to the bone".(181)

Thirteen of the 21 child offenders executed in the USA since 1977 were put to death in Texas. A further 27 are awaiting death in Texas, a third of the national total. In each of these 40 cases, a jury had to find that the defendant would probably commit acts of criminal violence in the future if allowed to live -- the so-called "future dangerousness" question. The very fact that Texas juries are asked to answer this question flies in the face of the international consensus that children have a greater capacity for rehabilitation, and that all efforts should be turned toward maximizing the possibility that the child offender may be reintegrated into society at the earliest possible opportunity.

Condemned child offenders are put into the opposite of rehabilitative care. They are warehoused until appeals are exhausted. Under such circumstances, it is remarkable when a child offender makes rehabilitative progress.

- Dalton Prejean spent 12 years on death row in Louisiana before being executed in 1990 for the murder of a police officer when he was 17. Before he was killed, he expressed remorse for the crime and added: "I've changed. There's a whole difference between being 17 and 30." The Board of Pardons recommended clemency, influenced by his abusive childhood, his mental deficiencies, his remorse, and his model behaviour in prison. However, the Governor rejected the board's recommendation on the grounds that the murder victim was a police officer: "So on behalf of our 780 state troopers, and thousands of police officers who put their lives on the line every day, the execution will proceed." The governor spoke to Prejean the night before the execution. It is understood that he told the prisoner that his death was necessary to serve society. Prejean reportedly asked that he be allowed to live in order to be able to give something back to society.
- On death row, Sean Sellers engaged himself in writing and artwork with a view to helping others learn from his experience. He made several videos which were widely shown, in which he talked about the dangers of cults, satanism and drug abuse. Several people who had engaged in prolonged letter-writing relationships with him credited him with helping them to deal with personal crises and to turn their lives around. Sean Sellers was executed in 1999 for crimes committed when he was 16 years old.
- Joseph Cannon's childhood was one which a psychologist described as "exceptional" in terms of the brutality and abuse to which he had been subjected. Indeed, it was so bad, that he thrived better in the structured confines of death row than he ever had in his home environment. For one thing, he learned to read and write. His self-image was also said to have improved in prison. He was executed in 1998 for a crime committed when he was 17.

In 1995, a jury found that Napoleon Beazley would be a future danger if allowed to live. His record on death row belied that finding. In his final written statement on 28 May 2002 before being killed by lethal injection for a crime committed eight years earlier when he was 17, Napoleon Beazley said: "*The act I committed to put me here was not just heinous, it was senseless. But the person that committed that act is no longer here - I am. I'm not going to struggle physically against any restraints. I'm not going to shout, use profanity or make idle threats. Understand though that I'm not only upset, but I'm saddened by what*

*is happening here tonight. I'm not only saddened, but disappointed that a system that is supposed to protect and uphold what is just and right can be so much like me when I made the same shameful mistake... Tonight we tell the world that there are no second chances in the eyes of justice. Tonight, we tell our children that in some instances, in some cases, killing is right.... There are a lot of men like me on death row - good men - who fell to the same misguided emotions, but may not have recovered as I have. Give those men a chance to do what's right. Give them a chance to undo their wrongs. A lot of them want to fix the mess they started, but don't know how. The problem is not in that people aren't willing to help them find out, but in the system telling them it won't matter anyway."*

### **Special risk of "wrongful execution"**

The *Atkins* majority added a final factor in their determination of the constitutionality of the use of the death penalty against defendants with mental retardation:

*The reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty. The risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty, is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As Penry demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury. Mentally retarded defendants in the aggregate face a special risk of wrongful execution.*

Again the same applies to children. They may be poor witnesses and provide poor assistance to their counsel. Like people with mental retardation, their youth may make them vulnerable to making false confessions that a more experienced adult would not make.

At the outset, however, it is important to emphasize that many of the child offenders who have been sentenced to death in the USA have been assessed as having retardation or borderline mental retardation in addition to their youthful immaturity, and in many cases an emotional development stunted by deprived and abusive upbringings. For example, the following people were all sentenced to death for crimes committed at 16 or 17:

- Adam Comeaux, on death row in Louisiana, IQ 68
- Ted Powers, on death row in South Carolina, IQ 69
- Corey Williams, on death row in Louisiana, IQ 69
- Herman Hughes, on death row in South Carolina, IQ 68-75
- Anthony Dixon, on death row in Texas, IQ under 70
- David Blue, on death row in Mississippi, IQ 67
- Ronald Foster, on death row in Mississippi, IQ 80
- Antonio Richardson, on death row in Missouri, IQ 70-73
- Ryan Matthews, on death row in Louisiana, IQ 71
- Excavious Gibson, on death row in Georgia, IQ 76-82
- Christopher Burger, executed in Georgia, IQ 82, brain damage and mental illness
- Robert Carter, executed in Texas, IQ 74
- Joseph Cannon, executed in Texas, IQ 79 and mental illness
- James Roach, executed in South Carolina, IQ 69-70
- Dalton Prejean, executed in Louisiana, IQ 71-76, and mental illness
- Dwayne Wright, executed in Virginia, borderline mental retardation
- Curtis Harris, executed in Texas, IQ 77
- Ruben Cantu, executed in Texas, IQ 70-80
- T.J. Jones, executed in Texas, IQ 78
- Gerald Mitchell, executed in Texas, IQ 75.

Evidence of the error-prone nature of the US capital justice system continues to mount. Indeed, on 1 July 2002, US District Judge Jed Rakoff concluded that the risk of executing the innocent was so great in

the USA that he would not allow the death penalty to be an option at the forthcoming trial of two federal defendants.(182) Since 1973, more than 100 people have been released from death rows after evidence of their innocence emerged.(183) In approximate terms, for every eight people executed in the United States in the "modern era" of the death penalty, another condemned prisoner has been found to have been wrongfully convicted. The ratio is about the same for people convicted of crimes committed when they were under 18 years old: 21 child offenders have been executed, while three who were sentenced to death for crimes committed at 16 or 17 were later exonerated.(184)

In any event, child offenders are at least as vulnerable to wrongful capital conviction as are their adult counterparts, whether through prosecutorial or police misconduct, inadequate representation, the state's reliance on questionable evidence or testimony, or other factors. In his recent opinion, Judge Rakoff noted that "it appears reasonably well established that the single most common cause of mistaken convictions is inaccurate eye-witness testimony." In 2000, Gary Graham was put to death in Texas for a crime he is alleged to have committed when he was 17. He was convicted on the basis of the disputed testimony of a single eyewitness. His trial lawyer had failed to present other eyewitnesses who did not identify Gary Graham as the gunman. Gary Graham maintained his innocence to the end.

Shareef Cousin was sent to Louisiana's death row for a murder committed when he was 16 years old. His conviction hinged on the testimony of an eyewitness to the crime who repeatedly stated to the jury her absolute certainty that Shareef Cousin was the perpetrator. However, the prosecutor had withheld evidence that on the night of the murder, this same eyewitness had told police that she had not got a good look at the gunman and would probably not be able to identify him. Shareef Cousin was granted a new trial on appeal in 1998 and the prosecution dropped the charges against him in January 1999. Four months later, in a neighbouring Louisiana jurisdiction, Ryan Matthews was sentenced to death for a murder committed during a robbery of a grocery shop in 1997 when he was two weeks past his 17th birthday. He was convicted mainly on the basis of the eyewitness testimony of two people. Their identifications were of the type that have been shown to be unreliable. For example, they were made under severe stress and were cross-racial. One of the witnesses testified at the trial that she saw the gunman's face through the glass door of the shop when he briefly lifted the face mask he was wearing. She testified that she was about 50 feet away and in a state of panic at the time, having just run from the shop after hearing the gunshots. When shown a photo line-up after the crime, she had said that she was unsure of her identification of Ryan Matthews. At the time of the trial two years later, she claimed that she was certain about her identification. The other eyewitness was in a car outside the store, attempting to avoid getting shot at as the gunman fled and fired his weapon. He identified Ryan Matthews as that gunman he had glimpsed.

In the five years since the crime, Ryan Matthews has consistently maintained his innocence. No physical evidence linked him to the crime, and DNA testing of blood found on the robber's mask does not implicate him. Descriptions of the getaway vehicle were inconsistent with the model of car in which Ryan Matthews and his co-defendant were stopped on the day of the crime. Also the windows of the car in which they were stopped did not function and were permanently closed. Yet one of the eyewitnesses stated that the gunman fled from the shop and jumped through an open window of the car before it sped away. There were also descriptions of the attacker's height which were seven to nine inches shorter than Ryan Matthews' height. The co-defendant, also 17 years old at the time, gave police a statement implicating Ryan Matthews in the crime. This was not allowed into evidence at the trial, and the co-defendant has since recanted his statement.

"Wrongful execution" does not refer only to the execution of the wrongfully convicted. It means the execution of anyone who, as the *Atkins* majority put it, had the death penalty imposed on them "*in spite of factors which [called] for a less severe penalty*". In a landmark study released in 2000, researchers concluded that US death sentences are "persistently and systematically fraught with error". The study revealed that appeal courts had found serious errors - those requiring a judicial remedy - in 68 per cent of the cases, and expressed "grave doubt" as to whether the courts catch all such errors. The most common errors in US capital cases, the study found, are "1) egregiously incompetent defense lawyers who didn't even look for - *and demonstrably missed* - important evidence that the defendant was innocent or did not deserve to die; and 2) police or prosecutors who *did* discover that kind of evidence but *suppressed* it, again keeping it from the jury." (185) As with adult offenders, legal representation for child offenders in the USA has frequently been deficient and fallen short of international standards. Frederick Lashley and Ruben Cantu, for example, were represented by lawyers who had never handled capital cases before. Both

Lashley and Cantu were sentenced to death for crimes committed at the age of 17 and have been executed. In the case of a juvenile defendant, the problems associated with the adequacy of trial representation may be exacerbated by clients less able to assist counsel. The defendants may also disproportionately become targets for prosecutors, notably in the area of encouraging jurors to view youth and perceived lack of remorse as "aggravating" factors.

### **Youth as an aggravator**

In a 1982 decision, the US Supreme Court ruled that "the chronological age of a minor is itself a relevant mitigating factor of great weight" in capital cases.(186) A number of the child offenders executed in the USA since that ruling were sentenced to death by juries that were not invited to consider the defendant's youthfulness as a mitigating factor. For example, Robert Carter was executed in 1998 for a crime committed at 17. His age was not presented to the jury as a mitigating factor.

- At the Oklahoma trial of Sean Sellers, the jury was not instructed that his age of 16 at the time of a crime was a mitigating circumstance, but were asked to decide *whether* his age was a mitigating factor. The judge did not allow the defence to introduce expert evidence that juveniles are developmentally different to adults, on the grounds that all jurors would know this anyway. In contrast, the prosecutor was allowed to develop the notion of Sean Sellers as an adult: "He's only 17 (Sellers was 17 by the time of the trial), but when he picked up that .357, he became a man.... He's acted like a man, he's going to have to stand up here like a man". Sean Sellers was executed in 1999.

In the case of Ronald Bell, sentenced to death in Florida in 2000 for a crime committed when he was 17 years old, the trial judge found that his age was a statutory mitigating circumstance, but one that should be afforded "little weight". Not only does this contradict the "great weight" referred to by the US Supreme Court in 1982, it also appeared to go against Florida law. In a 1998 decision, the Florida Supreme Court had stated that "considering that it is the patent lack of maturity and responsible judgment that underlies the mitigation of young age, the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes".(187) Sixteen-year-old offenders are not eligible for the death penalty in Florida, so Ronald Bell's age was within a year of the constitutional bar. His age should therefore have carried more than "little weight".

Particularly in some states where youthfulness is not expressly defined as a mitigating factor, a defendant's young age may become a double-edged sword that may increase the likelihood that the jury will view the defendant as a dangerous individual and therefore more deserving of death. This may be exacerbated by the fact that by the time the person comes to trial, it may be one or two years since the crime, and they are no longer the 16 or 17-year-old that they were at the time of the offence.

- Arguing for execution at the Missouri trial of Christopher Simmons for a crime committed when he was 17 years old, the prosecutor urged the jury not to consider the defendant's age as a mitigating factor. The prosecutor argued: "Does the defendant's age outweigh what he did? It doesn't matter if he was seventeen, twenty-seven, or seventy, the crime is still the same, and it's just as vicious... Don't let him use his age to protect himself now, because then he wins". Later, the prosecutor, responding to the defence counsel's closing argument, said: "Let's look at the mitigating circumstances... Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary." The federal Eighth Circuit Court of Appeals described these comments as "improper" and "condemn[ed] the prosecution for teetering on the edge of misstating the law". Christopher Simmons remains on death row.
- At the trial of T.J. Jones in Texas, the state presented a psychologist who testified that the defendant was a future danger, a necessary prerequisite for a death sentence in Texas. The expert testified that T.J. Jones's young age was an aggravating factor, and was a factor in his finding that the defendant would be a future danger if allowed to live.(188) T.J. Jones was executed on 8 August 2002.

### **Teen offenders as poor witnesses on their own behalf**

The profile of the typical condemned teenager is not of a youngster from a stable, supportive background, but rather of a mentally impaired or emotionally disturbed adolescent emerging from a childhood of abuse, deprivation and poverty.(189) This, combined with their young age, may make them additionally

vulnerable to the death penalty.

The US Supreme Court wrote in 1982, in a case of a 16-year-old offender, but which applies equally to 17-year-olds: *Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation. In some cases, such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant....[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. Even the normal 16-year-old customarily lacks the maturity of an adult... All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.*(190)

Although many people on death row were subjected to serious abuse and deprivation when they were children, the younger the offender, the closer in time they are to such abuse. The fact that their emotional trauma is more raw may make them less likely to divulge such information to their trial lawyer, or more likely to refuse to have such information divulged at trial. In some cases, this may be exacerbated by incompetent or inexperienced trial lawyers. In any event, the jury will be denied information about the defendant to weigh in their life-or-death decision.

- The childhoods of Johnny Garrett, Curtis Harris, Dalton Prejean, Christopher Burger, Robert Carter, Joseph Cannon and Glen McGinnis were all marked by serious physical or sexual abuse at the hands of adults. All seven were executed for murders committed at 17. Except in the case of Glen McGinnis, the juries that sentenced them to death were not presented with evidence of the defendants' abusive childhoods to be "duly considered in sentencing".
- Cedric Howard was the second youngest of eight people indicted for the murder of an elderly woman in Louisiana in 1994. He was 16 at the time of the crime. While in pre-trial detention, Cedric Howard had suffered a cerebral aneurysm, which required brain surgery, and which left him with some memory, speech and motor dysfunction.(191) He did not testify at his 1997 trial. However, before the jury entered the courtroom to hear the opening statements at the guilt stage of the trial, Howard addressed the court saying that he disagreed with his lawyer's strategy to seek a life sentence for a crime he did not commit, and that he, Howard, would prefer a death sentence. He then asked the judge to find him guilty. The trial proceeded and the jury found him guilty. At the sentencing phase, the prosecutor stressed that the defendant had shown "no remorse", and no "change or rehabilitation", and should be executed. Also during the sentencing phase, the prosecutor referred to Cedric Howard as a "thing": "You [jurors] are being put in this position because of what this thing did. You've been locked up from your families for two weeks because of what this thing did. This thing deserves the death penalty."(192) Cedric Howard was sentenced to death and remains on death row.
- On 6 October 2000, James Edward Davolt was sentenced to death in Arizona for a double murder committed in November 1998 when he was 16 years old. A few days before the sentencing hearing James Davolt dismissed his lawyers and, despite his young age and the seriousness of his situation, was allowed to represent himself. He presented no mitigating evidence. The lawyers had been investigating and preparing such evidence when the teenager fired them. They have told Amnesty International that there was evidence of mitigating evidence in the form of a very dysfunctional family life, and of possible physical and other abuse against James Davolt. James Davolt remains on death row.

Young offenders may have a particular tendency to present an appearance of lack of remorse in court. This "emotionlessness" may be a result of youthful bravado, or may be due to particular traumatic circumstances in their background, coupled with the effect of having been held in an adult jail for possibly the one or two years before the trial. A perceived lack of remorse on the part of the defendant has been shown to be highly aggravating in the minds of capital jurors.(193) Prosecutors frequently stress the perceived lack of remorse on the part of the defendant in arguing for execution.

