

NOTES

THE CONSTITUTIONALITY OF EXECUTING JUVENILE AND MENTALLY RETARDED OFFENDERS: A PRECEDENTIAL ANALYSIS AND PROPOSAL FOR RECONSIDERATION

Although the eighth amendment has been a part of the United States Constitution since 1791, the constitutional scope of the amendment's prohibition of cruel and unusual punishments continues to provoke sharp debate.¹ Borrowed verbatim from the English Bill of Rights of 1689, the eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."² Commentators have suggested that the American framers considered the cruel and unusual punishments clause constitutional "boilerplate."³ Notwithstanding this characterization, litigants have repeatedly petitioned the United States Supreme Court to define the meaning of the clause, particularly in relation to the death penalty.⁴

In its first 175 years, however, the United States Supreme Court rarely interpreted the cruel and unusual punishments clause.⁵ In fact, it was not until 1879, almost one hundred years after the amendment's adoption, that the Court first interpreted the clause

¹ U.S. CONST. amend. VIII; Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CALIF. L. REV. 839, 840 (1969).

² U.S. CONST. amend. VIII; Granucci, *supra* note 1, at 840.

³ Granucci, *supra* note 1, at 840. In his *Commentaries*, Justice Story reasoned that the eighth amendment was probably unnecessary in a free government because it was highly unlikely that such a government would authorize or justify such "atrocious" conduct. J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 710 (1987) (abr. ed. 1833).

⁴ See, e.g., *Stanford v. Kentucky*, 109 S. Ct. 2969, 2980 (1989) (execution of juveniles); *Perry v. Lynaugh*, 109 S. Ct. 2934, 2958 (1989) (execution of mentally retarded persons); *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) (execution of insane person); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (execution of rapist).

⁵ E.g., Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1777 (1970).

and its relation to the death penalty.⁶ Consequently, most nineteenth century commentators believed that the clause was an obsolete constitutional provision.⁷

During this period of perceived obsolescence, the Court adhered to what commentators now label the historical method of interpretation.⁸ Under this approach, the Court defined the meaning of the cruel and unusual punishments clause in relation to the views of the American framers of the eighth amendment.⁹ As a result, commentators note, the early Court interpreted the clause as only prohibiting those punishments that the framers deemed cruel and unusual in 1791.¹⁰

The Court ceased this strict historical interpretation at the beginning of the twentieth century.¹¹ Subsequently, the Court has interpreted the eighth amendment under what commentators now label the "evolving standards of decency" doctrine.¹² Under this doctrine, the Court has primarily asked whether contemporary society, rather than the eighth amendment's framers, abhors a particular punishment.¹³ Hence, the "evolving standards of decency" doctrine has defined the cruel and unusual punishments clause in accordance with contemporary society's conceptions of cruelty.

The Court has not, however, developed a consistent mode of constitutional analysis under the "evolving standards of decency"

⁶ See *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878) (death by public shooting not cruel and unusual punishment).

The *Wilkerson* decision was only the second time that the Court had ever discussed the cruel and unusual punishments clause. In the 1866 United States Supreme Court case of *Pervear v. Commonwealth*, the Court held that the eighth amendment did not apply to state action. 72 U.S. (5 Wall.) 475, 479-80 (1867). In *Pervear*, the defendant argued that this amendment prohibited the state from fining him fifty dollars and sentencing him to three months of hard labor for operating, without a license, an establishment that illegally sold and stored intoxicating beverages. *Id.* at 480. The Court reasoned that even if the eighth amendment restricted state action, the defendant's argument had no merit because the penalty imposed was a common punishment adopted in many states. *Id.* Therefore, the *Pervear* Court established that the eighth amendment had no relevance to state-imposed punishments and fines, but if it did, a sentence of hard labor for three months and a fine of fifty dollars was not excessive, cruel, or unusual. *Id.*

⁷ Granucci, *supra* note 1, at 842; Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 637 (1966) [hereinafter Note, *The Cruel and Unusual Punishment Clause*].

⁸ E.g., Berkman, *Perspectives on the Death Penalty: Judicial Behavior and the Eighth Amendment*, 1 YALE L. & POL'Y REV. 41, 44 (1982).

⁹ *Id.* at 45.

¹⁰ *Id.*

¹¹ Granucci, *supra* note 1, at 842.

¹² Goldberg & Dershowitz, *supra* note 5, at 1778.

¹³ See Berkman, *supra* note 8, at 48.

doctrine.¹⁴ Particularly in relation to the death penalty, the Court has taken a number of different approaches to determine the validity of this punishment.¹⁵ For instance, under the contemporary consensus approach, the Court has surveyed empirical data, such as state death penalty legislation and jury sentencing behavior, to ascertain whether contemporary society as a whole has rejected capital punishment as unnecessarily cruel.¹⁶ Under other approaches, the Court has independently considered its Justices' views on whether the death penalty falls within the constitutional meaning of cruelty.¹⁷ These independent approaches include proportionality analysis, under which the Court has examined the gravity of a particular crime to determine whether execution is a disproportionate penalty, and utilitarian excessiveness analysis, under which the Court has considered whether execution accomplishes society's interests in retribution and deterrence.¹⁸ Often, the Court has utilized a combination of these techniques.¹⁹

Each of these approaches has generated a significant amount of debate. For example, commentators argue that the contemporary consensus approach, with its focus on empirical data, renders the eighth amendment a meaningless prohibition against the states because it allows the states themselves to define the meaning of the cruel and unusual punishments clause.²⁰ On the other hand, some Justices have argued that the amendment itself implicitly endorses this approach because the amendment prohibits punishments that are cruel *and* unusual.²¹ These Justices also argue that the independent approaches are improper judicial exercises because they consist of the personal preferences of the individual Justices.²² Not surprisingly, the commentators and Justices favoring the independent proportionality and utilitarian excessiveness approaches argue that

¹⁴ *Id.* at 41-42.

¹⁵ *Id.* at 42.

¹⁶ *Id.*; see, e.g., *Gregg v. Georgia*, 428 U.S. 153, 179-82 (1976) (opinion of Stewart, Powell, & Stevens, JJ.) (state legislation and jury sentencing behavior did not indicate consensus against death penalty).

¹⁷ Berkman, *supra* note 8, at 66.

¹⁸ For an example of proportionality analysis, see *Coker v. Georgia*, 433 U.S. 584, 597-98 (1977) (plurality opinion) (death penalty for rape). For an example of utilitarian excessiveness analysis, see *Enmund v. Florida*, 458 U.S. 782, 798-801 (1982) (death penalty for nontriggerman guilty of felony murder).

¹⁹ See, e.g., *Enmund*, 458 U.S. at 797-801.

²⁰ E.g., Berkman, *supra* note 8, at 48-49; Goldberg & Dershowitz, *supra* note 5, at 1782.

²¹ See *Stanford v. Kentucky*, 109 S. Ct. 2969, 2979 (1989) (plurality opinion).

²² See *id.* at 2980.

the Court must engage in these approaches if the eighth amendment is to retain any meaning.²³

The Court, therefore, has struggled to find an appropriate approach to eighth amendment adjudication with regard to capital punishment.²⁴ This struggle has continued in the Court's treatment of the constitutionality of executing juvenile and mentally retarded offenders. In the 1988 United States Supreme Court case of *Thompson v. Oklahoma*, a plurality of the Court, by utilizing a combination of the contemporary consensus, proportionality, and utilitarian excessiveness approaches, held that the cruel and unusual punishments clause forbids the execution of a 15-year-old offender.²⁵ Nevertheless, in the 1989 decisions of *Stanford v. Kentucky*, in which the Court reviewed the death sentences of a 16 and a 17-year-old offender, and *Penry v. Lynaugh*, in which the Court reviewed the death sentence of a mentally retarded offender, a plurality of the Court, by adhering only to the historical and contemporary consensus approaches, held that the executions of these offenders could proceed.²⁶ Hence, these 1989 decisions suggest that the Court may modify its eighth amendment analysis in the future.

Consequently, this note analyzes this recent development in the United States Supreme Court's eighth amendment jurisprudence in light of the Court's prior cases concerning the cruel and unusual punishments clause. Section I examines the evolution of the Court's approaches to defining the clause, from the early Court's loyalty to the historical method of interpretation through the Court's various approaches under the "evolving standards of decency" doctrine.²⁷ Section I also discusses additional approaches to the "evolving standards of decency" doctrine that members of the Court have argued are appropriate.²⁸ Section II presents the Court's application of the preceding approaches in the *Thompson*, *Stanford*, and *Penry* decisions.²⁹ Section III analyzes the Court's approaches to eighth

²³ See, e.g., *id.* at 2986-87 (Brennan, J., dissenting); Berkman, *supra* note 8, at 77 (the Supreme Court must approach cruel and unusual punishments issues independently to give the eighth amendment substantive meaning).

²⁴ Goldberg & Dershowitz, *supra* note 5, at 1777; Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1002 (1978).

²⁵ *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2691-2700 (1988).

²⁶ *Stanford*, 109 S. Ct. at 2974-80; *Penry v. Lynaugh*, 109 S. Ct. 2934, 2953-55, 2958 (1989).

²⁷ See *infra* notes 32-193 and accompanying text.

²⁸ See *infra* notes 194-256 and accompanying text.

²⁹ See *infra* notes 257-461 and accompanying text.

amendment interpretation in the death penalty context, demonstrating that none of these approaches has adequately remedied the Court's problems in this area.³⁰ Section III also analyzes the Court's treatment of juvenile and mentally retarded offender executions, concluding that in these contexts, the Court should adopt a compelling state interest/least restrictive means approach to determine the constitutionality of their sentences.³¹

I. EVOLUTION OF JUDICIAL INTERPRETATION OF THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

Prior to the twentieth century, the United States Supreme Court had little occasion to interpret the cruel and unusual punishments clause of the eighth amendment.³² Throughout the nineteenth century, most commentators accepted the clause's obsolescence.³³ Contemporary commentators note a number of factors that may have contributed to the historical dormancy of the clause.

One factor that these commentators suggest may have contributed to the clause's historical dormancy is that most early American jurists interpreted the clause as a mere prohibition on the "barbarities" of Stuart England.³⁴ These early American jurists reasoned, commentators argue, that because the framers of the eighth amendment borrowed it from the English Bill of Rights of 1689, the framers intended the clause to prohibit only torturous modes of punishment such as "pillorying, disemboweling, decapitation, and drawing and quartering."³⁵ Commentators suggest, therefore, that because those sorts of torturous punishments were never commonplace in America, this early interpretation of the clause contributed to its historical desuetude in the courts.³⁶

³⁰ See *infra* notes 462-79 and accompanying text.

³¹ See *infra* notes 480-526 and accompanying text.

³² See Goldberg & Dershowitz, *supra* note 5, at 1777 & n.17 (Court discussed cruel and unusual punishments clause only ten times before 1970).

³³ Granucci, *supra* note 1, at 842; Note, *The Cruel and Unusual Punishment Clause*, *supra* note 7, at 637.

³⁴ Granucci, *supra* note 1, at 842; see Berkman, *supra* note 8, at 44. The "barbarities" practiced in Stuart England included physically torturous punishments such as the iron boot, the thumbscrew, the rack, breaking on the wheel, drawing and quartering, and crucifixion. Berkman, *supra* note 8, at 44; see *O'Neil v. Vermont*, 144 U.S. 323, 339 (1892) (Field, J., dissenting) (cruel and unusual usually applied to punishments that inflict torture).

