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# UNITED STATES OF AMERICA

## Indecent and internationally illegal

### The death penalty against child offenders

*This is an abridged version of a 105-page report of the same title (AI Index: AMR 51/143/2002, September 2002). The full report includes tables and footnotes.*

#### **Introduction**

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 21<sup>st</sup> 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. The ruling came a month after the United Nations adopted a resolution aimed at eliminating the death penalty for people with mental retardation.

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. 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. Within 10 years, this treaty would be ratified by 191 countries, all but the United States and Somalia.

The US Supreme Court has long recognized that the definition of "cruel and unusual" punishment is not static, but must move with the times. In 1958, for example, the Court said: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

In both the *Stanford* and *Penry* decisions, the Supreme Court applied the "evolving standards of decency" test. It found that there was insufficient evidence, such as legislation in the individual states, 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.

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”.

*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.

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”. Amnesty International 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.

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.

## **From *Penry* to *Atkins* – a “national consensus” evolves**

When the Supreme Court handed down *Penry v Lynaugh* on 26 June 1989, only one US state, Georgia, had legislation in force prohibiting 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. The *Penry* court ruled that this limited legislative activity 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. 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.*

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

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.

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.

### ***(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. 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. 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. 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. Several states had already legislated by then on the issue of children and the death penalty: 1973 - Connecticut; 1977 - Illinois; 1978 - California; 1979 - New Mexico; 1981 - Ohio; 1982 - Nebraska; 1984 - Tennessee; 1985 - Colorado and Oregon; 1986 - New Jersey; 1987 - Maryland; 1988 - US Government.

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. Since *Stanford*, five more states have been added to the list:

- 1993 Washington State (by state Supreme Court ruling)
- 1994 Kansas reintroduced the death penalty, excluding defendants who were under 18 years old at the time of the crime.
- 1995 New York reinstated the death penalty against defendants who were "more than 18 years old at the time of the commission of the crime".
- 1999 Montana
- 2002 Indiana

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. Indeed, 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. While much of this may have been sheer demagoguery, Amnesty International knows of no equivalent pressure on the mental retardation issue. Nevertheless, the regressive pressure on the juvenile issue has been resisted, a further sign of a “consensus” against such use of the death penalty.

## ***(2) 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* majority rejected this, stating that the number of abolitionist jurisdictions was irrelevant to the juvenile issue.

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.

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.

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”. 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.

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.

### ***(3) 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. In *Stanford v Kentucky*, the plurality rejected this as irrelevant to the question of whether there was a “national consensus” against the execution of young offenders, saying that “*the 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. Yet the federal legislation prohibited the death penalty against anyone who was younger than 18 years old at the time of the offence.

The federal government surely has some sort of overarching influence on the country as a whole. The federal death penalty should be given appropriate weight in determining contemporary “standards of decency” on the use of the death penalty for under-18-year-old offenders.

#### ***(4) 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.

**Idaho, South Dakota, Utah and Wyoming** rarely use the death penalty. All four allow the use of the death penalty against child offenders. Yet in the modern era of the death penalty, they have not 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.

**Arkansas** has been a more active death penalty state. 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. Within the past decade, Arkansas has executed two prisoners with substantial claims of mental retardation.

The small state of **Delaware** has the highest per capita rate of execution in the USA. 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. 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.

**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 moves also in some of the states which have continued to impose death sentences against child offenders. For example, **Arizona** had five child offenders on death row at the time of writing. 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.” Arizona last executed a child offender in 1934.

#### ***(5) 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. 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.

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.” Similarly, a Gallup poll in 2002 found that 69 per cent in the USA oppose the practice of executing child offenders.

#### ***(6) 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). 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.

There are currently some 80 child offenders on death row in the USA, about two per cent of the national condemned population. 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.

#### ***(7) 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.

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

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). 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.

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

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. 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.

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”.

### ***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 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***

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 a juror in any state 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. Currently, Missouri is 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”. Yet people can be taken into that same Louisiana death chamber and killed for crimes committed when they were 16 or 17.

### ***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.”

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.

Paraguay, for example, set its minimum age at 22, Greece 21, Hungary and Bulgaria 20, and Greece 21. 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.

### ***Failure of wider society***

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.*

! 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. 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 who have been sentenced to death for murders committed when they were 16, 16, and 17 respectively.

! 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.

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. 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. Steve Roach shot his neighbour, in an apparently impulsive crime, but one for which he was executed in January 2000.

- ! 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 falls, as the punishment becomes disproportionate. 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". 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”. 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.”

### **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 emphasise 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 to an emotional development stunted by deprived and abusive upbringings.

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. Since 1973, more than 100 people have been released from death rows after evidence of their innocence emerged. 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: 20 child offenders have been executed, while three who were sentenced to death for crimes committed at 16 or 17 were later exonerated.

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.

“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.” 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. 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.

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.

### ***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. 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.*

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".

! 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 “emotionless” 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. 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. 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.

### ***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.

- ! 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. Simmons eventually confessed to the murder. The state chose to seek his execution. He remains on Missouri’s death row.

- ! 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. 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.
- ! 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. 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.

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

The *Atkins* majority established 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”.

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**

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.

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". 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.

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, 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. 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 those countries which are reported to have carried out the execution of child offenders since 1990 -- Saudi Arabia, Iran, and Nigeria.

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. 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.

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.” 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). 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. 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). 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”. 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.

In urging the US Supreme Court in 1999 not to review the international law issue, 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. 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. 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.

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. 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).

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.

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**

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”. 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”.

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, 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 certainly 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.