- At the trial of Napoleon Beazley in 1995 for a crime committed at 17, an expert for the prosecution concluded that Beazley represented a future risk to society, citing "an incredible level of coldness, remorselessness, senselessness" and finding that there was not "one shred of remorse". He admitted,

however, that he was basing his assessment on the version of events told by Beazley's two co-defendants. The two co-defendants subsequently said that they had lied under pressure from the prosecution and had made Napoleon look as bad as possible to the jury. Their post-conviction affidavits suggested that Napoleon Beazley had in fact been very remorseful after the crime.(194) Beazley was executed in 2002.

- Arguing for execution at the 1999 sentencing hearing in Alabama for Gregory Wynn, convicted of a murder committed when he was 17, the prosecution focussed on the lack of emotion and remorse displayed by the defendant in the courtroom. His defence lawyer confirmed to Amnesty International that Gregory Wynn showed "not one blink of emotion" during the trial, and just stared at the computer monitor on the desk. She pleaded with the jury to consider that the abuse to which he had been subjected as a child could account for his demeanour: "Sixteen months in the county jail will make you not want to show how you feel. Seventeen years of abuse will make you not want to show how you feel." The jury took less than an hour to return a verdict for a death sentence. Gregory Wynn remains on death row.
- At the 1998 trial of Lawrence Jacobs for a crime committed when he was 16, the prosecutor repeatedly argued that jury should take account of the teenager's lack of remorse in returning a conviction: "You've watched him for five days, have you seen one shred of emotion, any kind of emotion? Nothing. Nothing. He shows no remorse, not even to this day"; "And I want you to look at his face. I want you to watch him. Not one time has he shown any remorse. The only expression I've seen on his face is cold blooded killer with an occasional smirk now and then." The jury voted to convict Lawrence Jacobs and then sentenced him to death.

### ***Risk of false confession***

As already noted, many of the child offenders who have been sentenced to death and executed in the USA have been mentally impaired and/or emotionally traumatized. This, coupled with their immaturity, and for some a lack of experience in custodial situations, may place them at risk of making false confessions or confessions that more experienced adults would not give without seeking legal advice first. The threat of the death penalty by interrogators as leverage during questioning may have a particular impact on a youthful suspect.

Teenager Todd Rettenberger was arrested in Salt Lake City in 1996 and questioned about a murder. He was interrogated for about two hours and then put in solitary confinement, without a pillow or blanket for about 22 hours, before being interrogated a second time. During the interrogation, the police repeatedly lied to Rettenberger, telling him that they had evidence against him. They used the "false friend" technique, whereby they pretended to be his friends and acting in his best interest. They repeatedly indicated that a confession would lead to leniency, including protecting him from execution.(195) He admitted his involvement in the crime. In August 1999, the Utah Supreme Court noted that "as interrogators have turned to more subtle forms of psychological persuasion... courts must also consider such factors as the defendant's mental health, mental deficiency, emotional instability, education, age, and familiarity with the judicial system." It ruled that a trial court had been wrong not to throw out Rettenberger's confession.(196)

Todd Rettenberger was 18 years old. Some of those interrogated in similar ways and later sentenced to death were 16 or 17.

- Christopher Simmons was arrested at school the day after the crime in question. Despite his age (17), below-average IQ (88), and the fact that he might face capital charges, he was interrogated, at times aggressively, for two hours by three police officers without a lawyer or parent present. At some point, a senior officer joined the interrogation. He told Christopher Simmons that he was facing the death penalty or life in prison and that it would be in his "best interest" to tell the truth. After this officer left, the three others repeated this. Christopher Simmons eventually confessed to the murder. The state chose to seek his execution. He remains on Missouri's death row.
- Nathan Joe Ramirez's confession was used against him at his 1996 capital trial in Florida. At the time he gave it to police, without an adult or lawyer present, Nathan Ramirez had just turned 17. He was

convicted and sentenced to death. In 1999, the Florida Supreme Court granted him a new trial, including on the grounds that the police had violated his constitutional rights in obtaining the confession. One of the judges stated that the police had engaged in "a carefully orchestrated trap" and "purposeful sleight-of-hand" in order to overcome Ramirez's constitutional protections. The judge noted that this police violation was "even more egregious here because the accused was a minor".(197)

- Johnny Ross, black, was sentenced to death in 1975 for the rape of a white woman when he was 16 years old. Police came to his home in the early hours of the morning, aroused him from his bed, arrested him and took him to the scene of the crime. He was then taken to the police station where, without the advice of any adult and surrounded by police, he waived his right to a lawyer. He "confessed" to the crime. He later alleged that he had been beaten by the police and that when he signed the four-page confession, only the phrase "No Statement" had been typed on each page.(198) After lawyers from the Southern Poverty Law Center in Alabama intervened and showed that his blood type did not match the perpetrator's, Johnny Ross was released in 1981.(199)
- Christopher Thomas was executed in Virginia on 10 January 2000. On the evening of 10 November 1990, Chris Thomas, a 17-year-old with a history of emotional and mental problems, was questioned by the police at his uncle and aunt's home. Without a lawyer or an adult present, while still under the effects of alcohol and drugs(200), and having slept for only two hours in the past 40, he confessed to the murder of Kathy and James Wiseman, the parents of his 14-year-old girlfriend Jessica Wiseman. At a hearing to have the confession suppressed, the defence presented expert testimony questioning the voluntariness of the statement. A psychologist testified that Chris Thomas was a developmentally immature teenager, who had a long history of mental and emotional problems. In jail awaiting trial, Chris Thomas had also indicated to the psychologist that he not fired all the shots, and had told him that he would take the blame for the shooting even if he did not do it. However, the confession was ruled admissible by the trial court, despite the circumstances under which it had been given to the police, including the inherently coercive situation of police questioning a child. At the 1991 trial, Chris Thomas was sentenced to death for the murder of Kathy Wiseman, who had survived the first shot, only to be shot again when she came down the hall to her daughter's bedroom. Thomas received a 65-year prison sentence for the murder of James Wiseman. On death row, Chris Thomas consistently maintained that he had not fired the final shot at the mother. He said: "I thought I would take the rap. I didn't know anything about capital punishment. I thought I would get 10 or 12 years in prison and at least she [Jessica] could come and see me". In 1999, two women came forward who had been held in juvenile detention with Jessica Wiseman. They both claimed that she had told them that she had fired the second shot at her mother. Jessica Wiseman, who was released in 1997 when she turned 21, has denied the claim.
- Without a lawyer present, 17-year-old Toronto Patterson gave police a statement in which he admitted to being at the scene of the crime with two Jamaican drug dealers (whose existence was later verified by a trial witness), but did not admit to the murders themselves. An aggressive interrogation followed, during which Toronto Patterson allegedly asked for a lawyer and for the interrogation to be recorded. After being held incommunicado for over four hours, Toronto Patterson confessed to the shootings. In a completely separate case in Dallas a month later, 21-year-old Michael Martinez was arrested and charged with capital murder. He confessed to the same police officer, who apparently used the same techniques he had employed in Toronto Patterson's case. Martinez's confession was false, and he was later exonerated. Patterson's jury was not allowed to hear Martinez's testimony to weigh against Patterson's claim that his confession had been coerced and that he was innocent of the murders. Toronto Patterson was executed on 28 August 2002. He maintained his innocence to the end.

The statements of children may also be used against capital defendants, and such cases may provide further evidence of the susceptibility of young people to giving false testimony under coercive circumstances. Dennis Williams, Verneal Jimerson, Willie Raigne and Kenny Adams were convicted in the 1978 Illinois murder of Larry Lionberg and Carol Schmal. Williams and Jimerson were sentenced to death, Raigne and Adams to life imprisonment. It took the next 18 years of effort by individuals, including students and journalists, to prove their innocence.(201)

The four African American men had been convicted largely on the basis of a coerced statement given to police by Adams's 17-year-old girlfriend Paula Gray. She later recanted her testimony and in 1996,

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she described on tape how the police had obtained her false statement: "Five or six white cops, all in plain clothes, took me over to the place...They yells at me, 'This is where the lady got killed, this is where you walked her up the steps in the middle of the night...They kept yellin', 'This is where she got raped and killed... Dennis shot her twice in the head, didn't he?' I seen the blood on the floor, a lot of blood, and they showed me some clothes and said they was the lady's. Then one of 'em screams, 'You know that they raped her. You saw Dennis shoot her in the head , didn't you? Didn't you? I kept sayin' everything's a lie, but I'm so scared I don't know what to do. I'm like a zombie. All of a sudden, I just start answering, 'Yes, yes, yes'" .(202)

Larry Osborne was sentenced to death in Kentucky in 1999 for a double murder committed when he was 17 years old. The main evidence against him was the testimony of Joe Reid, a friend of Larry Osborne who was aged 15 at the time of the crime. His statement only contained details that were already known to the police and which had been given to him by the police. During his videotaped police statement, the 15-year-old stated that "I just want to get out of trouble", and "I don't want to get into trouble for something I didn't do". During the statement, the video camera was turned off for an hour, and when it was turned back on, the police officer was reassuring Reid that he, the police officer, would talk to the prosecutor and tell him that Reid had been "truthful" and "honest". Before Larry Osborne's trial, Joe Reid drowned in a swimming accident. However, his testimony was used at the trial and the prosecution obtained a conviction and death sentence. The Kentucky Supreme Court granted a new trial on appeal, stating that Joe Reid's testimony could not be used again. At the retrial in 2002, a jury acquitted Larry Osborne, and he was released.

**Arbitrariness and discrimination**

*"It offends my conscience to execute someone who was under 18 at the time of the crime". A pro-death penalty Oregon prosecutor, 2000(203)*

Only a tiny percentage of the thousands of murders committed each year in the United States result in a death sentence. The condemned - juvenile and adult offenders alike - are selected for death under a system characterized by arbitrariness, discrimination and error. The mistakes and inequities are perpetrated not only on the defendants, but also on their families, and the wider community.

The state argues that the system is winnowing out the "worst of the worst". But were the 21 people executed in the USA since 1977 for murders committed when they were children really in this category? Were they "worse", for example, than the hitman for a cocaine ring in Washington DC, charged with eight murders; or five defendants in a Michigan cocaine conspiracy charged with 11 drug-related murders; or an alleged head of a Louisiana drug ring charged in eight drug-related murders?(204) In each of these cases, and many, many others, the government declined to seek the death penalty.

Arbitrariness, whether it be in relation to the deprivation of liberty or of life, violates international law.(205) The Human Rights Committee, the expert body established by the International Covenant on Civil and Political Rights to oversee implementation of that treaty has stated, regarding the right to liberty, that "arbitrariness" is not to be equated simply with "against the law", but should be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.(206)

There are 38 states in the USA where murder can lead to a death sentence against an adult offender. In addition, the federal government can pursue death sentences against adults accused of federal capital crimes in all jurisdictions, whether or not that jurisdiction is abolitionist. In contrast, anyone under 18 at the time of the crime cannot face the death penalty under the federal capital statute. A 17-year-old is "death-eligible" in 21 states, and a 16-year-old in 17 states. In practice, as outlined above, the number of states actually practising the juvenile death penalty is lower than this. This geographical concentration to a few locations means that the death penalty against juveniles is even more arbitrary than when used against adults.

This arbitrariness can be compounded by other factors, including prosecutorial discretion and quality of defence representation, as illustrated below:

Life Death	
After Jessica Holtmeyer was convicted	Prior to the 1992 trial of Glen McGinnis for a

<p>in Pennsylvania in 1999 for a murder committed when she was 16, the prosecutor dropped his pursuit of the death penalty at the request of the victim's family. The victim's mother reportedly stated: "We didn't feel she should get the death penalty. When you're on death row, you're there so long with nothing to bother you. In jail, she'll be with the murderers and rapists. We thought the death penalty would be too easy for her."(207)</p>	<p>crime committed when he was 17, the defence lawyer had "tried and tried and tried" to obtain a plea bargain to a life sentence but that, unlike in other cases, the prosecutor seemed set on a death sentence.(208) About 10 members of the victim's family were in the courtroom for the sentencing. They favoured a death sentence. The sister of the victim said: "Prior to [the murder], I had no opinion. Now, it's an eye for an eye".(209) Glen McGinnis was executed in January 2000.</p>
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Life	Death
<p>In 1999, sentencing Bobby Purcell to life imprisonment without parole rather than death for a double murder committed when he was 16, an Arizona judge wrote that "two of the mitigating factors - defendant's age and his lack of family support - are sufficiently substantial to call for leniency. The court concludes that at the time of the horrible murders of Renelyn Simmons and Andre Bradley, Bobby Charles Purcell was a dangerous and pitiless child, one devoid of empathy or compassion for others, made that way by parental rejection, abandonment and abuse. Defendant was a child who simply had no adult in his life who was willing or able to make Bobby Purcell's welfare a priority. By virtue of his upbringing, defendant had no one to turn to for help and by virtue of his age, he had no reason to know how troubled he was or how to deal with his enormous psychological problems."</p>	<p>In 1998, Joseph Cannon was executed in Texas for a murder committed when he was 17. At his retrial in 1982, the defence presented no psychiatric testimony or information on his highly disturbed background. The lawyers did this because they feared that such evidence would be construed by the jury as aggravating rather than mitigating. Joseph Cannon had been subjected to what one psychologist later characterized as "exceptional" in the extent of the brutality and abuse that Cannon had suffered as a child. He was severely sexually abused by his stepfather and his grandfather between the ages of seven and 17. He was expelled from school at the age of seven because his mental impairment meant that he could not function in a classroom. He turned to solvent abuse from the age of 10. He attempted suicide at 15. He had brain damage, and was diagnosed as suffering from schizophrenia.</p>

Life	Death
<p>In 1997, Ahmad McAdoo, 18, and Derrick Williams, 17, killed Juan Javier Cotera and Brandon Shaw in a car jacking in Texas. The prosecutor said that he would seek execution if the case went to trial. The victims' parents did not want the death penalty for their sons' murderers, and pleaded with the prosecutor not to seek it. The prosecution accepted an arrangement under which McAdoo and Williams pleaded guilty in order to avoid capital punishment. Both were sentenced to</p>	<p>In 1995 an all-white Texas jury sentenced Napoleon Beazley to death for a car jacking murder committed when he was 17. At a pre-trial hearing, the defence indicated to the judge that the defendant was willing to plead guilty in return for a sentence of life imprisonment. The prosecutor noted the "substantial contact with the family of the victim" in explaining that the state was unwilling to accept such a deal. Napoleon Beazley was executed in 2002.</p>

life imprisonment.(210)	

Life	Death
<p>At a Nevada trial in 2000, the prosecutor urged the jury to sentence Kenshawn Maxey to death for the murder of Sal Zendano committed when Maxey was 17: "A sentence of life without parole will remind Sal's family that the person who brutally killed Sal still lives, still eats, still breathes, and still plays basketball, and still can see his friends." The defence had done a thorough investigation of the teenager's background, the details of which the defence lawyers presented to the jurors. They invited the jury to consider Kenshawn Maxey's young age, and his childhood of appalling abuse and deprivation in mitigation. The prosecutor urged the jury not to allow Kenshawn Maxey to "hide behind" such "convenient excuses". When the jurors retired, they were reportedly split 11-1 in favour of the death penalty. However, they deliberated for a day and a half before deciding that the mitigating factors outweighed the aggravators, and voting that Kenshawn Maxey should not be killed.(211)</p>	<p>At Robert Carter's sentencing for a murder committed when he was 17, the prosecutor used 12 peremptory challenges to remove 12 potential jurors who had slight reservations about the death penalty, even though they expressed confidence in their ability to judge the case on the facts and impose the death penalty if they thought it appropriate. At the sentencing, the prosecutor told the jury that life imprisonment would be like a "slap on the wrist". The defence did not present as mitigating evidence Robert Carter's age at the time of the crime; the fact that he had an IQ of 74, was brain damaged; or that this was his first offence. The jury did not hear that he was brutally abused throughout his childhood by his mother and stepfather. In an incident shortly before the crime for which he was sentenced to die, Carter was shot in the head by his brother, the bullet lodging near his temple. He afterwards suffered seizures and fainting spells. The jury took 10 minutes to decide that Carter should die. He was executed in Texas in 1998.</p>

Life	Death
<p>Felipe Petrona-Cabanas was indicted for the shooting of a police officer in Arizona in 1999, committed when he was 17 years old. The prosecution sought a death sentence. The defence team did a very thorough job in investigating Felipe Petrona-Cabanas's background of poverty and deprivation in Mexico. A judge found that the mitigating circumstances, including the defendant's immaturity, impulsiveness and remorsefulness, outweighed the aggravating circumstances of the crime (including the fact that the victim was a police officer) and in 2002 sentenced Petrona-Cabanas to life imprisonment without the possibility of parole rather than to execution.</p>	<p>At Dalton Prejean's trial for the shooting of a police officer, the defendant's youth was not mentioned as a possible mitigating factor. The jury was not informed about his background of abuse and neglect, or about his documented history of mental illness and brain damage. He was sentenced to death. Despite an appeal from one of the trial jurors, and a recommendation for clemency by the state parole board which had also heard the mitigating evidence of his background and of his remorse and model conduct in prison, the governor refused to commute the sentence because the victim was a police officer. Dalton Prejean was executed in 1990.</p>

In the end, the only way to ensure the eradication of arbitrariness in the imposition of the death penalty is to eradicate the death penalty itself. The same is true in relation to the discriminatory application of capital punishment. The history of the death penalty in the USA is one of racist use, and to this day race remains an element in the application of this punishment. This is particularly so in relation to the race of the murder victim. More than 780 men and women have been executed in the USA since 1977 - in 80 per cent of cases the original crime had involved a white murder victim. Yet blacks and whites are the victims of murder in approximately equal numbers in the USA.