³⁵ Note, *The Cruel and Unusual Punishment Clause*, *supra* note 7, at 637; see also *Weems v. United States*, 217 U.S. 349, 389-90 (1910) (the framers intended the cruel and unusual punishments clause to prohibit the "atrocious, sanguinary and inhuman" punishments of the past).

³⁶ Granucci, *supra* note 1, at 842; see also *Weems*, 217 U.S. at 395 (White, J., dissenting)

Commentators also suggest that the courts' failure to develop workable constitutional standards with which to interpret the clause contributed to its dormancy.³⁷ They note that the United States Supreme Court has always been uncomfortable with the general language of the clause, and that the early Court therefore never attempted to detail the exact scope of the clause.³⁸ Additionally, they note that because the Court did not hold the cruel and unusual punishments clause to apply to the states until 1962, eighth amendment claims were rare during the Court's first 175 years.³⁹

Although the Court has interpreted the cruel and unusual punishments clause with increasing frequency during the twentieth century, scholars argue that eighth amendment doctrine remains underdeveloped.⁴⁰ These scholars reason that this underdevelopment is a result of the Court's confusion concerning its role in interpreting the clause.⁴¹ They contend that underdevelopment of cruel and unusual punishment doctrine is a serious problem because two of the most important functions of the Supreme Court are its respect for precedent and its dedication to principled decision-making.⁴²

(prior to the formation of the United States Constitution, Americans were no longer concerned with the English Bill of Rights' protection against cruel and unusual punishments because in general, the punishments of the past were no longer imposed).

³⁷ See Note, *Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996, 996 (1964).

³⁸ See Goldberg & Dershowitz, *supra* note 5, at 1777 n.16; see also *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (plurality opinion) (noting that the Court had not detailed the precise scope of the constitutional phrase "cruel and unusual"); *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878) (noting the difficulty in exactly defining the scope of the cruel and unusual punishments clause).

³⁹ Radin, *supra* note 24, at 997 & n.28 (Court rarely discussed cruel and unusual punishments clause before it applied the clause to the states in 1962); see *Robinson v. California*, 370 U.S. 660, 666-67 (1962) (state statute making it a misdemeanor punishable by imprisonment to be addicted to narcotics was cruel and unusual within the meaning of the eighth and fourteenth amendments).

⁴⁰ Goldberg & Dershowitz, *supra* note 5, at 1777; Radin, *supra* note 24, at 1002; see, e.g., *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989); *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1972).

⁴¹ Radin, *supra* note 24, at 1002; see Goldberg & Dershowitz, *supra* note 5, at 1777 (courts have failed to develop constitutional standards for interpreting cruel and unusual punishments clause).

⁴² See Berkman, *supra* note 8, at 65 (because the legitimacy and persuasive power of the Court turns on the reasoning of its published opinions, poorly reasoned opinions do not fulfill these goals); Goldberg & Dershowitz, *supra* note 5, at 1777 (although respect for precedent and principled decision-making constrains constitutional interpretation, established principles and precedent are sparse under the cruel and unusual punishments clause).

The remainder of this section will outline and discuss a number of the Court's different approaches to interpreting the cruel and unusual punishments clause. The scope of each approach will be defined and placed within the framework of constitutional adjudication of the eighth amendment. The remainder of this section will also discuss the merits of each approach as the Court and commentators have defined them.

A. *The Historical Method*

The United States Supreme Court first interpreted the cruel and unusual punishments clause in relation to the death penalty almost one hundred years after the states ratified the eighth amendment.⁴³ In the 1879 case of *Wilkerson v. Utah*, the United States Supreme Court held that death by public shooting was not cruel and unusual punishment for murder in the first degree.⁴⁴ After interpreting the governing statutes to authorize public shooting as a permissible mode of punishment, the Court reasoned that this mode of execution was constitutional because it was historically accepted.⁴⁵ Therefore, the Court established that death by public shooting was not a cruel and unusual punishment within the meaning of the eighth amendment.⁴⁶

In *Wilkerson*, a jury found the defendant guilty of first-degree murder.⁴⁷ The trial judge then sentenced the defendant to death by public shooting.⁴⁸ The defendant appealed his sentence on the basis that the trial judge had sentenced him under a statutory provision of the Territory of Utah that Congress had repealed.⁴⁹

In particular, an 1852 Act of the Territory of Utah permitted execution by public shooting.⁵⁰ An 1876 Act of the Territory, however, provided only that first degree murderers should suffer death, and contained a provision that repealed all prior acts inconsistent with the provisions of the 1876 Act.⁵¹ Thus, the defendant contended that his sentence was improper because no statutory provision authorized the mode of his execution.⁵²

⁴³ See *Wilkerson v. Utah*, 99 U.S. 130 (1879).

⁴⁴ *Id.* at 134-35.

⁴⁵ *Id.* at 132-37.

⁴⁶ *Id.* at 136-37.

⁴⁷ *Id.* at 130.

⁴⁸ *Id.* at 131.

⁴⁹ *Id.* at 132.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See *id.*

In holding that death by public shooting was a permissible punishment, the *Wilkerson* Court noted that the legislature had the authority to proscribe punishment subject to the cruel and unusual punishments clause of the eighth amendment.⁵³ It then observed that shooting was a common form of military punishment, and that the common law provided for additional modes of execution, such as public dissection and drawing and quartering.⁵⁴ Consequently, the Court reasoned that although the precise scope of the eighth amendment's proscription against cruel and unusual punishments was difficult to define, it was safe to confirm that the amendment forbade only torturous punishments such as those allowed under the common law.⁵⁵ Therefore, because death by public shooting was not uncommon in England or the United States, the Court reasoned that the eighth amendment did not invalidate the defendant's death sentence.⁵⁶

Commentators label the Court's approach in *Wilkerson* the historical method of interpreting the cruel and unusual punishments clause.⁵⁷ Under this approach, commentators note, the Court interprets the clause in relation to the views of the American framers of the eighth amendment.⁵⁸ Scholars contend that because the framers borrowed the cruel and unusual punishments clause verbatim from the English Bill of Rights of 1689, the American framers interpreted the clause to prohibit only what the English Puritans considered to be torturous or barbarous punishments in 1689.⁵⁹ Hence, commentators note that the historical method of interpretation seeks to restrict the clause's meaning to a prohibition against only those forms of punishments that the American framers of the eighth amendment considered torturous or barbarous at the time of the amendment's adoption.⁶⁰

⁵³ *Id.* at 133.

⁵⁴ *Id.* at 134-35, 137.

⁵⁵ *Id.* at 135-36.

⁵⁶ *Id.* at 134-35.

⁵⁷ *E.g.*, Berkman, *supra* note 8, at 44. For another early example of the Court's historical approach to the cruel and unusual punishments clause, see *In re Kemmler*, 136 U.S. 436, 446-47 (1890) (death by electrocution).

⁵⁸ Berkman, *supra* note 8, at 44.

⁵⁹ *See, e.g.*, Granucci, *supra* note 1, at 840; Radin, *supra* note 24, at 1031. Most scholars suggest that the English passed their Bill of Rights primarily to prohibit the infamous tortures of the Stuart reign. Granucci, *supra* note 1, at 840. In his article, however, Granucci suggests that instead of intending to prohibit the atrocities of the Stuart reign, the English framers intended to prohibit unauthorized punishments and disproportionate penalties generally. *Id.* at 860.

⁶⁰ Berkman, *supra* note 8, at 44. The eighth amendment was adopted in 1791. Granucci, *supra* note 1, at 840.

One advantage of the historical method for the Court, scholars suggest, is that the method helps to provide conclusive answers to questions posed under the cruel and unusual punishments clause.⁶¹ This approach, they observe, also allows the Court to avoid conflict with the other branches of government, because it allows legislatures to choose any penalty short of physical torture.⁶² Scholars also argue that the historical method tends to legitimize the Court by freeing its Justices from having to inject their own personal beliefs of what is cruel and unusual into the clause.⁶³

Commentators also cite a number of disadvantages to the historical method of interpretation. One such disadvantage is the possibility that the clause's framers did not intend for its meaning to be frozen in time.⁶⁴ If the framers intended for the clause's meaning to change in relation to society's conception of cruelty, a reading of the clause supported by its general language, scholars argue that the framers' conceptions of cruelty are irrelevant.⁶⁵ Scholars also criticize the historical method of interpretation for its failure to recognize the possibility that notions of cruelty change over time.⁶⁶ Finally, they note that taking a pure historical approach to the cruel and unusual punishments clause substantially limits the circumstances in which the Court will invoke the eighth amendment because it is unlikely that an American legislature would authorize torturous punishments.⁶⁷

Supreme Court opinions discussing the death penalty still periodically contain the argument that the historical approach is the only legitimate approach to the cruel and unusual punishments clause.⁶⁸ The Court, however, rejected the historical approach as its sole interpretative guide in 1910 by adopting a more expanded view

⁶¹ Berkman, *supra* note 8, at 46.

⁶² *Id.* at 46-47.

⁶³ *Id.* at 45.

⁶⁴ *Id.* at 47.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Radin, *supra* note 24, at 997; *see also* *Furman v. Georgia*, 408 U.S. 238, 430 (1972) (Powell, J., dissenting) (no American legislature would today tolerate punishments of our colonial era such as "pillorying, branding, or cropping or nailing of the ears").

⁶⁸ *See, e.g.,* *Woodson v. California*, 428 U.S. 280, 308 (1976) (Rehnquist, J., dissenting) (stating that the framers might have intended to limit the scope of the cruel and unusual punishments clause to those punishments American society deemed cruel and unusual when it adopted the Bill of Rights); *McGautha v. California*, 402 U.S. 183, 226 (1971) (Black, J., concurring) (the cruel and unusual punishments clause did not prohibit capital punishment because at the time of the eighth amendment's adoption, the laws of this country, and of "our ancestors'" countries, commonly authorized that penalty).

of the clause.⁶⁹ This expanded view is now known as the "evolving standards of decency" doctrine.⁷⁰

B. *The "Evolving Standards of Decency" Doctrine*

Under the "evolving standards of decency" doctrine, members of the United States Supreme Court have applied varying interpretations to the cruel and unusual punishments clause of the eighth amendment.⁷¹ In some cases, commentators note, the Court has sought to define the scope of the eighth amendment's proscription by ascertaining contemporary society's views on the punishment in question.⁷² The Court has also attempted to define the scope of the clause independently, however, by considering the individual Justices' views on a particular punishment.⁷³ At times, the Court has applied a combination of these techniques.⁷⁴

It was not until 1910, in *Weems v. United States*, that a majority of the United States Supreme Court expanded the originally accepted meaning of the cruel and unusual punishments clause.⁷⁵ In *Weems*, the Court held that a 15-year sentence of *cadena temporal*, a punishment of Spanish origin that subjected the prisoner to hard and painful labor, the wearing of chains on his wrists and ankles, and the perpetual loss of civil liberties, was cruel and unusual punishment.⁷⁶ The prisoner, an officer of the United States Government of the Phillipine Islands, received this punishment for falsifying a single public document.⁷⁷ The Court noted that *cadena temporal* was unusual in that there was no similar sentence in American legislation.⁷⁸ The Court then expanded the clause's meaning by reasoning

⁶⁹ Granucci, *supra* note 1, at 843. It should be noted, however, that Justice Field first argued for a more expansive view of the clause. See *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting) (stating that in addition to prohibiting torturous punishments, the cruel and unusual punishments clause prohibited punishments that were greatly disproportionate to the offense charged because of excessive length or severity).

⁷⁰ See, e.g., Goldberg & Dershowitz, *supra* note 5, at 1778; Radin, *supra* note 24, at 1032-33.

⁷¹ See, e.g., Berkman, *supra* note 8, at 41-42; Radin, *supra* note 24, at 1002-13.

⁷² See, e.g., Berkman, *supra* note 8, at 48; Goldberg & Dershowitz, *supra* note 5, at 1779-81.

⁷³ Berkman, *supra* note 8, at 66, 69.

⁷⁴ See, e.g., *Coker v. Georgia*, 433 U.S. 584, 593-600 (1977) (plurality opinion); *Enmund v. Florida*, 458 U.S. 782, 789-801 (1982).

⁷⁵ 217 U.S. 349, 378 (1910).

⁷⁶ *Id.* at 363-64, 382. In *Weems*, the provision at issue was the cruel and unusual punishments clause of the Phillipine Bill of Rights, which was taken from the United States Constitution. *Id.* at 367. The Court stated that the provision had the same meaning as that contained in the eighth amendment. *Id.*

⁷⁷ *Id.* at 357-58.

⁷⁸ *Id.* at 377.

that the clause was "not fastened to the obsolete" but might "acquire new meaning as public opinion [became] enlightened by a humane justice."⁷⁹ By reasoning that this punishment was excessive in relation to the prisoner's offense, and therefore cruel and unusual, the Court established that the extent or severity of a punishment, and not only its historical acceptance, may render it unconstitutional.⁸⁰

In the 1958 case of *Trop v. Dulles*, the United States Supreme Court again applied an expansive reading of the clause, and held that denationalization was cruel and unusual punishment.⁸¹ In *Trop*, the defendant, a United States army private serving in French Morocco in World War II, received his sentence for war-time desertion.⁸² In analyzing the defendant's punishment under the eighth amendment, the Court stated that the cruel and unusual punishments clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁸³ The *Trop* Court thus established that the substantive meaning of the clause may vary over time.⁸⁴

In its analysis, the *Trop* Court first noted that prior judicial interpretation of the cruel and unusual punishments clause was sparse.⁸⁵ It then stated that "nothing less than the dignity of man" was the underlying principle of the eighth amendment, and that the amendment stood to assure that civilized standards limited the nature of punishments.⁸⁶ Moreover, the Court noted that there was a fundamental right to citizenship, and reasoned that this mandated the Court to examine the safeguard of the eighth amendment with "special diligence."⁸⁷ Against this backdrop, the Court concluded that the eighth amendment barred the punishment of denationalization because that punishment offended the "cardinal principles for which the Constitution stands."⁸⁸

⁷⁹ *Id.* at 378.

⁸⁰ *Id.* at 378, 380-82; see also Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355, 359 (1973).

⁸¹ *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958) (plurality opinion).

⁸² *Id.* at 87. The defendant, by court-martial, was dishonorably discharged and sentenced to three years of hard labor, as well as forfeiture of all pay and allowances. *Id.* at 88. Upon applying for a passport a number of years later, the defendant learned that he had also lost his United States citizenship by reason of his dishonorable discharge and conviction. *Id.*

⁸³ *Id.* at 101.

⁸⁴ See Radin, *supra* note 24, at 1033.

⁸⁵ *Trop*, 356 U.S. at 99 (plurality opinion).

⁸⁶ *Id.* at 100.

⁸⁷ *Id.* at 103.

⁸⁸ *Id.* at 102. The Court elaborated on the character of denationalization as follows: [Denationalization] subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him,

Since *Trop*, the Court has continued to state that the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁸⁹ Commentary suggests that the Court has subsequently repeated this phrase so often that the phrase has acquired a life of its own.⁹⁰ In no case after *Trop* has a majority of the Court rejected this interpretation of the clause.⁹¹ Commentators suggest that this reflects the Court's acceptance of the notion that concepts of cruelty may change over time.⁹² They note, however, that the Court has taken varying approaches to determining the "evolving standards of decency that mark the progress of maturing society."⁹³ Under one of these approaches, the Court has sought to define the "evolving standards of decency" by focusing on empirical data thought to reflect society's views on a particular punishment.⁹⁴ Under other approaches, commentators note, the Court has sought to define the "evolving standards of decency" independently, by considering the views of its individual Justices.⁹⁵

1. The Contemporary Consensus Approach

Commentators refer to one of the United States Supreme Court's approaches to determining the "evolving standards of decency" as the contemporary consensus approach.⁹⁶ Commentators observe that under this approach, the Court examines "objective indicia," such as legislative enactments and jury sentencing behavior,

what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.

Id.

⁸⁹ *Id.* at 101; see, e.g., *Stanford v. Kentucky*, 109 S. Ct. 2969, 2974 (1989) (plurality opinion) (execution of juveniles); *Penry v. Lynaugh*, 109 S. Ct. 2934, 2953 (1989) (opinion of O'Connor, J.) (execution of mentally retarded person); *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (execution of insane person); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (medical attention to prison inmate).

⁹⁰ Radin, *supra* note 24, at 1033.

⁹¹ For recent examples of cases where the Court continued to use the "evolving standards of decency" doctrine, see *Stanford*, 109 S. Ct. at 2974; *Penry*, 109 S. Ct. at 2953.

⁹² Radin, *supra* note 24, at 1033.

⁹³ See *id.* at 1002-13.

⁹⁴ Berkman, *supra* note 8, at 43, 48.

⁹⁵ See, e.g., *id.* at 66-67.

⁹⁶ Berkman, *supra* note 8, at 48.

to determine contemporary society's views on a particular punishment.⁹⁷ The underlying reasoning of this approach, scholars argue, is that the approach allows the Justices to avoid imposing their subjective views into the meaning of the cruel and unusual punishments clause.⁹⁸ These scholars note that because the contemporary consensus approach relies on empirical data, it is similar to the historical approach discussed above.⁹⁹

The 1976 case of *Gregg v. Georgia* is an example of the United States Supreme Court's application of the contemporary consensus approach.¹⁰⁰ In *Gregg*, the Court held that the death penalty, as punishment for murder, does not invariably violate the eighth amendment.¹⁰¹ At issue in *Gregg* was the constitutionality of Georgia's death penalty statute, under which the trial court had sentenced the defendant to death for armed robbery and murder.¹⁰² The Court, by reasoning that empirical data, such as state death penalty legislation and jury sentencing behavior, did not reflect the notion that contemporary society had rejected the death penalty as cruel and unusual, established that a sentence of death was permissible under the eighth amendment.¹⁰³

The first empirical data that the *Gregg* Court considered was the death penalty legislation of all the states, data the Court reasoned was the most marked indication of society's endorsement or rejection of the death penalty.¹⁰⁴ To support its reasoning, the Court noted that in a democracy the legislatures, not the courts, are "constituted to respond to the will and consequently the moral values of the people."¹⁰⁵ Noting that specifications of punishments are unique legislative policy issues, the Court reasoned that it owed a high degree of deference to the legislature.¹⁰⁶ The Court then observed

⁹⁷ *Id.* For the first case where the Court took the contemporary consensus approach and labeled these factors "objective," see *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, & Stevens, JJ.).

⁹⁸ Berkman, *supra* note 8, at 48.

⁹⁹ *Id.* See *supra* notes 43-70 and accompanying text for a discussion of the historical approach.

¹⁰⁰ See *Gregg*, 428 U.S. at 179-82 (opinion of Stewart, Powell, & Stevens, JJ.); Berkman, *supra* note 8, at 48.

¹⁰¹ *Gregg*, 428 U.S. at 168-69 (opinion of Stewart, Powell, & Stevens, JJ.).

¹⁰² *Id.* at 161-62.

¹⁰³ *Id.* at 179-82, 186-87.

¹⁰⁴ *Id.* at 179-80.

¹⁰⁵ *Id.* at 175-76 (quoting *Furman v. Georgia*, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)).

¹⁰⁶ *Id.* at 176.

that at least thirty-five states authorized the death penalty for certain crimes resulting in death to the victim.¹⁰⁷

The Court also considered jury sentencing behavior in its attempt to ascertain the public's attitudes towards capital punishment.¹⁰⁸ The Court reasoned that because juries were directly involved with sentencing persons to death, juries were another reliable indicator of contemporary society's views on capital punishment.¹⁰⁹ Although it noted that juries imposed the death penalty with relative infrequency, the Court reasoned that this might reflect the public's opinion that criminals deserve the death penalty only in extreme cases.¹¹⁰

Consequently, the Court reasoned that jury sentencing behavior, like state death penalty legislation, supported the notion that a large portion of society approved of capital punishment.¹¹¹ Although the Court went on to consider a number of other approaches in its analysis, commentators suggest that the Court relied heavily on this empirical data in reaching its holding.¹¹² The Court has subsequently looked at state death penalty legislation and jury sentencing behavior in a number of death penalty challenges.¹¹³

Scholars have suggested a number of advantages to the contemporary consensus approach. For instance, they contend that like the historical approach, the contemporary consensus approach prevents the Justices from having to inject their own personal beliefs into the decision-making process.¹¹⁴ Scholars note that under this method, the Court can instead purport to allow society to interpret

¹⁰⁷ *Id.* at 179-80.

¹⁰⁸ *Id.* at 181.

¹⁰⁹ *Id.*; see also *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968) (one of a jury's most important functions is to preserve a link between present societal values and the penal system).

¹¹⁰ *Gregg v. Georgia*, 428 U.S. 153, 182 (1976) (opinion of Stewart, Powell, & Stevens, JJ.).

¹¹¹ *Id.*

¹¹² See Berkman, *supra* note 8, at 48; Radin, *supra* note 24, at 1035.

¹¹³ See, e.g., *Stanford v. Kentucky*, 109 S. Ct. 2969, 2975-79 (1989) (plurality opinion); *Penry v. Lynaugh*, 109 S. Ct. 2934, 2955 (1989); *Ford v. Wainwright*, 477 U.S. 399, 408 (1986); *Enmund v. Florida*, 458 U.S. 782, 789-96 (1982); *Coker v. Georgia*, 433 U.S. 584, 593-97 (1977) (plurality opinion).