Some of the race aspects of the US death penalty show signs of being even more pronounced in the case of child offenders.

- Of the adult offenders on death row in the USA in July 2002, about 53 per cent were from racial or ethnic minorities. In the case of child offenders, this figure is 63 per cent.
- Of the adult offenders executed in the USA between 1997 and 2002, 43 per cent were from ethnic or racial minorities. In the case of child offenders, this figure is 57 per cent.
- Of the adult offenders executed between 1977 and August 2002, 21 per cent were black defendants convicted of crimes involving white victims. In the case of child offenders this figure was 33 per cent.
- Of the adult offenders executed between 1977 and 2002, one per cent were of white defendants convicted of crimes involving black victims. No white person under 18 at the time of the crime has been executed for killing an African American.
- About six per cent of the adult offenders executed between 1977 and 2002 were African Americans convicted by all-white juries. About 30 per cent of the people executed for crimes committed when they were under 18 were African Americans convicted by all-white juries.(212)

### **Bringing the Court's own judgment to bear**

*"Execution, that's a terminal decision. It simply says as a society we've given up on our young people. I think that's a tragic statement for this state to make and for this country. That's why it's imperative that we as a state not allow an inhuman act, which is the execution of a child."* South Carolina legislator, 2001(213)

The *Atkins* majority decided that there was a national consensus against the execution of the mentally retarded. They explained that "in cases involving a consensus, our own judgment is brought to bear, by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators." Having asked themselves this question in the *Atkins* opinion, they determined that there was no such reason. And so they ruled that the practice was unconstitutional.

Justice Scalia, who authored the 1989 *Stanford* opinion, was back in the minority in the *Atkins* decision in June 2002. In his dissent, he argued that the majority had had to "thrash about" and fill a "grab bag of reasons" in order "miraculously" to be able to "fabricate" a national consensus against the execution of people with mental retardation. He accused the majority of having made their decision on the basis of their own personal feelings, in the presumed belief that they "have moral sentiments superior to those of the common herd".

In his dissent, Justice Scalia wrote that "[s]eldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members". Chief Justice Rehnquist agreed with Justice Scalia "that the Court's assessment of current legislative judgment regarding the execution of defendants like [Daryl Atkins] more resembles a *posthoc* rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency". A shared concern among the dissenters was that much of the legislation upon which the majority had based their finding of a national consensus was only very recent, and therefore the various states could not know

"whether they are sensible in the long term".

If these two dissenting Justices, joined by Justice Thomas, believe that their six colleagues have jumped on a passing bandwagon, they should rest assured that it is a vehicle that will drive the USA's international reputation to a better place. In an *amicus curiae* brief filed in the Court, nine former senior US diplomats argued that the USA's use of the death penalty against people with mental retardation had "become manifestly inconsistent with evolving international standards of decency". Continuing to execute such defendants, the brief asserted, would "strain diplomatic relations with close American allies, provide ammunition to countries with demonstrably worse human rights records, increase US diplomatic isolation, and impair the United States foreign policy interests".(214)

If this is true of the execution of people with mental retardation, it can be no less true in relation to the execution of child offenders, a practice now virtually unknown outside of the United States and condemned in all corners of the globe.

### **An overwhelming consensus: the international picture**

*"The overwhelming international consensus that the death penalty should not apply to juvenile offenders stems from the recognition that young persons, because of their immaturity, may not fully comprehend the consequences of their actions and should therefore benefit from less severe sanctions than adults. More importantly, it reflects the firm belief that young persons are more susceptible to change, and thus have a greater potential for rehabilitation than adults."* United Nations High Commissioner for Human Rights, 1 August 2002.(215)

On 3 September 2002, a court in China sentenced two teenagers to life imprisonment for an act of arson that killed 25 people. The defendants were spared the death penalty because they were under 18 years old at the time of the crime.(216) In July 2002, 74 child offenders on death row in Pakistan had their death sentences overturned because of their age at the time of the crime.(217) Also in July, the Philippines Supreme Court ordered the removal of 10 prisoners off death row after evidence was produced that they had been under 18 at the time of the crimes for which they were sentenced to die. The Court wrote: "It has long been recognized that youthful offenders should be afforded special treatment in our judicial system considering their developmental age and desired reintegration into and assumption of a constructive role in society. Every effort should be exerted to promote the welfare and enhance the opportunities of a juvenile in conflict with law to uphold his human dignity and worth and instill in him respect for the fundamental rights and freedoms of others."(218)

Meanwhile, in July and August 2002, the USA executed three people for crimes committed when they were under 18. At the time of writing, they were the only such executions known in the world during 2002. The USA is clearly out of step.

In 1997, the International Commission of Jurists (ICJ), an international non-governmental organization consisting of judges and lawyers from all regions and legal systems in the world working to uphold the rule of law and the legal protection of human rights, reported on the US death penalty. It suggested that the USA's ratification of treaties such as the International Covenant on Civil and Political Rights, which the USA ratified three years after the *Stanford v Kentucky* decision, represents "an important milestone in the progress of a maturing US society". The ICJ suggested that such ratifications should mean that the US authorities must no longer confine their definition of "standards of decency" to national criteria and opinion. Instead they must look to global standards, as articulated by international human rights instruments.(219)

Those international instruments are unequivocal. The imposition and carrying out of the death penalty against people who were under 18 years old at the time of the crime is prohibited. It is a prohibition from which there can be no derogation, even "in time of public emergency which threatens the life of the nation".(220) Amnesty International has long held that this prohibition is a principle of customary international law, binding on all countries regardless of which treaties they have or have not ratified.(221)

The prohibition enshrined in international treaties such as the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child is being reinforced at regional level. By the

end of 2001, 24 countries had ratified the American Convention on Human Rights(222), and 26 had ratified the African Charter on the Rights and Welfare of the Child. Both treaties prohibit the imposition of the death penalty against people who were under 18 at the time of the crime.

In cases where country's laws are incompatible with their obligations under international treaty obligations, moves have been made to bring them into line. For example, Barbados and Zimbabwe have done so in recent years, and Thailand is in the process of so doing. Even China, which accounts for the majority of the world's executions each year, in 1997 amended its criminal code to abolish the death penalty for defendants who were under 18 at the time of the crime, in order to comply with its obligations under the Convention on the Rights of the Child (CRC).

Article 37 of the CRC prohibits the use of the death penalty against people who were under 18 years old at the time of the crime. One hundred and ninety-one countries have ratified the CRC since 1989, the year that *Stanford v Kentucky* was decided. This is every UN member state but Somalia and the USA. The USA has signed the CRC, thereby binding itself not to do anything that would undermine the object and purpose of the treaty pending its decision on whether to ratify it.(223) In May 2002, Somalia signed the Convention and indicated its intention to ratify.

None of the states that have ratified the CRC have lodged a specific reservation to article 37 of the treaty. However, in the same way that the USA has agreed to be bound by the provisions of certain treaties only to the extent that they already match its own constitutional constraints, some Islamic states have made the general reservation when ratifying the CRC that they only accept its provisions to the degree that they do not conflict with Islamic law. In the absence of specific legislation, this can leave the door open for the imposition of the death penalty for crimes committed when under 18. Nevertheless, the fact that these countries are party to the CRC provides an opportunity for the Committee on the Rights of the Child, the expert body established by the CRC to oversee implementation of the treaty, to work to ensure that such loopholes are closed. This includes in the case of those countries which are reported to have carried out the execution of child offenders since 1990 -- Saudi Arabia(224), Iran(225), and Nigeria(226).

Pakistan was one of the countries, which like Saudi Arabia and Iran, filed a general reservation to the CRC when it signed the treaty in 1990. Its reservation stated: "Provisions of the Convention shall be interpreted in the light of the principles of Islamic laws and values". In its report on Pakistan in 1994, the Committee on the Rights of the Child expressed its concern about the reservation and urged it to take the necessary measures to rectify "the non-compatibility of certain areas of national legislation with the provisions and principles of the Convention", including the prohibition on the imposition of the death penalty for crimes committed by children below the age of 18.(227) In 2000, Pakistan abolished in law the death penalty for people who were under 18 at the time of the crime. In December 2001, President Musharraf told Amnesty International that he would commute the death sentences of all young offenders on death row in Pakistan. In July 2002, it was reported that 74 child offenders had had their death sentences commuted to life imprisonment.(228)

About 56 per cent of the known executions of child offenders since 1990 were carried out in the United States (18 out of 32). The others occurred in Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia and Yemen. Yemen and Pakistan have now abolished such use of the death penalty in law. The Democratic Republic of Congo, where a child soldier tried by military court was executed in 2000, commuted the sentences of five child offenders in 2001, and at the time of writing had a moratorium on executions. As the other perpetrators drop out of this infamous club, the USA's record as its leading member stands in ever starker relief. The United States accounts for 70 per cent of the juvenile executions reported worldwide since 1998 (12 out of 17).

Article 6 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to life. In 1993, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions wrote: "The General Assembly has referred to article 6 as forming part of the 'minimum standard of legal safeguards' for the protection of the right to life in a number of resolutions concerning summary or arbitrary executions, most recently in paragraph 12 of resolution 45/162 of 18 December 1990, and the Special Rapporteur considers that article 6 has become a rule of customary international law."(229) Article 6(5) prohibits the use of the death penalty for crimes committed by people under the age of 18. In 2000, the UN Sub-Commission on the Promotion and Protection of Human Rights affirmed that "the imposition of the death penalty on those aged under 18 at the time of the commission of the offence is contrary to customary international law".

The United States, along with 147 other countries, has ratified the ICCPR. The USA claims that the "reservation" it made with its 1992 ratification of the treaty exempts it from the prohibition articulated in article 6(5).(230) In its 1994 report to the Human Rights Committee, the expert body established by the ICCPR to oversee implementation of the treaty, the US government explained that it had made the reservation because "approximately half the states" of the USA allowed the execution of child offenders.(231) This justification contradicts international law. Article 27 of the Vienna Convention on the Law of Treaties states: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

Also in 1994, the Human Rights Committee had written: "Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant... Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or *children*..." (emphasis added).(232) The following year, the Human Rights Committee responded to the USA's report by stating that the US reservation was "incompatible with the object and purpose of the Covenant".(233) The Committee "deplored" the USA's continuing use of the death penalty against people for crimes committed when they were under 18, and urged it to take appropriate steps to stop the practice and to withdraw the reservation.(234)

In urging the US Supreme Court in 1999 not to review the international law issue(235), the US government repeated its support for the reservation, and claimed that as a "persistent objector" to the prohibition on executing child offenders, it is exempt from any international customary law ban. Its objection has not, however, been consistent and uninterrupted.(236) For example, in 1955, it ratified the Fourth Geneva Convention without reservation to article 68.4 which states that "the death penalty may not be pronounced against a protected person who was under eighteen of age at the time of the offence." It thereby agreed that in the event of war or other armed conflict in which the US may become involved, it would exempt all civilian under-18-year-olds in occupied countries from the death penalty. Although the Geneva Conventions apply in this particular context -- albeit one of heightened emergency -- and are therefore arguably informed by different policy considerations, the exemption is based on the very same principles (a young person's immaturity, etc) that lie behind the ICCPR and CRC prohibitions. The fact that the USA has accepted the principle without reservation in this context means that its claim to be a persistent objector fails.

In addition, the USA did not protest over article 6(5) of the ICCPR during drafting of the treaty, and its initial challenge to the prohibition in article 4 of the American Convention on Human Rights during drafting was withdrawn.(237) The USA did not block the 1984 adoption by consensus of the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, among the provisions of which is the prohibition on the death penalty against under-18-year-olds. The USA joined the consensus on a resolution in 1985 endorsing the Safeguards and urging all states retaining the death penalty to implement them.(238)

Even if a country has been a persistent objector to a rule, it cannot override that principle if it has become a "peremptory norm" of international law.(239) As already noted, article 4(2) of the ICCPR itself states that there may be "no derogation" from article 6, even in times of emergency. In 2001, in its authoritative interpretation of this article, the Human Rights Committee wrote: "The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7)." The Committee also stated that "article 6 of the Covenant is non-derogable *in its entirety*." (emphasis added).(240)

In 1987, the Inter-American Commission on Human Rights found that the USA had violated the American Declaration of the Rights and Duties of Man when it executed James Roach and Jay Pinkerton in 1986 for crimes committed when they were 17 years old. It found the violation to lie in the "fortuitous

element" in US practices: variations within a "patchwork scheme" of state laws relating to juveniles meant that the imposition of so serious a penalty depended on the location of the crime. The ruling also identified a peremptory norm prohibiting the "execution of children" (age undefined), and the Commission further declared that there was an "emerging" norm establishing 18 as the minimum age.

Since the IACHR's finding, the CRC has come into force and been ratified by 191 countries. Also since then, another 64 countries have become party to the ICCPR, which to date has been ratified by 148 countries. The CRC and the ICCPR, like the Geneva Conventions, the American Convention on Human Rights and the African Charter on the Rights and Welfare of the Child, set 18 as the minimum age for death penalty eligibility. At the same time, more US states have abolished the death penalty against under-18-year-olds, making the geographical bias on this use of capital punishment within the USA even more pronounced than it was in 1987, and the application of the juvenile death penalty even more arbitrary when viewed from a national perspective.

### ***A diminishing isolationism on the Court?***

"[A]ll treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby". Article VI of the US Constitution.

In 1804, the Chief Justice of the US Supreme Court wrote: "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains". (241) In 1900, the Court stated that "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction... For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat." (242)

Over recent decades, whether to take account of international law and standards of decency has been a source of contention on the US Supreme Court, and for some Justices the irrelevance of such standards appears to reach ideological proportions. In *Thompson v Oklahoma* in 1988, the decision that in effect rendered unconstitutional the use of the death penalty against defendants who were under 16 years old at the time of the crime, the plurality opinion wrote favourably about international standards: "The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community".

Dissenting in *Thompson*, Justice Antonin Scalia wrote: "The plurality's reliance upon Amnesty International's account of what it pronounces to be civilized standards of decency in other countries is totally inappropriate as a means of establishing the fundamental beliefs of this Nation... We must never forget that it is a Constitution for the United States of America that we are expounding... [T]he fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all...".

A year later, Justice Scalia was in the plurality, writing the *Stanford v Kentucky* opinion that the execution of 16- and 17-year-old offenders was constitutional. This opinion expressly rejected international standards: "We emphasise that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* that the sentencing practices of other countries are relevant".(243)

In *Atkins v Virginia* 13 years later, there were still signs of this isolationism on the Court. Chief Justice Rehnquist wrote: "While it is true that some of our prior opinions have looked to the climate of international opinion to reinforce a conclusion regarding evolving standards of decency, we have since explicitly rejected the idea that the sentencing practices of other countries could serve to establish the first Eighth Amendment prerequisite, that a practice is accepted among our people... *Stanford's* reasoning makes perfectly good sense... For if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant." Justice Scalia wrote: "I agree with the Chief

Justice that the views of professional and religious organizations and the results of opinion polls are irrelevant. Equally irrelevant are the practices of the world community, whose notions of justice are (thankfully) not always those of our people. We must never forget that it is a Constitution for the United States of America that we are expounding."