¹¹⁴ Berkman, *supra* note 8, at 48; Goldberg & Dershowitz, *supra* note 5, at 1779-80. In a number of cases, the Court itself has explicitly noted its concern over injecting the Justices' personal beliefs into the decision-making process. See, e.g., *Coker*, 433 U.S. at 592 (plurality opinion) ("Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices . . . [therefore, the Court's] judgment should be informed by objective factors to the maximum possible extent.").

the amendment.¹¹⁵ These scholars argue that the contemporary consensus approach helps to provide the Court with conclusive answers to questions posed under the cruel and unusual punishments clause.¹¹⁶ They also observe that when the Court takes this approach, it decreases its chances of conflicting with other branches of government.¹¹⁷ Finally, scholars suggest that the contemporary consensus approach avoids the stranglehold of the historical approach because it allows the Court to reject the moral judgments of the past while remaining faithful to the text of the amendment.¹¹⁸

On the other hand, commentators suggest that the contemporary consensus approach has a number of disadvantages. For example, they argue that the purpose of constitutional safeguards is to prevent political majorities from violating previously settled principles.¹¹⁹ They contend, therefore, that if the Court allows majorities to define what is cruel and unusual, the Court is eviscerating the eighth amendment.¹²⁰ Scholars also criticize the contemporary consensus approach for its circularity.¹²¹ They consider it improper for the Court to form constitutional doctrine based upon the acts of other governmental branches, when the Constitution requires that the Court limit those branches.¹²²

As *Gregg* illustrates, when the Court attempts to define the proscription of the eighth amendment under the contemporary consensus strand of the "evolving standards of decency" doctrine, the Court relies on empirical data such as state death penalty legislation and jury sentencing behavior.¹²³ Although some members of the Court may prefer this approach because it allows them to avoid injecting their own beliefs into the meaning of the cruel and unusual punishments clause, commentators suggest that the contemporary consensus approach, in its purest form, renders the eighth amendment a meaningless prohibition against the states.¹²⁴ The Court, however, has continued to utilize this approach, at least

¹¹⁵ See Berkman, *supra* note 8, at 50.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See *id.* at 49; Radin, *supra* note 24, at 1032.

¹¹⁹ Berkman, *supra* note 8, at 49.

¹²⁰ *Id.*

¹²¹ Radin, *supra* note 24, at 1036.

¹²² *Id.*

¹²³ *Gregg v. Georgia*, 428 U.S. 153, 179-82 (1976) (opinion of Stewart, Powell, & Stevens, JJ.).

¹²⁴ See, e.g., Berkman, *supra* note 8, at 48-49; Goldberg & Dershowitz, *supra* note 5, at 1779-80.

in part, when considering the constitutionality of the death penalty.¹²⁵

2. Independent Judicial Approaches

In some cases, the Court has noted that its Justices' views do have a role in the determination of what is cruel and unusual under the clause.¹²⁶ Scholars suggest that when the Court uses the views of its Justices to define the scope of the clause, the Court is taking an approach to determination of the "evolving standards of decency" that is independent of the views of society as reflected in death penalty legislation and jury sentencing behavior.¹²⁷ Commentators observe that under these approaches, the individual Justices attempt to use their independent judgment to define the concept of cruelty.¹²⁸ These approaches, commentators argue, reject the notion that either the eighth amendment's framers or contemporary society's views solely define the clause.¹²⁹ Additionally, they argue that when the Court engages in these approaches, it is actively accepting its role as guardian of constitutional values.¹³⁰

The Court's independent approaches to defining the "evolving standards of decency" include proportionality analysis¹³¹ and concepts of utilitarian excessiveness.¹³² One member of the Court has also considered the scope of the eighth amendment's prohibition under a normative approach.¹³³ Some members of the Court have

¹²⁵ See, e.g., *Stanford v. Kentucky*, 109 S. Ct. 2969, 2975-79 (1989) (plurality opinion); *Penry v. Lynaugh*, 109 S. Ct. 2934, 2955 (1989); *Ford v. Wainwright*, 477 U.S. 399, 408 (1986); *Enmund v. Florida*, 458 U.S. 782, 789-96 (1982); *Coker v. Georgia*, 433 U.S. 584, 593-97 (1977) (plurality opinion).

¹²⁶ See, e.g., *Enmund*, 458 U.S. at 797 ("Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us to ultimately judge whether the Eighth Amendment permits the imposition of the death penalty."); *Coker*, 433 U.S. at 597 (plurality opinion) ("[T]he attitude of state legislatures and sentencing juries do not wholly determine [what is cruel and unusual], for the Constitution contemplates that in the end our own judgment will be brought to bear on the question . . ."); *Gregg*, 428 U.S. at 174 (opinion of Stewart, Powell, & Stevens, JJ.) (although the Court must interpret the eighth amendment with an awareness of the Court's limited role, the Justices do have some role because the amendment restricts legislative power).

¹²⁷ Berkman, *supra* note 8, at 66.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See *infra* notes 136-79 and accompanying text for a discussion of proportionality analysis.

¹³² See *infra* notes 180-93 and accompanying text for a discussion of utilitarian excessiveness analysis.

¹³³ See *infra* notes 194-210 and accompanying text for a discussion of the normative approach.

suggested that the proper method of interpretation should include a compelling state interest/least restrictive means test similar to that used in relation to the due process and equal protection clauses of the fourteenth amendment.¹³⁴ The common element in each of these approaches, commentators suggest, is that the Justices' consider their own individual beliefs when considering the constitutionality of a punishment.¹³⁵

a. *Proportionality Analysis*

Commentators describe proportionality analysis as an inquiry into the relationship between a particular crime and a particular punishment.¹³⁶ They state that when the Court performs proportionality analysis, it seeks to determine when a criminal deserves a particular punishment for his or her crime.¹³⁷ This approach, commentators contend, rests on notions of moral blameworthiness.¹³⁸ Members of the Court have noted that the Court has performed proportionality analysis when considering the application of the death penalty to particular crimes or classes of offenders.¹³⁹

For example, in the 1977 case of *Coker v. Georgia*, a plurality of the United States Supreme Court held that the death penalty as a punishment for rape is grossly disproportionate to that crime, and hence, unconstitutional.¹⁴⁰ In *Coker*, the defendant, after having escaped from prison, raped a young woman in the presence of her husband.¹⁴¹ At the time of his escape, the defendant was serving a number of sentences for murder, rape, kidnapping, and aggravated assault.¹⁴² At trial, the jury's verdict recommended death by electrocution.¹⁴³ By reasoning that this sentence was unconstitutionally severe in relation to the defendant's offense, the Court established

¹³⁴ See *infra* notes 211-56 and accompanying text for a discussion of compelling state interest/least restrictive means analysis.

¹³⁵ Berkman, *supra* note 8, at 66-67.

¹³⁶ *Id.* at 67.

¹³⁷ *Id.* at 68-69.

¹³⁸ *Id.* at 69.

¹³⁹ See *Penry v. Lynaugh*, 109 S. Ct. 2934, 2955 (1989) (opinion of O'Connor, J.); see also *id.* at 2959 (Brennan, J., concurring in part and dissenting in part). For early cases mentioning proportionality analysis in relation to punishments other than the death penalty, see *Weems v. United States*, 217 U.S. 349, 368 (1910) and *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting).

¹⁴⁰ *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

¹⁴¹ *Id.* at 587.

¹⁴² *Id.*

¹⁴³ *Id.* at 591.

that the eighth amendment prohibits punishments that are disproportionate to the crime committed.¹⁴⁴

In its analysis, the Court first observed that Georgia was the only jurisdiction imposing the death sentence for the rape of an adult woman.¹⁴⁵ It reasoned that although the state legislatures were not wholly unanimous, this fact weighed heavily against the appropriateness of capital punishment for rape.¹⁴⁶ It also noted that in the vast majority of cases, Georgia juries had not imposed the death penalty for rape.¹⁴⁷ The Court stated, however, that these objective indicia did not decide the controversy.¹⁴⁸

The Court prefaced its proportionality analysis by noting "the Constitution contemplates that in the end our own judgment will be brought to bear on the question."¹⁴⁹ It then acknowledged the seriousness of the crime of rape by noting the physical and psychological pain that rape victims experience, and the injury to the community's sense of security.¹⁵⁰ The Court reasoned, however, that rape, despite its seriousness, is not as serious as murder because rape does not involve the unjustified taking of human life.¹⁵¹ Furthermore, the Court reasoned that because of the death penalty's uniquely severe and irrevocable quality, the death penalty is an excessive penalty for rape.¹⁵²

Justice Powell concurred in the judgment of the Court, and agreed with the *Coker* plurality's analysis to the extent that the death penalty ordinarily is a disproportionate punishment for rape.¹⁵³ He argued, however, that the plurality's holding was too broad because, in cases of aggravated rape, the death penalty might indeed be proportionate.¹⁵⁴ Therefore, Justice Powell argued that a more care-

¹⁴⁴ *Id.* at 592 & n.4.

¹⁴⁵ *Id.* at 595-96.

¹⁴⁶ *Id.* at 596.

¹⁴⁷ *Id.* at 597.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 597-98.

¹⁵¹ *Id.* at 598. The Court elaborated as follows:

Although [rape] may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.

Id.

¹⁵² *Id.*

¹⁵³ *Id.* at 601 (Powell, J., concurring in part and dissenting in part).

¹⁵⁴ *Id.* at 603 (Powell, J., concurring in part and dissenting in part). In his dissenting

ful inquiry of the objective indicators of society's "evolving standards of decency" was necessary to determine the constitutionality of the death penalty for the crime of aggravated rape.¹⁵⁵

Chief Justice Burger, joined by Justice Rehnquist, dissented.¹⁵⁶ He argued that the plurality's reasoning had overstepped the bounds of proper constitutional adjudication because the plurality had replaced the policy judgment of the state legislature with the views of the individual Justices.¹⁵⁷ The plurality's reasoning was faulty, Burger contended, because it focused upon the "bare fact" that murder always resulted in death, although rape did not.¹⁵⁸ He also argued that the plurality had failed to explain the relevance and constitutional significance of this distinction.¹⁵⁹ Thus, in Burger's opinion, the plurality's proportionality analysis was improper.¹⁶⁰

Another example of the United States Supreme Court's proportionality analysis is the 1982 case of *Enmund v. Florida*.¹⁶¹ In *Enmund*, the Court held that the death penalty is a disproportionate punishment for one who neither took life, attempted to take life, nor intended to take life.¹⁶² A jury had convicted the defendant, an alleged participant in a robbery that resulted in the death of an elderly couple, of two counts of first-degree murder and one count of robbery, and the trial judge had sentenced the defendant to death.¹⁶³ The Florida State Supreme Court upheld the defendant's sentence under the felony-murder rule, which renders a felon responsible for the lethal acts of a co-felon, despite that court's finding that the record supported no more than the inference that the defendant was waiting in the escape car.¹⁶⁴ The United States Su-

opinion in *Furman v. Georgia*, Justice Powell had also considered the appropriateness of the death penalty for rape. 408 U.S. 238, 456-61 (1972) (Powell, J., dissenting). In *Furman*, Powell argued that the proportionality test should be used to determine the constitutionality of executing a rapist on a case-by-case basis, but only in the "rare case in which the death penalty is rendered for a crime technically falling within the legislatively defined class but factually falling outside the likely legislative intent in creating the category." *Id.* at 461 (Powell, J., dissenting).

¹⁵⁵ *Coker v. Georgia*, 433 U.S. 584, 603-04 (1977) (Powell, J., concurring in part and dissenting in part).

¹⁵⁶ *Coker*, 433 U.S. at 604 (Burger, C.J., dissenting).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 619 (Burger, C.J., dissenting).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ 458 U.S. 782 (1982).

¹⁶² *Id.* at 797.

¹⁶³ *Id.* at 783-85.

¹⁶⁴ *Id.* at 786.

preme Court reasoned that the defendant's sentence was excessive because the defendant himself had not killed, attempted to kill, or intended to kill.¹⁶⁵ Thus, the Court established that the death penalty is a disproportionate, and therefore unconstitutional, punishment for a robber in these circumstances.¹⁶⁶

As in *Coker*, the *Enmund* Court first reviewed empirical evidence of the "evolving standards of decency" to ascertain society's view of the appropriateness of the sentence of death for a robber who neither took life, attempted to take life, nor intended to take life.¹⁶⁷ In particular, the Court noted that of the thirty-six state and federal jurisdictions that authorized the death penalty, only eight jurisdictions authorized that penalty for a robber who merely participated in a robbery in which another robber took a life.¹⁶⁸ The *Enmund* Court also noted that a survey of all the reported appellate court decisions since 1954 revealed that out of a total of 362 executions, only six nontriggermen felony-murderers had been executed.¹⁶⁹ In addition, the defendant was one of only three individuals in the nation that was currently on death row who had not been adjudged to have participated in a scheme designed to kill the victim.¹⁷⁰ This evidence, the Court reasoned, indicated that most legislatures and juries had rejected the death penalty for accomplice liability in felony murders.¹⁷¹

Again as in *Coker*, the *Enmund* Court noted that although such empirical evidence weighed heavily in the balance, it was for the Court ultimately to judge whether the death penalty was disproportionate to the defendant's crime.¹⁷² Following the same line of analysis as the Court in *Coker*, the *Enmund* Court reasoned that robbery, by definition, does not include serious injury or death to the victim.¹⁷³ Therefore, the Court reasoned that the death penalty, in light of its severity and irrevocability, is an excessive penalty for a robber who did not take human life.¹⁷⁴

¹⁶⁵ *Id.* at 797.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 789-96.

¹⁶⁸ *Id.* at 789.

¹⁶⁹ *Id.* at 794. All six of these executions occurred in 1955. *Id.* at 794-95.

¹⁷⁰ *Id.* at 795.

¹⁷¹ *Id.* at 797.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* Following *Enmund*, the Court held in the 1987 case of *Tison v. Arizona* that if a nontriggerperson substantially participates in a felony and shows reckless indifference to human life, a state may impose the death penalty. 481 U.S. 137, 158 (1987).

The underlying principle in the *Coker* and *Enmund* Courts' proportionality analysis, commentators suggest, is one of individual criminal responsibility.¹⁷⁵ This type of analysis can involve two determinations.¹⁷⁶ The Court can determine whether the punishment exceeds the crime, as the Court did in both *Coker* and *Enmund*.¹⁷⁷ The Court can also focus on the nexus between the mental state and criminal culpability of the actor, as the Court did in *Enmund*.¹⁷⁸ Commentators contend that proportionality analysis is an example of an independent approach to the determination of the "evolving standards of decency" because under this approach, the members of the Court use their own judgment to define the constitutional concept of cruelty.¹⁷⁹

b. *Utilitarian Excessiveness Analysis*

Utilitarian excessiveness analysis, the Court and commentators suggest, is another independent judicial approach to the determination of the "evolving standards of decency."¹⁸⁰ The *Coker* Court, in addition to stating that a punishment is excessive and unconstitutional if "grossly out of proportion to the severity of the crime," also stated that a punishment is excessive and unconstitutional if it "makes no measurable contribution to acceptable goals of punishment and hence, is nothing more than the purposeless and needless imposition of pain and suffering."¹⁸¹ Commentators note that under the utilitarian excessiveness approach, the Court's judicial process becomes a means/ends analysis.¹⁸² They suggest that this concept makes it necessary for the Court to attempt to determine the utility of a punishment in relation to legitimate penal purposes.¹⁸³ Members of the Court have noted that the Court has considered this strand of eighth amendment analysis when deciding the death penalty's application to certain crimes and classes of offenders.¹⁸⁴

¹⁷⁵ See Berkman, *supra* note 8, at 70 (underlying principle of *Coker* is individual criminal responsibility).

¹⁷⁶ See Casenote, *The Supreme Court and Tison v. Arizona: A Capital Example of Judicial Unsoundness*, 29 B.C.L. Rev. 969, 998-99 (1988).

¹⁷⁷ See *id.* at 999.

¹⁷⁸ See *id.*

¹⁷⁹ See Berkman, *supra* note 8, at 66.

¹⁸⁰ See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion); Berkman, *supra* note 8, at 67-68.

¹⁸¹ *Coker*, 433 U.S. at 592 (plurality opinion).

¹⁸² Berkman, *supra* note 8, at 67-68.

¹⁸³ *Id.* at 68.

¹⁸⁴ See *Penry v. Lynaugh*, 109 S. Ct. 2934, 2955 (1989) (opinion of O'Connor, J.); see also *id.* at 2959 (Brennan, J., concurring in part and dissenting in part).

Commentators note, however, that the Court has rarely used this approach.¹⁸⁵ They argue that this is because of the difficulty in resolving how effectively criminal punishments serve the penal goals of society, a resolution that the utility concept demands.¹⁸⁶ For instance, in *Gregg*, the Court observed that the death penalty's two principle purposes were "retribution and deterrence of capital crimes by prospective offenders."¹⁸⁷ The *Gregg* Court, however, noted that the utility of capital punishment as a deterrent was a complex factual issue and its resolution was a matter better suited for the legislature to resolve.¹⁸⁸

Commentary suggests that these sorts of concerns make the utility concept unworkable.¹⁸⁹ The *Enmund* Court, however, reasoned that the imposition of the death penalty on a robber who did not kill, attempt to kill, or intend to kill was unlikely to deter future crimes of a similar nature because the possibility of the death sentence in that situation would not enter into the mind of the offender.¹⁹⁰ The *Enmund* Court also reasoned that the appropriateness of retribution for justification of capital punishment depended on the degree of culpability of the offender, a degree in that case that did not support the justification.¹⁹¹ Furthermore, critics of the death penalty continue to argue against its constitutionality by presenting evidence against the death penalty's utility.¹⁹² In particular, Justices Brennan and Marshall maintain that one of the reasons the death penalty is unconstitutional is that it does not adequately serve penal goals.¹⁹³ Some members of the Court, therefore, believe that one appropriate method of eighth amendment analysis under the "evolving standards of decency" is the utilitarian excessiveness approach.

¹⁸⁵ Berkman, *supra* note 8, at 68.

¹⁸⁶ *Id.*

¹⁸⁷ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, & Stevens, JJ.). In *Gregg*, the Court also stated that the prevention of future crimes, accomplished by the incapacitation of dangerous offenders, was another purpose of the death penalty that other courts had discussed. *Id.* at 183 n.28.

¹⁸⁸ *Id.* at 186.

¹⁸⁹ Berkman, *supra* note 8, at 68.

¹⁹⁰ *Enmund v. Florida*, 458 U.S. 782, 799 (1982).

¹⁹¹ *Id.* at 800-01.

¹⁹² For recent studies that found that the death penalty did not serve various utilitarian purposes, see *The Death Penalty Approaches the 1990's: Where Are We Now?*, 23 *LOY. L.A.L. REV.* 1, 5-58 (1989) (symposium).

¹⁹³ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 233-41 (1976) (Marshall, J., dissenting); *Furman v. Georgia*, 408 U.S. 238, 300-05 (1972) (Brennan, J., concurring).

c. *Normative Approach*

Another independent judicial approach to the determination of the "evolving standards of decency," commentators note, is Justice Marshall's normative approach.¹⁹⁴ Justice Marshall has stated that he does not accept state death penalty legislation as conclusive of the "evolving standards of decency."¹⁹⁵ Rather, he suggests that the constitutionality of capital punishment rests upon whether an informed citizenry would reject it.¹⁹⁶

Justice Marshall developed his normative approach in his concurring opinion in the 1972 case of *Furman v. Georgia*.¹⁹⁷ The *Furman* Court, in a brief 5-4 per curiam opinion, held that the imposition of the death penalty in the three cases argued and decided constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.¹⁹⁸ Each of the nine Justices expressed his view in a separate opinion.¹⁹⁹ Under his normative approach, Justice Marshall concluded that the death penalty was *per se* unconstitutional.²⁰⁰

In *Furman*, Justice Marshall argued that the general public would find the death penalty "unwise" if informed of the following factors:

[T]hat the death penalty is no more effective a deterrent than life imprisonment, that convicted murderers are rarely executed, but are usually sentenced to a term in prison; that convicted murderers usually are model prisoners, and that they almost always become law-abiding citizens upon their release from prison; that the costs of executing a capital offender exceed the costs of imprisoning him for life; that while in prison, a convict under sentence of death performs none of the useful functions that life prisoners perform; that no attempt is made in the sentencing process to ferret out likely recidivists for execution; and that the death penalty may actually stimulate criminal activity.²⁰¹

¹⁹⁴ See Radin, *supra* note 24, at 1039.

¹⁹⁵ *Gregg*, 428 U.S. at 232 (Marshall, J., dissenting).

¹⁹⁶ *Furman*, 408 U.S. at 361 (Marshall, J., concurring).

¹⁹⁷ *Id.* at 361-69 (Marshall, J., concurring).

¹⁹⁸ *Furman*, 408 U.S. at 239-40 (per curiam).

¹⁹⁹ *Id.* at 240-470 (nine separate opinions).

²⁰⁰ *Id.* at 369 (Marshall, J., concurring).

²⁰¹ *Id.* at 362-63 (Marshall, J., concurring).

Justice Marshall also contended that if knowledge of those factors did not convince the public of the unacceptability of the death penalty, knowledge of the following factors would: the discriminatory imposition of capital punishment against certain identifiable classes of people; evidence of the executions of innocent people; and the havoc the death penalty has wreaked with the criminal justice system.²⁰² Knowledge of these factors, Justice Marshall argued, would shock the average citizen's conscience and sense of justice, which would therefore render capital punishment unconstitutional under the "evolving standards of decency" doctrine.²⁰³

Commentators note that Justice Marshall's approach is vulnerable to criticism because it seems to require the Court to substitute its own opinion of what people should feel for what they actually do feel.²⁰⁴ Moreover, in *Furman*, Justice Marshall himself acknowledged the argument that legislation authorizing the death penalty is a satisfactory reflection of the public's will because the legislature is the voice of the people.²⁰⁵ He also acknowledged the argument that persons remain uninformed of the death penalty's attributes by choice.²⁰⁶ This choice of ignorance, he noted, might reflect the public's lack of concern over the death penalty, and hence, the public's acceptance of it.²⁰⁷

In *Furman*, however, Justice Marshall countered the above arguments by contending that the normative approach is desirable because it forces the Court to acknowledge that its Justices have not gone through life in a vacuum.²⁰⁸ Additionally, in *Gregg* he cited a study conducted to test his approach as evidence that an informed public would find capital punishment unacceptable.²⁰⁹ Finally, he argued that this approach would make it less likely that the status quo would remain as a result of ignorance or indifference.²¹⁰ Justice

²⁰² *Id.* at 363-64 (Marshall, J., concurring).

²⁰³ *Id.* at 369 (Marshall, J., concurring).