However, this time Chief Justice Rehnquist and Justice Scalia were back in the minority, as they had been 14 years earlier in *Thompson v Oklahoma*. In a welcome development, the six Justices in the *Atkins* majority acknowledged that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."

The international disapproval is even more manifest in the case of child offenders. The execution of people with mental retardation is not expressly mentioned in any international treaty, only in the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. With the almost universal ratification of the Convention on the Rights of the Child, the international picture has become even clearer since 26 June 1989. It is time for the USA to come in from the cold.

## Conclusion

*"But we must have goals beyond just punishment. We must, at the deepest level, embrace our youth instead of fearing them."* President George W. Bush, July 2001(244)

On 15 August 1985, Jay Pinkerton was strapped down in the Texas lethal injection chamber to be killed for a crime committed when he was 17. The needles were inserted into his arms. Minutes before he was due to be put to death, a stay of execution was granted. He was taken back to his cell where he would stay for almost another year, coming 10 hours from execution in November 1985, before finally being killed on 15 May 1986. In the meantime, two other people had been put to death for crimes committed when they were under 18, becoming the first child offenders to be executed in the USA for over two decades. One of them, Charles Rumbaugh, was seriously mentally ill. He had "volunteered" for execution by giving up his appeals, in what two US Supreme Court Justices described as the "choice of a desperate man seeking to use the State's machinery of death as a tool of suicide".(245) The other, James Terry Roach, had an IQ of 70 and the intellectual functioning of a 12-year-old child. He was killed for a crime in which, as the trial judge found, he had acted under the domination of an adult co-defendant. His appeal lawyer described how, in a final attempt to gain the approval of those around him as he was being prepared for death in South Carolina's electric chair, James Roach "tried to pretend that all of the ritual preparation - the shaving of his head and right leg, the prolonged rubbing in of electrical conducting gel - was all of a normal sort of thing to have happen".(246)

One would have hoped that those three executions alone would have been enough to persuade the USA to change course. However, since Charles Rumbaugh, James Roach and Jay Pinkerton were killed, the USA has executed 18 more people for crimes committed when they were under 18 years old, in addition to more than 700 adult offenders. In the same period, more than 40 countries have abolished the death penalty, bringing to 111 the number that have done so in law or practice. At the same time, 191 countries -- all but the USA and Somalia -- have ratified the Convention on the Rights of the Child which prohibits the execution of people who were under 18 at the time of the crime. It is clear that the USA is out of step on this fundamental human rights issue, and far from the progressive force for human rights it so often claims to be.

On 26 June 1989, the US Supreme Court ruled that to execute people with mental retardation or those who commit crimes when 16 or 17 years old was acceptable under the US Constitution. Thirteen years later, in *Atkins v Virginia* in June 2002, it ruled that "standards of decency" had evolved in the USA to the extent that the execution of the mentally retarded was now "cruel and unusual" punishment and therefore constitutionally impermissible. Its 1989 decision on children, however, remains intact. As a result, around 80 people sentenced to death for crimes committed when they were 16 or 17 remain on the country's death rows. Yet if the Court's reasoning in *Atkins* is applied to the execution of child offenders, the only reasonable conclusion is that that practice, too, violates contemporary standards of decency. In some respects, there are signs of a firmer, and longer-held, "national consensus" against the execution of child offenders. The international consensus on the juvenile issue is at least as strong as on the mental retardation issue, and more explicit in international treaty law. The *Atkins* decision acknowledged the relevance of international standards. If the Supreme Court were to ignore the clearer global picture on the juvenile issue, it would be just one more sign of the arbitrary nature of the death penalty in the USA.

The US Supreme Court should overturn *Stanford v Kentucky* at the earliest opportunity. In the meantime, the legislatures of those states which still allow the execution of child offenders should pass laws to raise the age of death penalty "eligibility" to a minimum of 18. Finally, the clemency authorities should ensure that no one else is executed in the USA for crimes committed when they were under 18 years old.

## Appendices

### A selected chronology of how the international consensus has evolved

- 1642 - Thomas Graunger executed in Massachusetts for a crime committed when he was under 18 years old.
- 1791 - **Eighth Amendment** to the US Constitution adopted, prohibiting "cruel and unusual punishments".
- 1863 - **Venezuela** abolishes the death penalty for all crimes. By 2002, 111 countries were abolitionist in law or practice.
- 1910 - US Supreme Court writes that the **Eighth Amendment** ban on cruel and unusual punishment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice".
- 1932 - **United Kingdom** abolishes the death penalty for under 18-year-olds.
- 1941 - Three teenagers - Nathaniel Walker, Edward Powell and Willie Clay - are executed in Florida's electric chair on the same day, 29 December, for crimes committed when they were 14 and 15 years old.
- 1943 - Three teenagers - Benitez Dejesus, Edward Haight and William Diaz - are executed in New York's electric chair on the same day, 8 July, for crimes committed when they were 16 and 17 years old.
- 1949 - **Fourth Geneva Convention** adopted. Article 68.4 states that "the death penalty may not be pronounced against a protected person who was under eighteen of age at the time of the offence."
- 1954 - Six prisoners executed in the USA for crimes committed when they were 16 or 17.
- 1955 - USA ratifies the **Fourth Geneva Convention** without reservation to article 68.4, thereby agreeing that in the event of war or other armed conflict in which the US may become involved, it will protect all civilian children in occupied countries from the death penalty.
- 1958 - US Supreme Court writes that the **Eighth Amendment** ban on cruel and usual punishment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society".
- 
- 1964 - Texas executes James Andrew Echols for a crime committed at 17, the last juvenile offender to be executed in the USA prior to the US Supreme Court overturning the country's death sentences in 1972 in *Furman v Georgia*.
- 1966 - The **International Covenant on Civil and Political Rights** is adopted and opened for signature, ratification and accession by UN General Assembly resolution 2200 A(XXI) of 16 December 1966. Article 6(5) states: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age...".
- 1969 - The **American Convention on Human Rights** is opened for signature on 22 November. Article 4(5) states: "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age...".
- 1976 - *Gregg v Georgia* allows executions to resume in the USA. In the decision, the US Supreme Court notes that historically it has "not confined the prohibition embodied in the Eighth Amendment to "barbarous" methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner."
- 1976 - The **International Covenant on Civil and Political Rights** enters into force on 23 March after its 35th ratification.
- 1977 - **The Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I)** and the **Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)** are adopted on 8 June 1977 by the

Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. Article 77.5 of Protocol I states: "The death penalty for an offence related to armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed". Article 6 of Protocol II states: "The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence...". The USA signs the Protocols on 12 December 1977.

- 1977 - the USA signs the **International Covenant on Civil and Political Rights** and the **American Convention on Human Rights**, thereby binding itself in good faith not to do anything which would defeat the object and purpose of the treaties, pending a decision on whether to ratify them (Vienna Convention on the Law of Treaties (1979), article 18a).
- 1978 - The **American Convention on Human Rights** comes into force on 18 July after its 11th ratification.
- 1978 - **Additional Protocols I and II to the Geneva Conventions** enter into force on 7 December, following their second ratifications.
- 1984 - United Nations Economic and Social Council (ECOSOC) adopts, by consensus, the **Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty**. Safeguard 6 states that "persons below 18 at the time of the commission of the crime shall not be sentenced to death...". The UN General Assembly endorses the Safeguards.
- 1985 - The **Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders** adopts Resolution no 15, endorsing the death penalty Safeguards and urging all retentionist states to implement them. The United States joins in the consensus on this resolution.
- 1985 - Charles Rumbaugh is lethally injected in Texas on 11 September for a crime committed when he was 17, the first execution of a juvenile offender in the modern era of the US death penalty.
- 1985 - The **UN Standard Minimum Rules for the Administration of Juvenile Justice** are adopted by General Assembly resolution 40/33 of 29 November 1985. Rule 17.2 states: "Capital punishment shall not be imposed for any crime committed by juveniles".
- 1986 - **Bangladesh** is reported to have executed Mohammed Selim for a crime committed when he was 17 years old. There is substantial public outcry in the country, and the government later said that he was over 18 at the time of the crime. Bangladesh ratified the Convention on the Rights of the Child in 1990, without reservation to article 37. In its initial report to the UN Committee on the Rights of the Child, the government stated: "Bangladesh was one of the first countries to ratify and sign the Convention on the Rights of the Child. Bangladesh has accepted all of the provisions of the Convention...". Bangladesh acceded to the International Covenant on Civil and Political Rights in 2000, without reservation to article 6.
- 1987 - the **Inter-American Commission on Human Rights** declares that the USA violated Article 1 of the American Declaration of the Rights and Duties of Man when Texas executed James Terry Roach and Jay Pinkerton in 1986 for crimes committed when they were 17 years old. The Commission referred to the "emerging" principle of customary international law prohibiting the execution of child offenders.
- 1989 - the **Convention on the Rights of the Child** is adopted by the UN General Assembly. Article 37(a) states: "Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by person below eighteen years of age".
- 1989 - The **UN Sub-Commission on Prevention of Discrimination and Protection of Minorities** adopted resolution 1989/33 on 1 September 1989, urgently appealing to Member states which still applied the death penalty against under-18-year-olds "to take the necessary legislative and administrative measures with a view to stopping forthwith this practice".
- 1989 - **Barbados**, the only country in the English-Speaking Caribbean to allow for the death penalty for child offenders, abolishes the death penalty for people who were under 18 at the time of the crime. The death sentences of two child offenders, Patrick Greaves and Michael Taylor, both 17 at the time of the crime, are commuted to life imprisonment. The last execution of a child offender in Barbados (Martin Marsh, aged 17 at the time of the crime) took place in 1982.
- 1989 - The **US Supreme Court** rules that it is not unconstitutional to execute prisoners for crimes committed when they were 16 or 17 years old.
- 1990 - The **African Charter on the Rights and Welfare of the Child** opened for signature, ratification and accession. Article 5(3) states: "Death sentence shall not be pronounced for crimes committed by children." Article 2 states: "For the purposes of this Charter, a child means every human being below the age of 18 years".
- 1992 - the USA ratifies the **International Covenant on Civil and Political Rights** with a reservation

purporting to exempt it from article 6(5)'s prohibition on the use of the death penalty against under-18-year-olds. Yet Article 4 of the ICCPR states that there can be no derogation from article 6, even in times of emergency. **Eleven countries** formally object to the US reservation.

- 1993 - The **UN Special Rapporteur on extrajudicial, summary or arbitrary executions** wrote: "The General Assembly has referred to article 6 as forming part of the 'minimum standard of legal safeguards' for the protection of the right to life in a number of resolutions concerning summary or arbitrary executions, most recently in paragraph 12 of resolution 45/162 of 18 December 1990, and the Special Rapporteur considers that article 6 has become a rule of customary international law."
- 1994 - **Yemen**, one of only six countries known to have executed a child offender in the 1990s, abolishes the death penalty for those under 18 at the time of the crime.
- 1994 - The **Arab Charter on Human Rights** is adopted by the Council of the League of Arab States on 15 September. Article 12 states: "The death penalty shall not be inflicted on a person under 18 years of age..."
- 1995 - the **UN Human Rights Committee**, the expert body established by the International Covenant on Civil and Political Rights to oversee implementation of the treaty, holds that the US reservation violates the object and purpose of the treaty and should be withdrawn. The Committee "deplores" the USA's continuing use of the death penalty against child offenders.
- 1995 - the USA signs the **Convention on the Rights of the Child**, thereby binding itself to respect its terms in good faith, pending a decision on whether to ratify it.
- 1997 - **China**, which accounts for the majority of the world's executions each year, nevertheless abolishes the death penalty for those under 18 at the time of the crime, to be in compliance with its obligations under the Convention on the Rights of the Child, which it ratified in 1992.
- 1997 - The **UN Commission on Human Rights** calls on all retentionist countries "to comply fully with their obligations under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, notably not to impose the death penalty for any but the most serious crimes, not to impose it for crimes committed by persons below eighteen years of age..."
- 1998 - The **UN Special Rapporteur on extrajudicial, summary or arbitrary executions**, in the report of his 1997 mission to the USA, reiterates that the US reservation to the ICCPR should be considered void and that the use of the death penalty against child offenders violates international law.
- 1998 - The **UN Commission on Human Rights** repeats the call it made in 1997.
- 1999 - 10th anniversary of the **Convention on the Rights of the Child**. The treaty has been ratified by 191 countries, all but the USA and the collapsed state of Somalia.
- 1999 - Sean Sellers is executed in Oklahoma, becoming the first person since 1959 to be executed in the United States for a crime committed at the age of 16.
- 1999 - The **UN Sub-Commission on the Promotion and Protection of Human Rights** notes, in a resolution on the death penalty against juvenile offenders, "documented information according to which, since 1990, 19 executions of juvenile offenders have taken place worldwide in six countries: the Islamic Republic of Iran, Nigeria, Pakistan, Saudi Arabia, the United States of America and Yemen, of which 10 occurred in the United States, and that, in 1998, only the United States of America is known to have executed juvenile offenders". The Sub-Commission "Condemns unequivocally the imposition and execution of the death penalty on those aged under 18 at the time of the commission of the offence", and "Calls upon all States that retain the death penalty for juvenile offenders to commit themselves to abolishing the death penalty for those aged under 18 at the time of the commission of the offence".
- 1999 - The **UN High Commissioner for Human Rights** appeals to the US Government and Virginia state authorities to prevent the scheduled execution of Douglas Christopher Thomas and to "reaffirm the customary international law ban on the use of the death penalty on juvenile offenders".
- 1999 - The **African Charter on the Rights and Welfare of the Child**, which prohibits the use of the death penalty for the crimes of under 18-year-olds, enters into force on 29 November, following its 15th ratification. By the end of 2001, there are 26 ratifications.
- 1999 - The **UN Commission on Human Rights** repeats the call it made in 1997 and 1998.
- 1999 - The USA becomes one of the first countries to ratify the **International Labour Organization Convention 182 on the Worst Forms of Child Labour**, aimed at protecting children *under 18 years old*.
- 2000 - three child offenders are executed in the USA in the first month of the year.
- 2000 - **Pakistan's** Juvenile Justice System Ordinance, signed by the country's President on 1 July, abolishes the death penalty for people under 18 at the time of the crime. Pakistan is one of five countries reported to have executed a child offender since 1994.

- 2000 - the **UN Sub-Commission on the Promotion and Protection of Human Rights** affirms that "the imposition of the death penalty on those aged under 18 at the time of the commission of the offence is contrary to customary international law". The Sub-Commission repeats its unequivocal condemnation of such use of the death penalty and calls upon countries that retain the death penalty for child offenders to abolish it as soon as possible and, "in the meantime, to remind their judges that the imposition of the death penalty against such offenders is in violation of international law.
- 2000 - The **UN Commission on Human Rights** repeats the call it made in 1997, 1998 and 1999.
- 2001 - President Musharraf of **Pakistan** announces that he will commute the death sentences of child offenders on death row in his country.
- 2001 - Five child offenders have their death sentences commuted in **Democratic Republic of Congo**.
- 2001 - The **UN Commission on Human Rights** calls upon all retentionist states to comply fully with their obligations under the ICCPR and the CRC, including not to impose the death penalty for crimes committed by persons below eighteen years of age. It calls on countries to withdraw any reservations they have lodged to article 6 of the ICCPR given that this article "enshrines the minimum rules for the protection of the right to life and the generally accepted standards in this area". The Commission also welcomes the Sub-Commission's resolution of 2000.
- 2001 - In its authoritative interpretation of the **International Covenant on Civil and Political Rights**, the **Human Rights Committee** writes in its General Comment 29: "The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7)."
- 2002 - **Somalia** signs the **Convention on the Rights of the Child** on 9 May. At the **UN General Assembly Special Session on Children**, Somalia stated its intention to ratify the Convention. When it does so, it will be the 192nd state party, and the USA will be the only country not to have ratified. At the special session, the US government described itself as "the global leader in child protection".
- 2002 - The **UN Commission on Human Rights** "Reaffirms resolution 2000/17 of 17 August 2000 of the Sub-Commission on the Promotion and Protection of Human Rights on international law and the imposition of the death penalty on those aged under 18 at the time of the commission of the offence", and repeats its call on all retentionist countries not to use the death penalty against under-18-year-olds.
- 2002 - The Rome Statute of the **International Criminal Court** comes into force after the 60th country ratifies. The death penalty will not be an option on the ICC, even for the worst crimes in the world - genocide, war crimes and crimes against humanity.
- 2002 - USA executes three more child offenders. **Pakistan** takes 74 child offenders off death row.