²⁰⁴ See Radin, *supra* note 24, at 1040; see also *Furman v. Georgia*, 408 U.S. 238, 444 (1972) (Powell, J., dissenting) (the normative approach asks that the Court "rest a far-reaching constitutional determination on a prediction regarding the subjective judgments of the mass of our people under hypothetical assumptions that may or may not be realistic").

²⁰⁵ *Furman*, 408 U.S. at 361 n.145 (Marshall, J., concurring).

²⁰⁶ *Id.* at 362 n.145 (Marshall, J., concurring).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 369 n.163 (Marshall, J., concurring).

²⁰⁹ *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting) (citing Sarat & Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171).

²¹⁰ *Furman*, 408 U.S. at 362 n.145 (Marshall, J., concurring).

Marshall, therefore, has endorsed a normative independent judicial approach to the determination of the "evolving standards of decency."

d. *Compelling State Interest/Least Restrictive Means Approach*

Although a majority of the United States Supreme Court has not considered the constitutionality of the death penalty under a compelling state interest/least restrictive means approach, a type of analysis the Court has used when considering the substantive due process strand of the fourteenth amendment, a number of scholars have argued that the Court should adopt this approach in place of prior eighth amendment analysis in the death penalty context.²¹¹ These scholars contend that if the Court were to resort to a strict scrutiny approach when determining the constitutionality of the death penalty, its action would be sound.²¹² They note that under such an approach, the Court would abolish the death penalty only if another punishment, like life imprisonment, would serve the goals of penology as well as capital punishment while infringing less on the constitutional rights of prisoners.²¹³

Briefly stated, the Court's strict scrutiny method of review under the substantive aspect of the fourteenth amendment's due process clause is that when "fundamental rights" are involved, the state may justify the regulation of such rights only by a "compelling state interest," and the state must use the least onerous means to further its legitimate interests.²¹⁴ In *Trop v. Dulles*, in which the Court considered whether denationalization as punishment for war-time desertion was cruel and unusual, the Court reasoned that the government's appropriation of the defendant's "fundamental right of citizenship" compelled the Court to examine the punishment with "special diligence."²¹⁵ The Court has also stated that rights explicitly or implicitly guaranteed by the Constitution are fundamental.²¹⁶

²¹¹ See, e.g., Goldberg & Dershowitz, *supra* note 5, at 1796-97; Radin, *supra* note 24, at 1029-30; Comment, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1325, 1353 (1968). Although a majority of the United States Supreme Court has not specifically endorsed a compelling state interest/least restrictive means approach, in *Weems v. United States*, the Court did support its reasoning by suggesting that a less severe punishment would serve the government's interest. See *Weems v. United States*, 217 U.S. 349, 381 (1910).

²¹² Radin, *supra* note 24, at 1014.

²¹³ Comment, *supra* note 211, at 1325.

²¹⁴ See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973).

²¹⁵ *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality opinion).

²¹⁶ See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 29, 33-34 (1973) (education not a fundamental right).

Commentators contend, therefore, that the Constitution's references to "life" in the fifth and fourteenth amendments are arguably enough to demand application of a strict scrutiny approach to the determination of the constitutionality of the death penalty.²¹⁷

Commentators also argue that the irrevocability of the death penalty demands that the Court examine its constitutionality under a heightened standard of review.²¹⁸ They note that in other contexts when irrevocability was a factor, the Court has engaged in strict scrutiny.²¹⁹ For example, in the 1942 case of *Skinner v. Oklahoma*, the United States Supreme Court invoked strict scrutiny under the equal protection clause of the fourteenth amendment, and held that Oklahoma's Habitual Criminal Sterilization Act was an unconstitutional deprivation of an offender's fundamental rights to marriage and procreation.²²⁰ Commentators suggest that at a minimum, *Skinner* stands for the proposition that to deprive even a felon of basic rights, the state must show more than a rational basis for its decision.²²¹ They contend, furthermore, that the death penalty's irrevocability makes strict scrutiny an appropriate standard of review because of the inherent risk of error that accompanies all judicial decisions.²²²

²¹⁷ Comment, *supra* note 211, at 1325 & n.497. One commentator has noted that Justice Stone's famous footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), is also an applicable justification for the Court to apply strict scrutiny to the constitutionality of the death penalty because a specific provision of the Bill of Rights is involved, and it is unlikely that the persons needing the protection of the eighth amendment are able to utilize the political process to protect their interests. See Note, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 82 (1972).

²¹⁸ Radin, *supra* note 24, at 1029-30; see also *Commonwealth v. O'Neal*, 369 Mass. 242, 246 & n.2, 339 N.E.2d 676, 678-79 & n.2 (1975).

²¹⁹ Radin, *supra* note 24, at 1023.

²²⁰ 316 U.S. 535, 536-38, 541 (1942). In addition to invoking strict scrutiny in contexts where irrevocability was a factor, the Court has invoked strict scrutiny when a class was absolutely deprived of a right because of characteristics for which the class was not responsible. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982) (strict scrutiny analysis applied to public school system's exclusion of illegal alien children despite the Court's holding in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973), that the right to education was not fundamental).

²²¹ Comment, *supra* note 211, at 1359.

²²² Radin, *supra* note 24, at 1017, 1029. Radin explained the relationship between fundamental rights, irrevocability, and the strict scrutiny standard of review as follows:

When crucial individual interests are at stake, many of which are enumerated in the Bill of Rights, our system recognizes that it is often better to risk error on the side of the individual. Given that *prima facie* recognition, the extent to which error on the side of the individual should be risked may, in cases where the gravity factor is not peremptory, depend on the demonstrable strength and

An understanding of the permissible goals of penology, commentators note, is critical to a compelling state interest/least restrictive means approach because the state's justification for imposing the death penalty must be based upon how effectively the death penalty serves these goals in relation to less severe penalties like life imprisonment.²²³ Commentators argue that to remain constitutional, the death penalty must serve a penal goal other than mere retribution more effectively than life imprisonment.²²⁴ They reason that if retribution alone were the measuring stick, the state could justify torturous punishments, such as boiling in oil, on the theory that it would accomplish retribution more effectively than any other punishment.²²⁵ Furthermore, they note that if the Court was to take a strict scrutiny approach when determining the constitutionality of the death penalty, it would most likely hold that the death penalty was unconstitutional because the state would probably be unable to justify its imposition of the death penalty due to the difficulty with proving the utilitarian value of capital punishment.²²⁶

Some members of the United States Supreme Court have argued for a compelling state interest/least restrictive means approach in the death penalty context. For example, in *Furman*, Justice Marshall noted that a compelling state interest/least restrictive means approach to the cruel and unusual punishments clause would differ from one under the due process clause only in that the analysis would focus on necessity, not rationality.²²⁷ He then suggested that the Court should require the state to show a compelling interest to justify the retention of the death penalty because capital punishment deprives a person of the fundamental right of life.²²⁸

Justice Brennan's *Furman* concurrence contains another example of an argument for compelling state interest/least restrictive means analysis in the death penalty context.²²⁹ In *Furman*, Justice

certainty of the countervailing governmental interests. This appears to be the kernel of the compelling state interest doctrine.

Id. at 1021.

For examples of mistakenly imposed executions, see *Miscarriages of Justice and the Death Penalty*, in *THE DEATH PENALTY IN AMERICA* 234-41 (H. Bedau ed. 3d ed. 1982).

²²³ Goldberg & Dershowitz, *supra* note 5, at 1796.

²²⁴ *Id.* at 1797.

²²⁵ *Id.*

²²⁶ See, e.g., *id.* at 1796-98; Comment, *supra* note 211, at 1364.

²²⁷ *Furman v. Georgia*, 408 U.S. 238, 359 n.141 (1972) (Marshall, J., concurring).

²²⁸ *Id.*

²²⁹ *Id.* at 301-05 (Brennan, J., concurring).

Brennan reasoned that the death penalty was unconstitutional because evidence of the deterrent effect of execution was inconclusive.²³⁰ Moreover, commentators suggest that Brennan implicitly argued that there was a fundamental "right to be free from cruel and unusual punishment" that required strict scrutiny when legislation threatened it.²³¹ In addition, they reason that Justice Brennan argued that it should be the state's burden to prove that legitimate penal purposes mandate retention of the death penalty.²³²

Other members of the Court, however, have not endorsed a compelling state interest/least restrictive means approach in the death penalty context. For instance, Chief Justice Burger, in his *Furman* dissent, argued against the strict scrutiny approaches suggested by Justices Marshall and Brennan by stating that shifting the burden to the states would only provide an "illusory solution to an enormously complex problem."²³³ Furthermore, he argued that if the Court took this approach, all punishments would be suspect to being cruel and unusual.²³⁴ If this was true, he argued, the Court might have to require the state to show by convincing proof that a \$5 parking ticket is not as effective a deterrent as a \$10 parking ticket.²³⁵

Burger's argument assumes, commentators note, that all eighth amendment challenges should be brought under a compelling state interest/least restrictive means approach.²³⁶ They suggest that one flaw in Burger's argument is that the Court has never applied one standard of review to all cases.²³⁷ They also suggest that his fear of unjust burden on the states would disappear if the Court articulated consistent principles to justify different adjudicatory approaches.²³⁸

One state court has undertaken a compelling state interest/least restrictive means approach in relation to the death penalty. In the

²³⁰ *Id.* at 301-02, 305 (Brennan, J., concurring) (additional factors contributing to the death penalty's unconstitutionality were that it was unusually severe and degrading, it was probably inflicted arbitrarily, and most of contemporary society had rejected it).

²³¹ Radin, *supra* note 24, at 1005 n.68; see *Furman*, 408 U.S. at 268-69 (Brennan, J., concurring).

²³² Radin, *supra* note 24 at 1005; see *Furman*, 408 U.S. at 279-82 (Brennan, J., concurring) (punishment unconstitutionally severe if there is no reason to believe the punishment serves penal purposes more effectively than less severe penalty).

²³³ *Furman*, 408 U.S. at 396 (Burger, C.J., dissenting).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Radin, *supra* note 24, at 1012.

²³⁷ *Id.* at 1013.

²³⁸ *Id.*

1975 case of *Commonwealth v. O'Neal*, the Massachusetts Supreme Judicial Court, in an unsigned order, held that the mandatory death sentence for murder committed in the course of rape or attempted rape was repugnant to the Massachusetts Constitution.²³⁹ In a detailed concurring opinion, Chief Justice Tauro, by applying strict scrutiny analysis to the issue presented, reasoned that the state had failed to justify its imposition of the death penalty because it had failed to prove that the death penalty was a more effective punishment than life imprisonment.²⁴⁰ The state, therefore, had not chosen the least restrictive means necessary to accomplish its legitimate penal goals, and Chief Justice Tauro concluded that the mandatory death sentence for murder committed during the course of a rape or attempted rape was repugnant to the Massachusetts Constitution.²⁴¹ Three other Justices, in their own concurring opinions, agreed with portions of the reasoning of Chief Justice Tauro.²⁴²

²³⁹ 369 Mass. 242, 243, 339 N.E.2d 676, 677 (1975) (per curiam). Five justices wrote concurring opinions, and two justices dissented. *Id.* at 244, 339 N.E.2d at 677.

Following the *O'Neal* decision, the Massachusetts legislature amended article XXVI in 1982 to include the following addition:

No provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death. The general court may, for the purpose of protecting the general welfare of the citizens, authorize the imposition of the punishment of death by the courts of law having jurisdiction of crimes subject to the punishment of death.