**Table 1: International instruments, and USA's position on them**

International instrument		States Party	
<b>Protection from death penalty to under-18-year-olds</b> <b>Notes on US position</b>			
International Covenant on Civil and Political Rights	148	Article 6(5): "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age...".	Reservation to article 6(5) found invalid by Human Rights Committee. Article 6 is non-derogable (article 4.2).
Convention on the Rights of the Child	191	Article 37(a): "Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences	The USA signed in 1995. Under article 18 of the Vienna Convention on the Law of Treaties, it thereby bound itself not to

		committed by person below eighteen years of age".	undermine the object and purpose of the treaty, pending a decision on whether to ratify it.
American Convention on Human Rights	24	Article 4(5): "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age...".	The USA signed in 1977, see above.
Fourth Geneva Convention	189	Article 68.4 states that "the death penalty may not be pronounced against a protected person who was under eighteen of age at the time of the offence."	Ratified by the USA in 1955, without reservation to article 68
Additional Protocol I to the Geneva Conventions	159	Article 77.5: "The death penalty for an offence related to armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed".	Signed by the USA in 1977.
Additional Protocol II to the 1949 Geneva Conventions	151	Article 6: "The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence...".	Signed by the USA in 1977.
UN Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty	consensus	Safeguard 6 states that "persons below 18 at the time of the commission of the crime shall not be sentenced to death...".	The USA did not block the adoption of the Safeguards.

**Table 2: Reported executions of child offenders outside USA, 1990 - 2002**

Country	Name of prisoner	Age at crime (C), sentence (S), or execution (E)	Year of death	Notes
Democratic Republic of Congo	Kasongo	14 (C/E)	2000	In 2001, the death sentences of five children were

				commuted. At the time of writing there was a moratorium on executions in DRC.
Iran	Kazem Shirafkan Male (name unknown) Male (name unknown) Male (name unknown) Male (name unknown) Ebrahim Qorbanzadeh Jasem Abrahimi Mehrddad Youssefi	17 (E) 16 (E) 17 (E) 17 (E) 17 (E) 17 (E) 16 (C)	1990 1992 1992 1992 1999 2000 2001	
Nigeria	Chiebore Onuoha	15 (C)	1997	
Pakistan	Name unknown Shamun Masih Ali Sher	17 (E) 14 (C) 13 (C)	1992 1997 2001	In July 2000, the Juvenile Justice System Ordinance was promulgated, abolishing the death penalty for anyone under 18 at the time of the crime. In July 2002 it was announced that 74 young offenders had been taken off death row.
Saudi Arabia	Sadeq Mal-Allah	17 (S)	1992	
Yemen	Nasser Munir Nasser al'Kirbi	13 (E)	1993	In 1994 Yemen abolished the death penalty for people under 18 at the time of the crime.

**Table 3: Juvenile executions in the USA since 1977**

	Name	State	Age at crime	Year of execution			
Race of defendant Race of victim(s)							
	1	Charles Rumbaugh	Texas	17	1985	W	W
	2	James Terry Roach	S. Carolina	17	1986	W	W
	3	Jay Pinkerton	Texas	17	1986	W	W
	4	Donald Prejean	Louisiana				
	17						
	19						
	90						
	BW						
	5	Johnny Garrett	Texas	17	1992	W	W
	6	Curtis Harris	Texas	17	1993	B	W
	7	Frederick Lashley	Missouri	17	1993	B	B
	8	Ruben Cantu	Texas	17	1993	L	L
9	Christopher Burger	Georgia	17	1993	W	W	
10	Joseph Cannon	Texas	17	1998	W	W	
11	Robert Carter	Texas	17	1998	B	L	
12	Dwayne Allen Wright	Virginia	17	1998	B	B	
13	Sean Sellers	Oklahoma	16	1999	W	W	

14	Christopher Thomas	Virginia	17	2000	W	W
15	Steven Roach	Virginia	17	2000	W	W
16	Glen McGinnis	Texas	17	2000	B	W
17	Gary Graham	Texas	17	2000	B	W
5						
18	Gerald Mitchell	Texas	17	2001		
BW						
19	Napoleon Beazley	Texas	17	2002	B	W
20	T.J. Jones	Texas	17	2002	B	W
21	Toronto Patterson	Texas	17	2002	B	B

B = Black; L = Latino; W = White x2880

**Table 4: Prisoners with alleged mental retardation executed since 1977**

	<b>Name</b>	<b>State</b>	<b>Year of execution</b>	<b>Notes, including on IQ assessment (247)</b>
1	Arthur Goode	Florida	1984	IQ 60-63. History of mental illness.
2	Ivon Stanley	Georgia	1984	IQ 62.
3	James Henry	Florida	1984	IQ 70-75.
4	Morris Mason	Virginia	1985	IQ 66. Also history of mental illness.
5	James Roach	S.Carolina	1986	IQ 69-70.
6	Jerome Bowden	Georgia	1986	IQ 59-65.
7	Willie Celestine	Louisiana	1987	IQ 69 reported.
8	John Brogdon	Louisiana	1987	IQ 64-74.
9	Horace Dunkins	Alabama	1989	IQ 65-69.
10	Alton Waye	Virginia	1989	Probable mental retardation.
11	Johnny Anderson	Texas	1990	IQ 70.
12	Dalton Prejean	Louisiana	1991	IQ 71-76. Also history of mental illness.
f1 13	Ignacio Cuevas	Texas	1991	IQ 61 reported.
14	Ricky Rector	Arkansas	1992	Already impaired, had the equivalent of a frontal lobotomy during surgery after shooting himself in the head on arrest.
15	William White	Texas	1992	IQ 66-69.
16	Nollie Martin	Florida	1992	IQ 59.
17	Ricky Grubbs	Missouri	1992	IQ 72.
18	Cornelius Singleton	Alabama	1992	IQ 58-69.
19	Robert Sawyer	Louisiana	1993	IQ 65-68. History of mental illness.
20	William Hance	Georgia	1994	IQ low 70s.
21	Mario Marquez	Texas	1995	IQ 62-66.
22	Sylvester Adams	S.Carolina	1995	IQ 65-69.

		a		
23	Barry Fairchild	Arkansas	1995	Post-conviction testing in 1989 assessed his IQ at 63. Other ttests had put the score at 75-78. At school, his IQ had been assessed at 65.
24	Jerry White	Florida	1995	IQ 72.
25	Walter Correll	Virginia	1996	IQ 64.
26	Luis Mata	Arizona	1996	IQ 64-70.
27	Frank Middleton	S.Carolina	1996	IQ 68-69.
28	Terry Washington	Texas	1997	IQ 58-69.
29	Tony Mackall	Virginia	1998	IQ 68.
30	Reginald Powell	Missouri	1998	IQ 65.
31	Robert Carter	Texas	1998	IQ 74. Diagnosed as having retardation.
w Width 10 80				
32	Ronald Yeatts	Virginia		
19 991 Q 70.				
33	Charles Boyd	Texas	1999	IQ 64.
34	David Leisure	Missouri	1999	IQ 70-74
35	Alvaro Calambro	Nevada	1999	IQ 71, and said to have "mental age" of 13. Also suffered mental illness.
36	Willie Sullivan	Delaware	1999	At the trial, psychologist testified that Sullivan had mental retardation. Post-conviction testing in 1995 and 1999 placed his IQ at 70-71.
37	Charles Foster	Oklahoma	1999	Was assessed as mentally retarded at school until he was 15 years old.
38	Oliver Cruz	Texas	2000	IQ 64-76.
39	John Satterwhite	Texas	2000	IQ 74. Diagnosed as mentally retarded. Also had history of mental illness.

40	Robert Clayton	Oklahoma	2001	The 11th Circuit Court of Appeals said: "Clayton is retarded and has an IQ of 68".

**Table 5: Executions of people with alleged borderline mental retardation.**

	Name	State	Year of execution	Notes
1	Richard Whitley	Virginia	1986	IQ 75
2	George Gilmore	Missouri	1990	Borderline mental retardation
3	Ruben Cantu	Texas	1993	Borderline mental retardation, IQ 70-80.
4	Curtis Harris	Texas	1993	IQ 77.
5	Joe Wise	Virginia	1994	Borderline mental retardation
6	Willie Clisby	Alabama	1995	Borderline mental retardation.
7	Girvies Davis	Illinois	1995	Borderline mental retardation.
8	Richard Oxford	Missouri	1996	IQ 70-80.
9	John Earl Bush	Florida	1996	rd Borderline mental retardation.
10	Kenneth Harris	Texas	1997	IQ variously assessed at 68, 71 and 93. Two experts said he functioned in the borderline or mild mental retardation range.
11	Joseph Cannon	Texas	1998	IQ 79.
12	Ronald Fitzgerald	Virginia	1998	Borderline mental retardation
13	Dwayne Wright	Virginia	1998	Borderline mental retardation.
14	Tony Fry	Virginia	1999	IQ 77
15	Victor Kennedy	Alabama	1999	IQ mid 70s to mid 80s.
16	Thomas Royal	Virginia	1999	Borderline mental retardation.
17	Raymond Jones	Texas	1999	IQ 73-80
18	Cornel Cooks	Oklahoma	1999	In Special Education at school. IQ 75.
19	Bobby Ross	Oklahoma	1999	IQ 57-76
20	James Chambers	Missouri	2000	IQ 78.
21	Eddie Trice	Oklahoma	2000	IQ 79.
22	Wanda Jean Allen	Oklahoma	2001	Borderline mental retardation.
23	Gerald Mitchell	Texas	2001	Evidence of IQ 75 presented at trial

24	Jose Martinez High	Georgia	2001	Borderline mental retardation.
25	T.J. Jones	Texas	2002	IQ 78.

**State prohibition on execution of juveniles or mentally retarded**

**1. States prohibiting the execution of the mentally retarded, at the time of *Atkins***

Arizona  
Arkansas  
Colorado  
Connecticut  
Florida  
Georgia  
Indiana  
Kansas  
Kentucky  
Maryland  
Missouri  
Nebraska  
New York  
New Mexico  
North Carolina.  
South Dakota  
Tennessee  
Washington    Total - 18

**2. States prohibiting the execution of people for crimes committed when under 18**

California  
Colorado  
Connecticut  
Illinois  
Indiana  
Kansas  
Maryland  
Montana  
Nebraska  
New Jersey  
New Mexico  
New York  
Ohio  
Oregon  
Tennessee  
Washington    Total - 16

**3. Abolitionist jurisdictions**

Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, District of Columbia

Total - 13

**Child offenders on death row in the USA, August 2002**

**Alabama**

Renaldo Adams - B - 17  
Willie Burgess, Jr. - B - 16

Timothy Davis - W - 17  
Mark Duke - W - 16  
Trace Duncan - W - 17  
Gary Hart - B - 16  
James Hyde - W - 17  
William Knotts - W - 17  
Kenny Loggins - W - 17  
Marcus Pressley - B - 16  
Nathon Slaton - W - 17  
Shaber Wimberly - W - 17  
Gregory Wynn - B - 17

### **Arizona**

James Davolt - W - 16  
Martin Soto-Fong - H - 17  
Christopher Huerstel - W - 17  
Levi Jackson - W - 16  
Kenneth Laird - W - 17

### **Florida**

Ronald Bell - B - 17  
James Bonifay - W - 17  
Cleo LeCroy - W - 17  
Rossiny St Clair - B - 17

### **Georgia**

Exzavious Gibson - B - 17  
Larry Jenkins - B - 17

### **Kentucky**

Kevin Stanford - B - 17

### **Louisiana**

Roy Bridgewater - B - 17  
Adam Comeaux - B - 17  
Dale Craig - W - 17  
Cedric Howard - B - 16  
Ryan Matthews - B - 17  
Corey Williams - B - 16  
Lawrence Jacobs - B - 16(248)

### **Mississippi**

David Blue - B - 17  
Kelvin Dycus - W - 17  
Roderick Eskridge - B - 17  
Ronald Foster - B - 17  
William Holly - W - 17  
Stephen McGilberry - W - 16

### **Missouri**

Antonio Richardson - B - 16  
Christopher Simmons - W - 17

### **Nevada**

Michael Domingues - H - 16

### **North Carolina**

Thomas Adams - W - 17  
Lamorris Chapman - B - 17

Kevin Golphin - B - 17  
Francisco Tirado - H - 17  
Travis Walters - B - 17

**Oklahoma**

Scott Hain - W - 17

**Pennsylvania**

Derrick Harvey - B - 16  
Kevin Hughes - B - 16  
Percy Lee - B - 17  
Antione Ligons - B - 17

**South Carolina**

Robert Conyers - B - 16(249)  
Herman Hughes - B - 16  
Ted Powers - W - 16

**Texas**

Steven Alvarado - H - 17  
Randy Arroyo - H - 17  
Mark Arthur - W - 17  
Mauro Barraza - H - 17  
Johnnie Bernal - H - 17  
Edward Capetillo - H - 17  
Raymond Cobb - W - 17  
John Dewberry - W - 17  
Justin Dickens - W - 17  
Anthony Dixon - B - 17  
Derek Guillen - H - 17  
Patrick Horn - B - 17(250)  
Eddie Johnson - B - 17  
Anzel Jones - B - 17  
Leo Little - W - 17  
Michael Lopez - H - 17  
Jose Monterrubio - H - 17  
Efrian Perez - H - 17  
Whitney Reeves - W - 17  
Robert Springsteen - W - 17  
Christopher Solomon - B - 17  
Oswaldo Soriano - H - 17  
Son Vu Khai Tran - A - 17  
Raul Villareal - H - 17  
Bruce Williams - B - 17  
Nanon Williams - B - 17  
Geno Wilson - B - 17  
40

**Virginia**

Shermaine Johnson - B - 16(251)

A = Asian = 1  
B = Black = 38 (47%)  
H = Hispanic = 14 (17%)  
W = White = 29 (35%)  
Total = 82

- *The death penalty and juvenile offenders* (AMR 51/23/91, October 1991)
- *Texas: Executing juvenile offenders* (AMR 51/74/93, August 1993)
- *On the wrong side of history: Children and the death penalty in the USA* (AMR 51/58/98, October 1998)
- *Killing hope: The imminent execution of Sean Sellers* (AMR 51/108/98, December 1998)
- *Shame in the 21st Century: Three child offenders scheduled for execution in January 2000* (AMR 51/189/99, December 1999)
- *Crying out for clemency: The case of Alexander Williams, mentally ill child offender facing execution* (AMR 51/139/00, September 2000)
- *Too young to vote, old enough to be executed. Texas set to kill another child offender* (AMR 51/105/2001, July 2001)

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- (1) Senator Greer. Tenn. S., *Debate on HB 2107 on the Floor of the Senate*, 96th Gen. Assembly, 2nd Reg. Sess. (12 April 1990). Tennessee adopted the bill exempting people with mental retardation in 1990. It had done so for defendants under the age of 18 at the time of the crime six years earlier.
- (2) *Penry v Lynaugh*, 492 U.S. 302 (1989). For a description of the case, see *Beyond Reason: The imminent execution of John Paul Penry*, AI Index: AMR 51/195/99, December 1999.
- (3) UN Economic and Social Council Resolution 1989/64, adopted 24 May 1989, recommended that UN member states eliminate the death penalty "for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution".
- (4) *Stanford v Kentucky*, 492 U.S. 361 (1989). The case was combined with *Wilkins v Missouri*. Kevin Stanford was 17 at the time of the crime. Heath Wilkins was 16. A year earlier, the US Supreme Court handed down a decision which, in effect, ruled that the execution of people who were under 16 years old at the time of the crime was unconstitutional, *Thompson v Oklahoma*, 487 U.S. 815 (1988).
- (5) Adopted and opened for signature, ratification and accession by UN General Assembly resolution 44/25 of 20 November 1989. The Convention came into force on 2 September 1990, 30 days after the 20th ratification.
- (6) *Weems v US*, 217 U.S. 349 (1910).
- (7) *Trop v Dulles*, 356 U.S. 86 (1958).
- (8) Amnesty International was one of the *amici*, that is, had filed an *amicus curiae* [friend of the court] brief with the Court detailing international law and trends on the issue.
- (9) *Atkins v Virginia*, (2002).
- (10) The "modern era" of the death penalty refers to the period since the US Supreme Court ruled in *Gregg v Georgia* in 1976 that executions could resume under revised capital statutes. Four years earlier, in *Furman v Georgia*, the Court had found that the death penalty was being applied in an unconstitutional manner.
- (11) *A New Millennium: Time To Stop Tinkering with the Machinery of Death*. Remarks of Senator Russ Feingold. Columbia University School of Law, 10 April 2000.
- (12) Although the state claimed that no electricity had reached the prisoner, later affidavits from official witnesses claimed that the teenager had "groaned and jumped so that the chair came off the floor", "his body squirmed and tensed", and "this boy really got a shock when they turned that machine on". *State of LA. Ex Rel Francis v Resweber*, US Supreme Court, 329 U.S. 459 (1947).
- (13) For other examples of "botched" executions, see <http://www.deathpenaltyinfo.org/botched.html>
- (14) See *Dignity Denied: The experience of Murder Victims' Family Members who Oppose the Death Penalty*, August 2002, Murder Victims Families for Reconciliation. <http://www.mvfr.org/dignitydenied.html>
- (15) *State cruelty against families*, AI Index: AMR 51/132/2001, 4 September 2001.
- (16) Lakeisha Brumfield, from transcript of clemency video, 2002.
- (17) *Death in black and white*. AI Index: AMR 51/117/2001, 9 August 2001.
- (18) *State v Makwanyane*, 6 June 1995, Justice Kate O'Regan, concurring.