MASS. CONST. art. XXVI (as amended by the sixteenth article of the amendments to the Massachusetts Constitution). In the 1984 case of *Commonwealth v. Colon-Cruz*, however, the Massachusetts Supreme Judicial Court again invalidated the state death penalty statute, this time on the ground that it violated article XII as amended by impermissibly burdening a defendant's rights to trial by jury and against self-incrimination. 393 Mass. 150, 153, 470 N.E.2d 116, 118 (1984).

²⁴⁰ *O'Neal*, 369 Mass. at 263, 339 N.E.2d at 687-88 (Tauro, C.J., concurring). Chief Justice Tauro's conclusion that the mandatory death sentence was unconstitutional was based on articles I, X, XII, and XXVI of the Massachusetts Declaration of Rights. *Id.* (Tauro, C.J., concurring).

Article I of the Massachusetts Declaration of Rights provides in part that "all people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives." MASS. CONST. art. I. Article X provides in part that "each individual of the society has a right to be protected by it in the enjoyment of his life." MASS. CONST. art. X. Article XII provides in part that "no subject shall be . . . deprived of his life . . . but by the judgment of his peers, or the law of the land." MASS. CONST. art. XII. Article XXVI provides in part that "no magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." MASS. CONST. art. XXVI.

²⁴¹ 369 Mass. at 263, 339 N.E.2d at 687-88 (Tauro, C.J., concurring).

²⁴² See *id.* at 274-75, 339 N.E.2d at 693-94 (Hennessey, J., concurring); *id.* at 276-78, 339 N.E.2d at 694-96 (Wilkins, J., concurring); *id.* at 278-79, 339 N.E.2d at 696 (Kaplan, J., concurring).

Chief Justice Tauro justified his compelling state interest/least restrictive means approach by reasoning that the natures of capital punishment and the right of life compelled the court to apply strict scrutiny.²⁴³ He noted that life is a fundamental right, and that capital punishment is a complete and irrevocable deprivation of that right.²⁴⁴ Thus, he reasoned that it was appropriate to place the burden of justifying the constitutionality of the death penalty on the state.²⁴⁵

Chief Justice Tauro recognized that the state has vital interests in deterrence, incapacitation, and retribution.²⁴⁶ He argued that the evidence the state had introduced to support the deterrent effect of the death penalty was at best equivocal.²⁴⁷ He also reasoned that the death penalty is unnecessary to incapacitate an offender, and that this state interest could be accomplished by less onerous means.²⁴⁸ Furthermore, he noted that retribution could not act as the sole justification for the mandatory death penalty, and that it was impossible to assess the degree of punishment necessary to accomplish the goal of retribution.²⁴⁹ He reasoned, therefore, that any marginal benefit the use of capital punishment might have in serving the state's interest in retribution was insufficient to satisfy the state's burden under a compelling state interest/least restrictive means approach.²⁵⁰ Hence, Chief Justice Tauro concluded that under this approach, the mandatory death penalty was unconstitutional under the Massachusetts Constitution.²⁵¹

As mentioned above, a majority of the United States Supreme Court has not adopted a compelling state interest/least restrictive means approach to determine the "evolving standards of decency." The Court has instead stated that the legislature's selection of punishments are presumed valid, and that the legislature does not have to select the least severe penalty as long as the penalty otherwise comports with the dictates of the eighth amendment.²⁵² Critics of the death penalty, the Court has noted, must therefore overcome a

²⁴³ *Id.* at 245-46, 339 N.E.2d at 678 (Tauro, C.J., concurring).

²⁴⁴ *Id.* at 245-46 & n.2, 339 N.E.2d at 678 & n.2 (Tauro, C.J., concurring).

²⁴⁵ *Id.* at 246, 339 N.E.2d at 678-79 (Tauro, C.J., concurring).

²⁴⁶ *Id.* at 251, 339 N.E.2d at 681 (Tauro, C.J., concurring).

²⁴⁷ *Id.* at 258, 339 N.E.2d at 685 (Tauro, C.J., concurring).

²⁴⁸ *Id.* at 260, 339 N.E.2d at 686 (Tauro, C.J., concurring).

²⁴⁹ *Id.* at 261-62, 339 N.E.2d at 686-87 (Tauro, C.J., concurring).

²⁵⁰ *Id.* at 263, 339 N.E.2d at 687 (Tauro, C.J., concurring).

²⁵¹ *Id.* at 263, 339 N.E.2d at 688 (Tauro, C.J., concurring).

²⁵² See *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (opinion of Stewart, Powell, & Stevens, JJ.).

heavy burden to invalidate the constitutionality of capital punishment.²⁵³

In sum, the United States Supreme Court has taken a number of different approaches when it has interpreted the cruel and unusual punishments clause of the eighth amendment. The early Court primarily adhered to an historical method that defined the prohibition of the clause according to the beliefs of the framers of the amendment.²⁵⁴ From the beginning of the twentieth century, the Court has interpreted the clause's prohibition more expansively. Under the "evolving standards of decency" doctrine, the Court has attempted to define the meaning of the eighth amendment in relation to societal views on the meaning of what is cruel and unusual punishment.²⁵⁵ The Court, however, has taken varying approaches to determining the "evolving standards of decency," particularly in the death penalty context. The Court's debate surrounding these varying approaches, and that concerning the proper role of the Court in the interpretation of the cruel and unusual punishments clause, continued in the Court's decisions examining the constitutionality of the death penalty for minors and the mentally retarded.²⁵⁶

II. JUDICIAL INTERPRETATION OF THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE AND THE CONSTITUTIONALITY OF THE DEATH PENALTY FOR JUVENILES AND THE MENTALLY RETARDED

The preceding sections have outlined some of the approaches that the United States Supreme Court, its individual Justices, a state court, and legal scholars have taken in attempts to define appropriately the "evolving standards of decency" for eighth amendment purposes. In the 1989 decisions of *Stanford v. Kentucky* and *Penry v. Lynaugh*, members of the United States Supreme Court again took differing approaches to the determination of the "evolving standards of decency."²⁵⁷ Although in both cases a majority of the Court stated that it was appropriate to engage in some independent ju-

²⁵³ *Id.*

²⁵⁴ See *supra* notes 43-70 and accompanying text for a discussion of the Court's historical approach to eighth amendment interpretation.

²⁵⁵ See *supra* notes 71-210 and accompanying text for a discussion of the "evolving standards of decency" doctrine.

²⁵⁶ See *infra* notes 257-461 and accompanying text for a discussion of the Court's decisions regarding the constitutionality of the execution of minors and the mentally retarded.

²⁵⁷ See *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989); *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989).

dicial approaches, four members of the Court argued that the historical and contemporary consensus approaches should be the Court's sole interpretive guide.²⁵⁸ The remainder of this section will illustrate this conflict by presenting the Court's decisions concerning the constitutionality of the death penalty for juveniles and the mentally retarded.

A. *The Death Penalty for Juveniles*

In the United States Supreme Court's two cases considering the constitutionality of the death penalty for juveniles, a plurality of the Court in each case approached the issue differently. In a 1988 decision, *Thompson v. Oklahoma*, a plurality of the United States Supreme Court held that the cruel and unusual punishments clause of the eighth amendment prohibited the execution of a person for a crime he or she committed before age 16.²⁵⁹ In another decision involving the death penalty for juveniles, the 1989 decision of *Stanford v. Kentucky*, a plurality of the Court held that the cruel and unusual punishments clause did not prohibit the execution of a person for a crime he or she committed at 16 or 17 years of age.²⁶⁰ In *Thompson*, the plurality reached its holding by using contemporary consensus, and independent proportionality and utilitarian excessiveness approaches.²⁶¹ In *Stanford*, the plurality reached its holding by adhering to historical and contemporary consensus approaches.²⁶² Thus, in cases involving defendants separated in age by just a few months, the *Thompson* and *Stanford* pluralities disagreed as to the proper method of determining the "evolving standards of decency," as well as the proper role of the Court in eighth amendment adjudication.

²⁵⁸ See *Stanford*, 109 S. Ct. at 2980 (plurality opinion) (four Justices reasoned that the Court should only evaluate punishments according to the historical and contemporary consensus approaches); see also *id.* at 2981 (O'Connor, J., concurring) (one Justice disputed plurality's rejection of proportionality analysis); *id.* at 2982 (Brennan, J., dissenting) (four Justices applied proportionality and utilitarian excessiveness analysis); *Perry*, 109 S. Ct. at 2955-58 (opinion of O'Connor, J.) (one Justice applied proportionality and utilitarian excessiveness analysis); *id.* at 2959 (Brennan, J., concurring in part) (two Justices applied proportionality and utilitarian excessiveness analysis); *id.* at 2963 (Stevens, J., concurring in part) (two Justices applied proportionality and utilitarian excessiveness analysis); *id.* at 2964 (Scalia, J., dissenting in part) (four Justices rejected appropriateness of proportionality and utilitarian excessiveness analysis).

²⁵⁹ *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2700 (1988) (plurality opinion).

²⁶⁰ *Stanford*, 109 S. Ct. at 2980.

²⁶¹ *Thompson*, 108 S. Ct. at 2963-2700.

²⁶² *Stanford*, 109 S. Ct. at 2980.

1. Thompson v. Oklahoma

The United States Supreme Court squarely considered the constitutionality of the death penalty for juveniles for the first time in the 1988 case of *Thompson v. Oklahoma*.²⁶³ In *Thompson*, a plurality of the Court held that the eighth amendment prohibited the execution of a person for a crime he or she committed before age 16.²⁶⁴ In reaching its holding, the Court considered a number of factors to determine whether the "evolving standards of decency" proscribed the execution of juveniles at this age.²⁶⁵

In *Thompson*, 15-year-old William Wayne Thompson, with the aid of three older persons, brutally murdered his former brother-in-law.²⁶⁶ The motive behind the murder was that the victim had physically abused Thompson's sister.²⁶⁷ Approximately four weeks after the murder, the victim's body, chained to a concrete block, was found in a river.²⁶⁸ The recovered body had two gunshot wounds, cuts on the abdomen, chest, and throat, multiple bruises, and a broken leg.²⁶⁹

After Thompson's arrest, the Grady County District Court conducted a hearing and found probable cause that he had committed first-degree murder.²⁷⁰ Because Oklahoma law defined Thompson as a "child," the district attorney petitioned the court to certify that Thompson be tried as an adult.²⁷¹ The trial court granted the district attorney's request, reasoning that there was essentially no hope for the rehabilitation of Thompson within the juvenile justice system.²⁷²

At trial, a jury found Thompson guilty of first-degree murder.²⁷³ During the penalty phase of the trial, the jury found as an

²⁶³ *Thompson*, 108 S. Ct. at 2689-2700. In the 1982 case of *Eddings v. Oklahoma*, the United States Supreme Court also considered the validity of a 16-year-old juvenile offender's death sentence. 455 U.S. 104, 109 (1982). Without deciding the constitutionality of executing juvenile offenders, the Court held that age was one appropriate mitigating factor to be considered before the death penalty was imposed. *Id.* at 116.

²⁶⁴ *Thompson*, 108 S. Ct. at 2700.