- (19) *The death penalty in South Africa*, AI Index: AFR 53/02/80, April 1980.
- (20) *On the wrong side of history: Children and the death penalty in the USA*, AI Index: AMR 51/58/98, October 1998, page 17.
- (21) Amnesty International press release, IOR 41/017/2000, 14 May 2002. Also *USA: Hypocrisy or human rights? Time to choose*, AI Index: AMR 51/075/2002, 15 May 2002.
- (22) *West Virginia State Board of Education v Barnette*, 319 U.S. 624 (1943).
- (23) *People v Anderson*, California Supreme Court, 6 Cal. 3d 628 (1972).
- (24) Anti-Drug Abuse Act, 1988. "A sentence of death shall not be carried out upon a person who is mentally retarded." 21 USC 848 (1).
- (25) *Patterson v Texas*, 536 U.S. (2002), Justice Stevens dissenting from denial of application for stay and petition for writ of *certiorari*.
- (26) *Atkins v Commonwealth*, 260 VA. 375 (2000), Justice Hassell dissenting.
- (27) *Atkins v Commonwealth*, Justice Koontz dissenting.
- (28) *Atkins v Virginia*, 20 June 2002.
- (29) *Domingues v State*, 31 July 1998, Chief Justice Springer and Justice Rose dissenting.
- (30) The US Supreme Court stopped the execution of Ernest McCarver in North Carolina shortly before it was due to be carried out on 2 March 2001 in order to give itself more time to consider whether to re-examine the constitutionality of executing people with mental retardation. On 26 March 2001, it agreed to take the McCarver appeal. Arizona, Connecticut, Florida, Missouri and North Carolina subsequently enacted legislation exempting people with mental retardation from the death penalty. The Supreme Court dropped the McCarver case after North Carolina adopted its legislation. The Court later agreed to take the case of Daryl Atkins in Virginia.
- (31) *Domingues v State*. In the US Supreme Court, on petition for a writ of *certiorari* to the Supreme Court of Nevada. Brief for the United States as amicus curiae. October 1999.
- (32) See Amnesty International Urgent Action 150/99, AMR 51/102/99, 29 June 1999, and updates (AMR 51/171/99, 22 October 1999 and AMR 51/148/99, 1 November 1999).
- (33) *Judge leaning toward death penalty for killer of couple*. Mohave Daily News, 27 June 2000.
- (34) Transcript of videotape of hearing, made by Napoleon Beazley's appeal lawyer.
- (35) The Illinois trial of Richard Loeb and Nathan Leopold took place for the murder of a 14-year-old boy committed in 1924 when the two defendants were 18 and 19. Clarence Darrow was their defence lawyer.
- (36) *Ex parte Burgess* and *Ex parte Pressley*, 28 January 2000. Justice Houston was quoting from *Attorney for the Damned: Clarence Darrow in His Own Words* (Simon and Schuster, 1957). The *Burgess* opinion was replaced by another on 21 July 2000 (with Justice Houston repeating his opinion), in which the Alabama Supreme Court upheld the conviction, but remanded for resentencing. Roy Burgess was sentenced to life imprisonment in 2001. Marcus Pressley remained on Alabama's death row at the time of writing.
- (37) *Tokman v State*, 435 So. 2d 664. Chief Justice Patterson wrote the opinion upholding the death sentence of George David Tokman for a crime committed when he was 17.
- (38) In addition, in 1988 the Supreme Court found that 18 states was sufficient evidence of a national consensus against the execution of people who were under 16 years old at the time of the crime. *Thompson v Oklahoma*, 487 U.S. 815 (1988). "Relevant state statutes - particularly those of the 18 States that have expressly considered the question of a minimum age for imposition of the death penalty, and have uniformly required that the defendant have attained at least the age of 16 at the time of the capital offense - support the conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense".
- (39) Based on the 2000 Census, rounding figures.
- (40) *Furman v Georgia*, 408 U.S. 238 (1972).
- (41) *Gregg v Georgia*, 428 U.S. 153 (1976).
- (42) Details in this report of juvenile executions that occurred in the USA before 1972 are taken from Streib, Victor L. *Death penalty for juveniles*. Indiana University Press, 1987; and Bowers, William J. *Legal homicide. Death as punishment in America, 1864-1982*. Northeastern University Press, 1984.
- (43) *Rice v Cunningham*, 61 Ill. 2d 353 (1975).
- (44) The Commission on Capital Punishment appointed by Governor George Ryan after he imposed a moratorium on executions in Illinois in January 2000 has recommended that the state "adopt a statute which prohibits the imposition of the death penalty for those defendants found to be mentally retarded". Recommendation 68. *Report of the Governor's Commission on Capital Punishment*. April 2002.
- (45) For example Hubert Gerald, whose IQ has been assessed as low as 59, was sentenced to death in 1997. Latasha Pulliam whose IQ has been assessed at 69 was sentenced in 1992. Julius Kuntu, with an IQ of 58-69, was sentenced to death in 1994. Girvies Davis, who was diagnosed with borderline mental retardation and brain damage from being hit by a truck when he was 10, was executed in 1995. Illinois has

not executed a child offender since 1929.

(46) According to the California Department of Corrections, there were 610 prisoners under sentence of death in the state on 31 March 2002. This is about 16 per cent of the USA's condemned inmates.

(47) *Justices face IQ test*. LA Weekly, 1-7 March 2002. This article gives two possible cases: David Rey Fierro (IQ 66-77) and Tracy Cain (IQ 74).

(48) *Battin Seeks Death Penalty For 16 And 17 Year Old Killers*. Senator Jim Battin news release, 17 March 1999. "Governor Gray Davis announced during his campaign that he favors expanding the death penalty for juvenile murderers to age 16 and up. [This bill] will help keep the Governor's campaign promise to all Californians."

(49) Report on hearing before the Assembly Committee on Public Safety, 13 April 1999.

(50) *Governor favors death penalty for kids as young as 13*. Lubbock Avalanche-Journal, 16 January 1996. Cited in *Killing for Votes: The Dangers of Politicizing the Death Penalty Process*, by Richard C. Dieter, Death Penalty Information Center, October 1996.

(51) *Johnson softens death-penalty stance*. The Santa Fe New Mexican, 19 December 2001.

(52) *Lockett v Ohio*, 438 U.S. 586 (1978). The Court found that the Ohio statute unconstitutionally restricted the consideration of mitigating factors for sentencing.

(53) John Harris (17); Willie Bell (16); Ronnie Bridgeman (17); Mark Davis (17); Willie Johnson (17) and Paul Starks (17). *The juvenile death penalty today: Death sentences and executions for juvenile crimes, January 1, 1973 - December 31, 2001*. Victor Streib, Ohio Northern University. 8 March 2002. Willie Bell, sentenced to death for a crime committed in 1974 when he was 16, was also mentally impaired. See *Bell v Ohio*, 438 U.S. 637 (1978).

(54) By 12 July 2002, at least eight Ohio death row inmates had appealed against their death sentences on the basis of claims of mental retardation following the *Atkins* decision. *Number growing of death row appeals based on high court ruling*. Associated Press, 12 July 2002.

(55) *State v Stewart*, 197 Neb. 497 (1977).

(56) A psychologist for the defence had assessed Van Tran's IQ at 67. The state's expert contested this and said that the IQ was 72. The courts sided with the state version. Using an updated test, the defence expert subsequently assessed Van Tran's IQ at 65, which led to the new appeal. Under the Tennessee statute, an IQ of under 70, together with other indications of mental retardation, exempt such a defendant from execution.

(57) *Heck Van Tran v State of Tennessee*, No W2000-00739-SC-R11-PD (4 December 2001), Justice Barker and Justice Holder concurring in part, dissenting in part.

(58) For a case summary of James Trimble's case, see *The death penalty and juvenile offenders in the USA*. AI Index: AMR 51/23/91, October 1991. James Trimble's IQ was assessed at 64-66.

(59) 21 USC 848 (1).

(60) This also seems to have been indicated since. Justice Stevens, who authored the *Atkins* decision, reportedly told a gathering of judges on 18 July that the question of executing child offenders was likely to be resolved by legislation, rather than through the courts. *Supreme Court justice: Next big death penalty issue could be age*, Associated Press, 18 July 2002. Then, on 28 August 2002, the US Supreme Court refused to stop the execution of Toronto Patterson and review the constitutionality of executing people who, like Patterson, were under 18 at the time of the crime.

(61) *State v. Furman*, 858 P.2d 1092 (1993).

(62) Prosecutors had originally sought the death penalty against four of the defendants, three of the 17-year-olds (including Furman) and one of the 16-year-olds. The other seven were sentenced to life imprisonment without the possibility of parole, in violation of article 37 of the Convention on the Rights of the Child.

(63) *State v. Furman*, 858 P.2d 1092 (1993), Justice Utter concurring.

(64) Norman Roye and William Byers, executed in 1956. Bowers, William J. *Legal homicide. Death as punishment in America, 1864-1982*. Northeastern University Press, 1984.

(65) Kansas Statute No. 21-4634. Chapter 21. PART III. Part 2. Article 46 (f).

(66) At the 1980 trial of John Penry in Texas, "the jury rejected his insanity defense, which reflected their conclusion that Penry knew that his conduct was wrong and was capable of conforming his conduct to the requirements of the law" (*Penry v Lynaugh*, 1989). John Penry, whose case led to the landmark 1989 *Penry* decision, has consistently been assessed as having mild to moderate mental retardation and the mental age of a seven-year-old. In the *Penry* ruling, the Supreme Court held that the Eighth Amendment ban on cruel and unusual punishments "does not categorically prohibit the execution of mentally retarded capital murderers of [Penry's] reasoning ability." Upholding the death sentence against Daryl Atkins in Virginia in 2000, the Virginia Supreme Court noted that the state's expert, as well as the defence expert who testified that Atkins had mild mental retardation, had both testified that "Atkins was able to appreciate the

criminality of his conduct and understood that it was wrong to shoot [the victim]". As the *Atkins* majority noted, Georgia became the first state to prohibit the use of the death penalty against people with mental retardation following the widespread criticism of the execution of Jerome Bowden, a prisoner with an IQ of 59-65. The Board of Pardons and Paroles had stayed his execution for a week in order that new IQ tests could be conducted. Although these tests also put his IQ at 65, the Board decided that Bowden knew right from wrong and voted to allow the execution to proceed. They, too, had essentially applied the legal insanity test.

(67) New York Criminal Procedure, Title L. Article 400, Section 27.12 (c) and (d).

(68) See Amnesty International Urgent Action, EXTRA 59/99, AMR 51/79/99, 14 May 1999. The jury recommended, and the judge accepted, a sentence for Gregory Dickens of life imprisonment without the possibility of parole.

(69) Indiana prosecutors had obtained death sentences against at least two child offenders in the 1980s, Keith Patton and Paula Cooper, for crimes committed when they were 17 and 15 respectively. Both sentences were overturned on appeal and each is now serving a life sentence.

(70) Aside from the state legislative moves already noted, other indications of this consistently upward movement include: Kentucky raised its minimum from 14 to 16 in 1986 (Kentucky had revised its juvenile code in 1980, under which it would have exempted under-18-year-olds from the death penalty. However, due to funding problems, the code was never implemented and was repealed in 1984). North Carolina raised its minimum from 14 to 17 in 1987. Missouri raised the minimum from 14 to 16 in 1990. In 1999, the Florida Supreme Court raised the minimum age for death penalty eligibility in that state from 16 to 17. *Keith Brennan v State of Florida*, No. 90,279 (Revised opinion, 9 July 1999). The Court ruled that to execute people for crimes committed when they were 16 violated the state's constitutional ban on cruel or unusual punishment.

(71) See *Betraying the Young: Human rights violations against children in the US justice system*, AMR 51/57/98, November 1998.

(72) *Executioner's myth*. By Michael A. Males, Los Angeles Times, 4 May 1997.

(73) *Old enough to kill, old enough to die*. By Steven A. Drizen and Stephen K. Harper. San Francisco Chronicle, 16 April 2000.

(74) *Battin Seeks Death Penalty For 16 And 17 Year Old Killers*. Senator Jim Battin news release, 17 March 1999.

(75) *Teen gets death in slaying of lawman*. Houston Chronicle, 25 May 1999.

(76) *Maxey v State*. Transcript of sentencing hearing, 8 February 2000. In the 1995 decision finding the death penalty unconstitutional, Justice Sachs of the Constitutional Court of South Africa wrote: "Executing a trussed human being long after the violence has ended, totally lacks proportionality in relation to the use of force, and does not fall within the principles of self-defence". *State v. Makwanyane*, 6 June 1995.

(77) *On the wrong side of history*. *Op.cit.* pages 11-14.

(78) *Executioner's myth*, Los Angeles Times, 5 May 1997.

(79) *Penry v Lynaugh*, 492 U.S. 302 (1989).

(80) *Thompson v Oklahoma*, 487 U.S. 815 (1988), Justice O'Connor, concurring in the judgment.

(81) House Study Bill 544 and Senate Bill 3023. Iowans Against the Death Penalty: [www.iadp.org](http://www.iadp.org)

(82) Senate Bill 328, introduced 21 November 2001.

(83) Senate Bill 0202: "Death penalty for first degree murder".

(84) Napoleon Beazley and T.J. Jones were executed in Texas on 22 May and 8 August 2002 respectively for car jacking murders committed in 1994 when they were 17. There are other child offenders on death row in the USA for car jacking murders, including Bruce Williams (17, Texas), Dale Craig (17, Louisiana) and Levi Jackson (16, Arizona).

(85) US Code, Title 18, Section 3591 (a)(2)(D)

(86) *Olmstead v US*, 277 U.S. 438 (1928), Justice Brandeis dissenting.

(87) *Heck Van Tran v State of Tennessee* (2001), part concurrence, part dissent, *op.cit.*

(88) *Burroughs v US*, 290 U.S. 534 (1934).

(89) *Anderson v Celebrezze*, 460 U.S. 780 (1983).

(90) *The illusion of control: "Consensual" executions, the impending death of Timothy McVeigh, and the brutalizing futility of capital punishment*. Amnesty International Index: AMR 51/053/2001, April 2001.

(91) *Sanford v State*, CR 99-1057, 14 September 2000. Sanford's IQ was assessed at 67 by the defence and 75 by the state. His school records show that Sanford was considered to have mild mental retardation during much of his time in school.

(92) See: <http://www.deathpenaltyinfo.org/percapita.html>

(93) Prosecutors sought a death sentence against Justin Burrell at his trial in Dover in August 1999 for a murder committed when he was 17 years old, but were unsuccessful. The jury recommended life

imprisonment without parole. See Amnesty International Urgent Action EXTRA 106/99, AMR 51/126/99, 10 August 1999.

(94) Amnesty International Urgent Action 220/99, AMR 51/135/99, 26 August 1999.

(95) These five death sentences are now in question following the US Supreme Court decision in *Ring v Arizona* on 24 June 2002 concerning the constitutionality of judge v. jury sentencing in capital cases.

(96) Office of the Attorney General, State of Arizona. *Capital Case Commission Interim Report*, 2001.

(97) *Spring 2000 Kentucky Survey*, University of Kentucky Research Center.

(98) *Executing Children: Kentucky can end practice by enacting law in this session*. By Stephen B. Bright, Louisville Courier Journal, 17 March 2002.

(99) *Executing juveniles*. Editorial, Louisville Courier-Journal, 22 February 2002.

(100) HB 447.

(101) HB 407.

(102) American Baptist Churches, American Friends Service Committee, American Jewish Committee, American Jewish Congress, Christian Church (Disciples of Christ), Mennonite Central Committee, General Conference Mennonite Church, National Council of Churches, General Assembly of the Presbyterian Church, Southern Christian Leadership Conference, Union of American Hebrew Congregations, United Church of Christ Commission for Racial Justice, United Methodist Church General Board of Church and Society, United States Catholic Conference, and West Virginia Council of Churches.

(103) Transcript of *Dead Kid Walking*. BBC *Correspondent* program, broadcast on 16 August 1999.

(104) As a judge on the Oklahoma Court of Criminal Appeals put it: "While the Governor refused to sign House Bill 2635, its passage may be taken as an expression of the will of the majority of Oklahomans, showing that our citizens, like most of the country as reflected in *Atkins*, do not wish to execute the mentally retarded." *Murphy v State*, OK CR 32, 4 September 2002, Judge Chapel dissenting.

(105) Smith, Tom W., *Public opinion of the death penalty for youths*. National Opinion Research Center, University of Chicago, prepared for the Joyce Foundation, p.2 (December 2001).

(106) *Slim majority of Americans say death penalty applied fairly*. Gallup News Service, 20 May 2002.

(107) At the 1978 trial of Jose Martinez High in Georgia, his date of birth was given as 19 August 1958, which would have made him 17 at the time of the murder for which he was subsequently sentenced to death. The Georgia authorities later stated that High's birth certificate gave his birth date as 19 August 1956, in which case he was 19 years old in July 1976. High, who had been diagnosed with mental illness and assessed as having borderline mental retardation, was executed on 6 November 2001. In 2001 and 2002, Amnesty International intervened in the case of Samnang Prim, a former Cambodian child refugee facing the possibility of a death sentence in Colorado. AI took the position that because the state could not prove beyond a reasonable doubt that Samnang Prim was not under 18 at the time of the crime, the death penalty should not be pursued under Colorado or international law (the state had held that he was just over 18, but due to his background and the known details about his birth, AI believed that certainty on this issue was not possible). The prosecutor subsequently announced that he would not seek a death sentence. See AI Urgent Action EXTRA 25/02, AMR 51/052/2002, 28 March 2002, and update 5 April 2002.

(108) John Penry, who has consistently been assessed as having mental retardation and an IQ of 53-60, was sentenced to death for a 1979 murder for a third time on 3 July 2002. The Texas prosecutor argued that Penry's mental retardation was a "myth". During proceedings he argued: "Just like Enron, [Penry's medical] records do not always give an accurate picture. He's got no conscience. He's got no remorse." (*Prosecutor: Killer's claims of retardation questionable*, Corpus Christi Caller-Times, 11 June 2002). In Daryl Atkins's case, the state's expert gave his opinion that Atkins was "of average intelligence, at least", while not refuting the defence expert's finding that he had an IQ of 59. The Virginia Supreme Court upheld the death sentence. One of the two dissenting judges said that the state expert's opinion deserved "no credence whatsoever" and was "incredulous as a matter of law". *Atkins v Commonwealth*, 2000, op.cit.

(109) Billy Ray Anderson, \*Roscoe Artis, \*Elwell Barnes, Fuzzy Best, Charles Bond, Anthony Bone, Wade Cole, Jerry Cummings, Yvette Gay, Renwick Gibbs, Anthony Hipps, Russell Holden, Levon Jones, Robbie Locklear, Ernest McCarver, Henry McCollum, \*Doc McKoy, Robert McLain, Elton McLaughlin, Patrick Moody, Kenny Neal, Lorenza Norwood, \*John Oliver, Michael Pinch, Ronald Poindexter, Timothy Richardson, \*Phillip Robbins, Dwight Robinson, Christopher Roseboro, Sherman Skipper, Johnnie Spruill, Patrick Steen, Stacey Tyler, Larry Williams, Marvin Williams, \*Bernardino Zuniga. Source: Center for Death Penalty Litigation, Durham, North Carolina. 21 September 2000. Those marked \* were pending retrial/resentencing at the time.

(110) *Inmates affected by Supreme Court ruling*. Dallas Morning News, 20 June 2002. Walter Bell, Darrell Carr, Brian Davis, Tony Dixon (juvenile), Theodore Goynes, Doil Lane, Willie Moddon, Bobby Moore, Curtis Moore, John Penry, Anthony Pierce, Michael Richard, Steve Rodriguez, Demetrius Simms, Paul Slater, Exzavier Stevenson, Alberto Valdez, Jeffrey Williams, Bobby Woods, Kevin Zimmerman.

- (111) For one thing, the Dallas Morning News overview is not exhaustive. For example, Elroy Chester was granted a new sentencing hearing in July on a post-*Atkins* claim of mental retardation. Michael Hall, with an IQ assessed at under 70, also has such a claim. Jose Briseno's execution was stopped a few hours before it was due to be carried out on 10 July 2002 on the basis of a mental retardation claim (IQ 67).
- (112) Report of Mark D. Cunningham, Clinical and Forensic Psychologist, 2 April 1998.
- (113) Richard Hammon, Robert Lambert, Darrin Pickens, Gilberto Martinez, Jervaughn Miller and Patrick Murphy.
- (114) *Number growing of death row appeals based on high court ruling*. Associated Press, 12 July 2002. Nine had been listed by 18 July: William Garner, Danny Hill, Allen Holloway, Gregory Lott, William Thomas, David Sneed, Michael Stallings, Clifton White, and Terrell Yarbrough.
- (115) *South Carolina faces dilemma over death penalty*. Charlotte Observer, 27 July 2002. Lawyers have filed a petition with the South Carolina Supreme Court asking the court to develop procedures in the light of the *Atkins v Virginia* decision. The petition was filed on behalf of seven inmates with claims of mental retardation Kenneth Simmons, Herman Hughes, Ted Powers, Ricky George, Larry Hall, Ellis Franklin and Johnny Pearson. *Court asked to address death penalty procedures*. Post and Courier, 1 August 2002.
- (116) "On March 18, during a Senate Judiciary Committee public hearing on Senate Bill 26, testimony was offered that indicated there are currently 26 Pennsylvania death row inmates identified as mentally retarded. Cumberland County District Attorney Skip Ebert, testifying on behalf of the Pennsylvania District Attorneys' Association, told the Committee the Department of Corrections has identified these 26 mentally retarded individuals through its standard use of IQ testing. As Governor, you have the power to immediately commute the death sentences of these 26 mentally retarded inmates and impose sentences of life in prison without parole. I urge you to do so." Letter from Pennsylvania Senator Edward Helfrick to Governor Mark Schweiker, 10 July 2002.
- (117) There were 245 inmates on Pennsylvania's death row as of 2 July 2002. Pennsylvania Department of Corrections.
- (118) *USA: Memorandum to President Clinton: Appeal for human rights leadership as the first federal execution looms*, AI Index: AMR 51/158/00, November 2000.
- (119) On 4 September 2002, the Oklahoma Court of Criminal Appeals issued a ruling on the appeal of Patrick Murphy, a death row inmate in Oklahoma who has a claim of mental retardation. The Court noted that the *Atkins* decision "puts this State in an interesting position, considering our legislature has attempted to do just that [prohibit the execution of people with mental retardation], but our Governor has apparently disagreed with the legislature's efforts. Thus, the task falls upon this Court to develop standards to guide those affected until the other branches of government can reach a meeting of the minds on this issue". The Court then proceeded to define such criteria and guidelines, drawing substantially on the bill that was vetoed by the Governor. *Murphy v State*, 2002 OK CR 32.
- (120) Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
- (121) *State v Jacobs*. In the Supreme Court of the State of Louisiana. Appellant's brief on appeal. 2000.
- (122) *State v Jacobs*, Supreme Court of Louisiana, No 99-KA-1659, 29 June 2001. The prosecutor had peremptorily dismissed four of the five African Americans from the jury pool, and tried to do the same to the fifth and final African American, but was prevented by the court from doing so.
- (123) *Brennan v State*, No. 90,279 (1999).
- (124) At a competency hearing in 2000, four mental health experts testified that McKnight whose combination of mental retardation and mental illness rendered him incompetent to stand trial. No expert evidence was presented to the contrary. Although the judge acknowledged that Johnny McKnight had mental retardation, he found him competent to stand trial. The prosecution continued to pursue a death sentence, until it changed its mind shortly before the trial was due to begin in September 2001. In January 2002, a different judge ruled that Johnnie McKnight did not have the capacity to proceed with the trial, and the defendant was involuntarily committed to a state mental hospital.
- (125) By taking the appeal of North Carolina inmate Ernest McCarver whose IQ had been assessed at 67.
- (126) Amnesty International Urgent Action 230/99 (AMR 51/144/99, 3 September 1999), and various updates until AMR 51/008/2002, 15 January 2002.
- (127) Mobile Press Register, 27 July 1991.
- (128) The Gainesville Sun, 27 October 1991.
- (129) See *Old Habits Die Hard: The death penalty in Oklahoma*, AMR 51/056/2001, April 2001.
- (130) See Amnesty International Urgent Action 17/02, AMR 51/010/2002, 17 January 2002 and update AMR 51/027/2002, 7 February.
- (131) *Furman v Georgia*, 408 U.S. 238 (1972), Justice Marshall concurring.
- (132) Amnesty International is concerned that prosecutors are able to hold the threat of a death sentence

over a teen offender, which may coerce them into pleading guilty to avoid the possibility of a death sentence and accepting one of life without the possibility of parole, a sentence which also violates international law when used against people who were under 18 at the time of the crime.

(133) Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998). In another study, only 35 per cent of mock capital jurors were willing to sentence 17-year-old offenders to death. Finkel, N.J., Hughes, K.C., Smith, S.F., and Hurabiell, M.L. *Killing kids: The juvenile death penalty and community sentiment*. Behavioural Sciences and the Law, 12, 5-20 (1994).

(134) *The Oklahoman*, 20 June 1998.

(135) *Hollis gets life sentence*. *The State*, 5 March 2000. It was reportedly only the third time in two decades that a Lexington County jury had handed down a life sentence in the more than 30 death penalty cases prosecuted by this prosecutor.

(136) UN Doc. E/CN.4/1998/68.Add 3.

(137) In addition to these three, another 10 child offenders prosecuted in Harris County were awaiting execution at the time of writing. Thirteen is also the number of child offenders reportedly executed in the whole of the rest of the world outside the USA since 1992.

(138) In addition to these 27, Texas has sentenced another 25 people to death since 1975 for crimes committed at 17. Thirteen have been executed, and 12 had their death sentences overturned on appeal. The 12 are (including dates of resentencing to life terms): Magdaleno Rodriguez (1981), Bernard Ferguson (1982), Victor Burns (1986), Lee Barrow (1986), Billie Battie (1989), John Matson (1992), Efran Ibanez (1993), Johnny Rey (1996), Laquan Miles (1997), Robert Wills (1998), and Oscar Ortiz (1998), Miguel Martinez (2000).

(139) The death sentences of two child offenders on death row in Alabama - James Hyde and William Knotts - were imposed by a judge overriding a jury's recommendation of a life sentence. In the light of the US Supreme Court's decision in *Ring v Arizona*, such death sentences may face reversal. Other cases which may be affected by the *Ring* decision include those sentenced to death by judges in Arizona. Several child offenders on death row have claims of mental retardation and therefore may fall under the *Atkins* protection (see page 66).

(140) For a report on the Beazley case, see *Too young to vote, old enough to be executed. Texas set to kill another child offender*. AI Index: AMR 51/105/2001, July 2001.

(141) *Ex parte Beazley*. State's response to applicant's supplement brief to motion for stay of execution and application/petition for post conviction writ of habeas corpus. 21 September 2001.

(142) Urgent Action 162/02, AMR 51/086/2002, 31 May, and update AMR 51/136/2002, 19 August.

(143) Letter to Gerald Garrett, Chairman, Texas Board of Pardons and Paroles, 16 May 2002.

(144) *When the state kills... The death penalty v. human rights*. Amnesty International publications, 1989.

(145) These included appeals for clemency from the trial judge, the prosecutor of Napoleon Beazley's home county, a former warden of death row, and 18 Texas legislators. They were among a reported 4,416 appeal documents from people in Texas, 8,768 from elsewhere in the USA, and 4,542 internationally. Some were petitions. For example, a single newspaper in Sweden generated over 13,000 appeals for clemency, which were handed to the Board of Pardons and Paroles in the form of a petition.

(146) A state-wide poll in February 2001 indicated that 34 per cent of Texas respondents, and 25 per cent of Harris County respondents, supported the execution of juvenile offenders. *Juvenile cases: Just 1 in 4 in county thinks death appropriate*. *Houston Chronicle*, 7 February 2001.

(147) In other cases, the TCCA has upheld the death sentences of a man whose lawyer slept during his trial, a man whose trial jury was not able to consider the evidence of mental retardation, and a man whose sentencing hearing, by the state's own admission, had been tainted by racist testimony. None of the three cases subsequently passed the US Supreme Court (The cases, respectively, were those of Calvin Burdine, John Penry, and Victor Saldaño).

(148) *Law officials lobby Perry for death sentence*. *Dallas Morning News*, 18 August 2001.

(149) Transcript of videotape of hearing, made by Napoleon Beazley's appeal lawyer.

(150) *Let's not forget the victims*. *Tyler Morning Telegraph*, 29 June 2001.

(151) Letter to Governor Perry from Texas State Representative Leo Berman. 20 September 2001.

(152) Letter to Governor Rick Perry, dated 17 September 2001. Signed by Representatives Lon Burnham, Sylvester Turner, Paul Moreno, Domingo Garcia, Michael Villarreal, Elliott Naishtat, Ignacio Salinas, Ruth Jones McClendon, Robert Puente, Senfronia Thompson, Helen Giddings, Glen Maxey, Harryette Ehrhardt, Carlos Uresti, John Longonia, Manny Najera, Juan Hinjosa, and Glenn Lewis.

(153) The House of Representatives passed House Bill 2048, to raise the age to 18 for death penalty eligibility. The bill was subsequently due to be voted on in the Senate as an amendment to a juvenile justice bill. The governor's office reportedly threatened to veto any bill with HB 2048 attached. The juvenile justice bill passed the Senate without an amendment, and HB 2048 died without a Senate vote.

- (154) *Perry says he's comfortable with execution age law.* Dallas Morning News, 15 August 2001.
- (155) *Perry rebuts attack on justice in Texas -- Governor defends system court cited.* Houston Chronicle, 22 June 2002.
- (156) Letter to Governor Rick Perry, from state representative Lon Burnam, seeking a moratorium in Texas on the execution of people who were under 18 at the time of the crime.
- (157) Justices Brennan, Marshall, Blackmun and Stevens were the *Stanford* dissenters. Justice Stevens authored the *Atkins* decision, and was joined by Justices O'Connor, Kennedy, Souter, Ginsburg and Breyer.
- (158) Senator Greer. Tenn. S., *Debate on HB 2107 on the Floor of the Senate*, 96th Gen. Assembly, 2nd Reg. Sess. (12 April 1990). Cited in *Van Tran v State*, Tennessee Supreme Court, 2001, op.cit.
- (159) *Mandatory Justice: Eighteen Reforms to the Death Penalty.* The Constitution Project. The report lists one other category: "Persons convicted of felony murder, and who did not kill, intend to kill, or intend that a killing take place, should not be eligible for the death penalty."
- (160) *Brennan v State*, Florida Supreme Court (1999). Justice Anstead, specially concurring.
- (161) *McGilberry v State*, No. 97-DP-00213-SCT. 12 February 1996, Justice McRae dissenting.
- (162) Louisiana Revised Statutes 15.570.
- (163) Other states also prohibit under-18-year-olds from witnessing executions. For example, Kansas legislated to this effect in 1998.
- (164) *Teenage brain: A work in progress.* [www.nimh.nih.gov/publicat/teenbrain.cfm](http://www.nimh.nih.gov/publicat/teenbrain.cfm)
- (165) Patrick, *The Status of Capital Punishment: A World Perspective*, 56 J.Crim.L., Crim. & Pol.Sci 397 (1965). Cited in *Trimble v State*, Court of Appeals of Maryland, 300 Md. 387, 17 August 1984.
- (166) *When the state kills...The death penalty v human rights.* Amnesty International 1989.
- (167) For example, at least 25 people have been executed in Texas since 1982 for crimes committed when they were 18 or 19. The following were 18: Anthony Williams, Billy White, Danny Harris, Clifton Russell, Irineo Montoya, Juan Soria, and Emerson Rudd. The following were 19: Jesse de la Rosa, Jesus Romero, Richard Wilkerson, Walter Williams, Warren Bridge, Jeffrey Motley, Fletcher Mann, Dorsie Johnson, Davis Losada, David Castillo, George Cordova, Jose de la Cruz, Ponchai Wilkerson, James Richardson, Jesse Carlos San Miguel, Jeffery Dillingham, Monty Delk, and Reginald Reeves. Since January 2000 alone, Texas has sentenced to death at least 14 prisoners for crimes committed when they were 18 or 19: Ray Jasper, Michael Hall, Leon Dorsey, Juan Garcia, Bernardo Tercero, Kenneth Vodochodsky, Robert Woodard, Alvin Braziel, Reginald Blanton, Obie Weathers, Miguel Paredes, Jesus Flores, Perry Williams and Irving Davis.
- (168) *Former first lady calls for halt to executions.* Atlanta Journal-Constitution, 13 August 2002.
- (169) *Stanford v Kentucky*, 492 U.S. 361 (1989). Internal quotations omitted.
- (170) Amnesty International Urgent Action 268/01, AMR 51/155/2001, 23 October 2001.
- (171) *A brain too young for good judgment.* By Daniel R. Weinberger. New York Times, 10 March 2001.
- (172) *Holly v State*, No. 97-DP-00818-SCT, 3 March 1993.
- par(173) Denying an appeal that the prosecution had failed to present enough evidence to prove "future dangerousness", the Virginia Supreme Court seems to have viewed the parole violation involving the shotgun as a major predictor of future dangerousness: "Violent behavior arose from this probation violation when Roach used the shotgun to kill Mrs Hughes. Therefore both the fact of the violation and its particular nature were relevant evidence in the jury's determination of "future dangerousness". *Steve Roach v Commonwealth of Virginia*, 1996
- (174) In most states, the alternative to the death penalty is life imprisonment without the possibility of parole (LWOP). It can be argued that LWOP is a harsher punishment for child offenders than adults as they have a longer life expectancy. It should be noted that LWOP for child offenders also violates international law, specifically article 37a of the Convention on the Rights of the Child, which states: "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age".
- (175) Weekly media briefing, US Justice Department, 20 January 2000.
- (176) *Ring v Arizona* (24 June 2002). Justice Breyer, concurring in the judgment.
- (177) *Battin Seeks Death Penalty For 16 And 17 Year Old Killers.* Senator Jim Battin news release, 17 March 1999.
- (178) *Brennan v State*, Florida Supreme Court (1999). Justice Anstead, specially concurring.
- (179) *Ring v Arizona* (24 June 2002). Justice Breyer, concurring in the judgment.
- (180) *Bonifay v State*, Florida Supreme Court (1995).
- (181) *McGilberry v State*, No. 97-DP-00213-SCT. Supreme Court of Mississippi, 12 February 1996.
- (182) *USA v Quinones*, US District Court, Southern District of New York, S3 00 Cr. 761, (2002).
- (183) See: <http://www.deathpenaltyinfo.org/innocases.html>
- (184) Johnny Ross (aged 16 at crime, Louisiana, sentenced to death 1975, released 1981); Shareef Cousin

- (aged 16 at crime, Louisiana, sentenced to death 1996, charges dropped before retrial 1999); Larry Osborne (aged 17 at crime, Kentucky, sentenced to death 1999, acquitted at retrial 2002).
- (185) *A Broken System: Error Rates in Capital Cases, 1973-1995*, by James S. Liebman, Jeffrey Fagan and Valerie West, Columbia Law School, New York. 12 June 2000.
- (186) *Eddings v Oklahoma*, 455 U.S. 104 (1982) (internal quotations omitted).
- (187) *Urbin v State*, 7 May 1998.
- (188) Transcript of sentencing hearing. Testimony of Tom Allen, psychologist.
- (189) A study in 1986-87 found that of 14 juveniles on death row, 12 had been subjected to serious physical or sexual abuse during their childhood. All 14 had sustained head injuries as children, eight of which were serious enough to require hospitalization. Nine of the 14 had serious neurological abnormalities, including evidence of brain injury; seven suffered from serious psychiatric disturbances. Only two had IQ scores above 90. Lewis, Dorothy Otnow; Pincus, Jonathan H. et al. *Neuropsychiatric, psychoeducational, and family characteristics of 14 juveniles condemned to death in the USA*. *American Journal of Psychiatry*, vol. 145 (1988): 584-89. See also *USA: The death penalty and juvenile offenders*, AI Index: AMR 51/23/91, October 1991.
- (190) *Eddings v Oklahoma*, 455 U.S. 104 (1982) (internal quotations omitted).
- (191) A cerebral aneurysm is an abnormal swelling of the wall of a blood vessel inside the brain. Even successful surgery can result in permanent disabilities, including personality problems, weakness, or fatigue. A person with significant disabilities may need rehabilitation therapy on a long-term basis. This may include speech therapy, occupational therapy, and physical therapy.
- (192) *State v Louisiana*, 751 So.2d 783 (23 April 1999).
- (193) For example, Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998).
- (194) *Too young to vote, old enough to be executed. Texas set to kill another child offender* (AMR 51/105/2001, July 2001)
- (195) For example: Interrogator A: "Right now you're booked on a capital offence. Right now capital offences are punishable by death, period. You're looking at lethal injection, okay? You're looking at a firing squad, what are the other choices, is that it?" Interrogator B: "Hanging. Interrogator A: "Hanging, okay? ... I don't think we even need to go there. You see what I'm saying? Let's just put that behind us, let's look at what really happened that night, and let's get this death row bullshit out of the way....".
- (196) *Utah v Rettenberger*, 1999 UT 80.
- (197) *Ramirez v. State*, 8 July 1999.
- (198) *State v Ross*, 343 So.2d. 722 (7 March 1977).
- (199) <http://www.splcenter.org/legalaction/la-4.html>
- (200) His aunt was present for part of the questioning. She has said that she had earlier given Chris Thomas some medication (one of her own sleeping pills or tranquilizers) and was concerned what effect this might have had on him during the interrogation. Chris Thomas' mother was at the house when the police arrived, but was not allowed to be present during questioning.
- (201) For the full story, see *A Promise of Justice*, by David Protess and Rob Warden. Hyperion, New York, 1998.
- (202) *A Promise of Justice*, page 136.
- (203) Astoria District Attorney Joshua Marquis, board member of the National Association of District Attorneys. *Whether to kill those who killed as youths*. *New York Times*, 22 August 2000.
- (204) *US v Perry*, No. 92-CR-474 (D.D.C. 1992); *US v Bryant*, CR No .92-81127 (E.D. Mich. 1992); *US v Pena*, CR no. 97-CR-145-All (E.D. La. 1997).
- (205) International Covenant on Civil and Political Rights, Article 6: "No one shall be arbitrarily deprived of his life", and Article 9: "No one shall be subjected to arbitrary arrest".
- (206) UN Doc. CCPR/C/39/D/305/1988. 15 August 1990.
- (207) Associated Press, 28 January 1999.
- (208) USA: Shame in the 21st century: Three child offenders scheduled for execution on January 2000. AI Index: AMR 51/189/1999, December 1999.
- (209) *Death penalty will be asked for murderer*. *Conroe Courier*, 25 July 1992.
- (210) *From death, spirit to right young lives. Refusing to withdraw into bitterness, Coteras and Shaws work against juvenile violence*. *Austin American-Statesman*, 7 June 1998.
- (211) Update to Urgent Action 203/99, AI Index: AMR 51/24/00, 10 February 2000.
- (212) The percentage for black adult offenders tried by all-white juries is based on the 45 cases known to Amnesty International, which may not be exhaustive. For list, see *USA: Arbitrary, discriminatory, and cruel: An aide-mémoire to 25 years of judicial killing*, AI Index: AMR 51/003/2002, January 2002.
- (213) South Carolina Representative Joe Neal. *The Greenville News*, 2 April 2001.

- (214) *Ernest Paul McCarver v State of North Carolina*. Brief of *Amici Curiae*. Diplomats Morton Abramowitz, Stephen W. Bosworth, Stuart E. Eizenstat, John C. Kornblum, Phyllis E. Oakley, Thomas R. Pickering, Felix G. Rohatyn, J. Stapleton Roy, and Frank G Wisner in support of Petitioner.
- (215) Mary Robinson was appealing for Texas not to execute T.J. Jones and Toronto Patterson.
- (216) Associated Press, 4 September 2002.
- (217) Pakistan News, 25 July 2002.
- (218) Resolution of the Court *En Banc*, 30 July 2002, O.C. No. 01-20.
- (219) International Commission of Jurists. *Administration of the death penalty in the United States*. 1997.
- (220) Article 4, International Covenant on Civil and Political Rights.
- (221) See *USA: The death penalty: Developments in 1987*. AI Index: AMR 51/01/88, January 1988.
- (222) Except the USA, all of the countries which have not ratified the ACHR have either abolished the death penalty or have laws setting the minimum age for death penalty eligibility at 18 or higher.
- (223) Vienna Convention on the Law of Treaties, Article 18.
- (224) Saudi Arabia became a State Party to the CRC in 1996. In January 2001, the Committee of the Rights of the Child noted that the definition of the child is unclear under Saudi law and that the age of majority is not defined. The Committee expressed its serious concern that "there is a possibility that the death penalty may be imposed for offences committed by persons who were under 18 years at the time the offence was committed". Amnesty International received a report of a 16-year-old who was sentenced to death in 1996, but was saved from execution because his mother paid blood money to the relatives of the murder victim. The organization does not know of any executions of child offenders that have taken place since Saudi Arabia acceded to the CRC.
- (225) Nigeria became a state party to the CRC in 1991, lodging no reservations to its provisions, specific or general. Nigeria's national legislation places a minimum age of 18 years for death penalty eligibility. Nigeria is reported to have executed a child offender in 1997. At the 52nd Session of the UN Sub-Commission on the Promotion and Protection of Human Rights in 2000, Nigeria denied that the prisoner executed in 1997 had been under 18 at the time of the offence (indicating that the Nigerian federal government agrees with the prohibition). The Nigerian delegate stated that in cases where juveniles had been convicted of capital offences, the death sentences had been commuted to terms of imprisonment. However, the new Sharia Penal Codes introduced in 12 States of northern Nigeria (Bauchi, Borno, Gombe, Kaduna, Kano, Katsina, Kebbi, Jikawa, Niger, Sokoto, Yobe and Zamfara), to be applied to people of Muslim faith, allow Sharia Courts to impose the death penalty. The age of adulthood is a flexible category in the Sharia penal legislation, as it has been introduced in Nigeria. It is defined as the age at which a person becomes responsible for his or her acts. Very often this is considered the age of puberty. If found guilty under the Sharia penal legislation, Nigerians under 18 could face the death penalty.
- (226) In its report on Iran in 2000, the Committee on the Rights of the Child noted that a "governmental working group has been established to study the compatibility of existing laws with the Convention". The Committee continued that it was "nevertheless concerned that the broad and imprecise nature of [Iran's] general reservation potentially negates many of the Convention's provisions and raises concern as to its compatibility with the object and purpose of the Convention." In addition the Committee wrote that it was "seriously disturbed at the applicability of the death penalty for crimes committed by persons under 18" and called on Iran to abolish such use of capital punishment.
- (227) CRC/C/15/Add.18. 25 April 1994
- (228) *74 get relief against death sentence*. Pakistan News. 25 July 2002.
- (229) UN Doc. E/CN.4/1993/46, para. 678.
- (230) "The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age."
- (231) CCPR/C/81/Add.4.
- (232) General Comment 24, para 8.
- (233) Article 19 of the Vienna Convention on the Law of Treaties states: "A state may...formulate a reservation unless: (a) the reservation is prohibited by the treaty; ... or (c)... the reservation is incompatible with the object and purpose of the treaty".
- (234) CCPR/C/79/Add.50, 3 October 1995.
- (235) *Domingues v Nevada*. Brief for the United States as *amicus curiae*. op. cit.
- (236) A state that has persistently objected to a rule is not bound by it so long as the objection was made "consistently and uninterruptedly". *UK v Norway*, International Court of Justice (1951). ICJ Reports 116, p.138.
- (237) Schabas, William A. *The abolition of the death penalty in international law*. Second edition, 1997,

pages 305-307.

(238) Resolution No 15, Seventh UN Congress on the Prevention of Crime and Treatment of Offenders.

(239) According to Article 53 of the Vienna Convention on the Law of Treaties, "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted...". A peremptory norm is also known as a *jus cogens* norm.

(240) General Comment 29. CCPR/C/21/Rev.1/Add.11, para 11 and para 15.

80 (241) *Murray v The Charming Betsy*, 6 U.S. 64 (1804).

(242) *The Paquete Habana*, 175 U.S. 677 (1900).

(243) *Stanford v Kentucky*, Footnote 1. Amnesty International was one of the amici (ie had filed an amicus curiae [friend of the court] brief with the Court).

(244) Remarks to National Organization of Black Law Enforcement Executives, 30 July 2001.

(245) *Rumbaugh v McCotter*, 473 U.S. 919 (1985). Justice Marshall and Justice Brennan dissenting.

(246) Affidavit of David Bruck.

(247) The American Association of Mental Retardation's definition of mental retardation, cited by the US Supreme Court in the *Atkins* decision in June 2002, includes the following note on IQ scores: "Intelligence refers to a general mental capability. It involves the ability to reason, plan, solve problems, think abstractly, comprehend complex ideas, learn quickly, and learn from experience. Although not perfect, intelligence is represented by Intelligent Quotient (IQ) scores obtained from standardized tests given by a trained professional. In regard to the intellectual criterion for the diagnosis of mental retardation, mental retardation is generally thought to be present if an individual has an IQ test score of approximately 70 or below. An obtained IQ score must always be considered in light of its standard error of measurement, appropriateness, and consistency with administration guidelines. Since the standard error of measurement for most IQ tests is approximately 5, the ceiling may go up to 75. This represents a score approximately 2 standard deviations below the mean, considering the standard error of measurement. It is important to remember, however, that an IQ score is only one aspect in determining if a person has mental retardation. Significant limitations in adaptive behavior skills and evidence that the disability was present before age 18 are two additional elements that are critical in determining if a person has mental retardation." See: [www.aamr.org](http://www.aamr.org)

(248) Lawrence Jacobs is on death row despite having been granted a new trial. At the time of writing, the prosecution was intending to seek a death sentence at his retrial in January 2003.

(249) Robert Conyers' death sentence was reversed on appeal. However, the South Carolina Supreme Court has granted the state's request to have this decision reviewed. A ruling is expected in 2003.

(250) Patrick Horn was sentenced to death in 1999 for a 1991 murder. He is in federal prison serving life without parole for a later crime. If his Texas death sentence survives the appeals process, the state Attorney General would have to ask the US Attorney General to allow Horn to be transferred to Texas for execution.

(251) Johnson's 1998 death sentence was overturned on appeal in 2001. At his resentencing on 14 August 2002, a jury recommended a death sentence. Formal sentencing was set for 28 October.