²⁶⁵ *Id.* at 2691-92; see Note, *Thompson v. Oklahoma: Debating the Constitutionality of Juvenile Executions*, 16 PEPPERDINE L. REV. 737, 744 (1989).

²⁶⁶ *Thompson*, 108 S. Ct. at 2690.

²⁶⁷ *Id.* at 2712 (Scalia, J., dissenting).

²⁶⁸ *Id.* at 2690.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 2713 (Scalia, J., dissenting).

²⁷¹ *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2690 (1988) (citing OKLA. STAT. ANN. tit. 10, § 1112(b) (West 1987)).

²⁷² *Id.*

²⁷³ *Id.* at 2713 (Scalia, J., dissenting).

aggravating circumstance that "the murder was especially heinous, atrocious, or cruel" and fixed Thompson's punishment at death.²⁷⁴ The Oklahoma Court of Criminal Appeals affirmed Thompson's conviction and sentence, noting that it was constitutionally permissible to punish a minor as an adult once he or she was certified to stand trial as an adult.²⁷⁵ The United States Supreme Court granted certiorari to consider whether the death penalty constituted cruel and unusual punishment for a 15-year-old offender.²⁷⁶

Justice Stevens delivered the *Thompson* plurality opinion, in which Justices Brennan, Marshall, and Blackmun joined.²⁷⁷ The plurality first noted that the Court's guiding principle to the eighth amendment issue was a determination of the "evolving standards of decency that mark the progress of a maturing society."²⁷⁸ The plurality explained that it would first review relevant state legislation, and then jury sentencing behavior, to resolve the eighth amendment issue.²⁷⁹ It then stated, however, that it would subsequently explain why that empirical data confirmed the Court's judgment that a person 15 years of age at the time of his or her crime was incapable of acting with the necessary degree of culpability to justify a sentence of death.²⁸⁰ To support its reasoning, the *Thompson* plurality cited *Coker* as standing for the proposition that "in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty."²⁸¹ Therefore, the plurality established that its approach to the determination of the "evolving standards of decency" would begin with a contemporary consensus approach, but end in an independent judicial approach.²⁸²

In considering state legislation, the *Thompson* plurality noted that all states have statutes that distinguish between children and

²⁷⁴ *Id.* at 2690. The prosecutor also asked the jury to find that the defendant was a continuing threat to society because of the likelihood that he would commit violent criminal acts in the future. *Id.*

²⁷⁵ *Id.* at 2690-91.

²⁷⁶ *Id.* at 2691. The Court also granted certiorari to consider whether photographic evidence, that a state court ruled erroneously admitted but harmless at the guilt phase, violated a capital defendant's constitutional rights. *Id.* The Court found it unnecessary to reach this second issue given its disposition of the eighth amendment issue. *Id.* at 2700 n.48.

²⁷⁷ *Id.* at 2689.

²⁷⁸ *Id.* at 2691 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

²⁷⁹ *Id.* at 2691-92.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 2692 n.8 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion)).

²⁸² See *id.* at 2691-92.

adults.²⁸³ Furthermore, it observed that in almost all of the fifty states and the District of Columbia, persons under 16 are unable to vote, or to drive a car, or marry without parental consent.²⁸⁴ Most relevant, the plurality noted, was that no state had a statute setting the maximum age for juvenile court jurisdiction at less than 16.²⁸⁵ The plurality reasoned that legislation such as this reflected mankind's experience that normal 15-year-olds were not capable of assuming the totality of adult responsibilities.²⁸⁶

In considering state death penalty legislation, the *Thompson* plurality reasoned that most states had not expressly considered a minimum age for the death penalty.²⁸⁷ To support its reasoning, it noted that although most states had waiver statutes that allowed juveniles accused of serious offenses to be transferred from juvenile court to criminal court, fourteen states did not authorize capital punishment at all, and out of the remaining states, nineteen had not expressly set a minimum age for a sentence of death.²⁸⁸ The *Thompson* plurality reasoned that the statutes of those nineteen states should be put aside because those statutes did not focus on the issue at hand.²⁸⁹ Confining its attention to the eighteen states that had set a minimum age in their death penalty statutes, the plurality noted that no state had set a minimum age lower than 16 at the time of the capital offense.²⁹⁰

The next empirical evidence of the "evolving standards of decency" that the *Thompson* plurality surveyed was the views of professional organizations and of other nations.²⁹¹ It noted that the American Bar Association and the American Law Institute opposed the execution of juveniles.²⁹² Additionally, it noted that the United Kingdom, New Zealand, and the Soviet Union, all countries authorizing the death penalty, prohibited juvenile executions.²⁹³

²⁸³ See *id.* at 2692-93.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 2693.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 2693-94.

²⁸⁸ *Id.* at 2694-95.

²⁸⁹ *Id.* at 2695.

²⁹⁰ *Id.* at 2695-96.

²⁹¹ *Id.* at 2696.

²⁹² *Id.*

²⁹³ *Id.* The *Thompson* plurality also noted that West Germany, France, Portugal, the Netherlands, and all of the Scandinavian countries had abolished capital punishment, and that Canada, Italy, Spain, and Switzerland had retained capital punishment only for exceptional crimes such as treason. *Id.*

Continuing its search for the public's views on the execution of juveniles, the *Thompson* plurality considered jury sentencing behavior.²⁹⁴ The plurality noted that according to one scholar's data regarding minors, eighteen to twenty executions of offenders under the age of 16 had occurred in the twentieth century.²⁹⁵ It also noted that the last of these executions occurred in Louisiana in 1948.²⁹⁶ This data indicated, the plurality reasoned, an "unambiguous conclusion" that the community's conscience generally abhorred the execution of 15-year-old offenders.²⁹⁷ The *Thompson* plurality also noted that according to Department of Justice statistics, juries had sentenced to death only five persons under 16 at the time of their offense between 1982 and 1986.²⁹⁸ Although it admitted that statistics such as those were subject to varying interpretation, the plurality reasoned that the statistics suggested that the five sentences were "cruel and unusual in the same way as being struck by lightning is cruel and unusual."²⁹⁹ Hence, the plurality reasoned that jury sentencing behavior, like the death penalty legislation of the states setting a minimum age for the death penalty, and the views of professional organizations and other nations, supported the view that there was a contemporary consensus against the execution of a minor who committed a crime before age 16.³⁰⁰

The *Thompson* plurality then considered the constitutionality of the death penalty for minors by utilizing a form of proportionality analysis.³⁰¹ To do so, the plurality considered whether an adult's standard of culpability should apply to a juvenile.³⁰² First, it reiterated the general principle that a punishment should be directly related to a criminal defendant's personal culpability.³⁰³ Second, it stated that as a class, adolescents were not as mature and responsible as adults.³⁰⁴ Consequently, the plurality reasoned that less culpability should attach to a juvenile than to an adult who committed the same crime.³⁰⁵ As additional support for its reasoning, the plurality

²⁹⁴ *Id.* at 2697.

²⁹⁵ *Id.* (citing V. STREIB, DEATH PENALTY FOR JUVENILES 190-208 (1987)).

²⁹⁶ *Id.* at 2697 & n.37 (citing V. STREIB, DEATH PENALTY FOR JUVENILES 190-208 (1987)).

²⁹⁷ *Id.* at 2697.

²⁹⁸ *Id.*

²⁹⁹ *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring)).

³⁰⁰ *Id.* at 2695-97.

³⁰¹ *See Id.* at 2698.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* The Court also stated that the underlying philosophy of the juvenile court system is that children lack criminal responsibility. *Id.* at 2698 n.41.

cited various scholarly works on adolescent development as standing for the proposition that teenagers are less culpable for their crimes because of their inexperience, lesser education and intelligence, and tendency to be motivated by peer pressure and emotion.³⁰⁶ Therefore, the plurality concluded that the personal culpability of a juvenile offender did not justify the death penalty.³⁰⁷

Finally, the *Thompson* plurality examined the utility of executing juveniles by considering whether such executions served the "two principle social purposes" of the death penalty—retribution and deterrence.³⁰⁸ The plurality reasoned that executing juveniles would not serve the goal of retribution because of a juvenile offender's lesser culpability, his or her capacity for growth, and society's fiduciary duty to its children.³⁰⁹ In considering the goal of deterrence, the plurality noted that according to Department of Justice statistics, about 98 percent of the persons arrested for willful homicide were over 16 at the time of the crime.³¹⁰ The plurality also stated that teenage offenders probably did not give any consideration to the death penalty because the possibility of execution was remote.³¹¹ Furthermore, the plurality reasoned that even if a teenage offender gave consideration to the death penalty, it was unlikely that he or she would be deterred knowing how few persons his or her age had been executed in the twentieth century.³¹² Consequently, the plurality reasoned, sentencing persons to death for crimes they committed under the age of 16 was "nothing more than the purposeless and needless imposition of pain and suffering" because it would not contribute to the goals of capital punishment.³¹³ Thus, by using the contemporary consensus approach, and the independent proportionality and utilitarian approaches, the *Thompson* plurality held that the cruel and unusual punishments clause of the eighth amendment prohibited the execution of a juvenile who committed his or her crime before age 16.³¹⁴

³⁰⁶ *Id.* at 2699 & n.43.

³⁰⁷ *Id.* at 2698–99.

³⁰⁸ *Id.* at 2699–2700 (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)).

³⁰⁹ *Id.* at 2699.

³¹⁰ *Id.* at 2700.

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)). The *Thompson* plurality declined the invitation to "draw a line" prohibiting the execution of persons under 18 at the time of their offense. *Id.*

³¹⁴ *Id.* at 2691–92, 2700.

In her concurrence in *Thompson*, Justice O'Connor identified the reason for the disagreement between the plurality and dissent as being their different evaluations of relevant social consensus evidence.³¹⁵ To her, the most persuasive statistic in support of the Court's holding was that all the state legislatures that had set a minimum age in their death penalty statutes had chosen 16 or above.³¹⁶ She reasoned that those eighteen states, when combined with the fourteen that had abolished the death penalty entirely, made it clear that almost two-thirds of the States had expressly concluded that persons under 16 at the time of their offense did not deserve the death penalty.³¹⁷ She also argued that the nineteen states that had not set an age limit in their death penalty statutes might not have considered the issue.³¹⁸

Justice O'Connor stated that this evidence did not, however, convince her of a national consensus against executing persons under 16 at the time they committed their crime.³¹⁹ Thus, she too considered jury sentencing behavior and execution statistics in an effort to determine the public's views.³²⁰ She noted that the plurality's treatment of these statistics supported the inference that there was a national consensus opposing the death penalty for 15-year-olds, but stated that this evidence also did not resolve the issue.³²¹ Rather, she argued that without knowledge of how many prosecutors had asked juries to impose the death penalty on persons below 16 at the time of their crimes, it was improper to infer that juries were more reluctant to sentence those persons to death than similarly situated older defendants.³²²

Justice O'Connor also argued that the *Thompson* plurality's proportionality analysis did not properly resolve the issue.³²³ She stated that even if adolescents were generally less blameworthy than adults, it was not necessarily true that all 15-year-olds lacked the requisite culpability that justified capital punishment.³²⁴ Additionally, she disagreed with the plurality's treatment of the utility of executing

³¹⁵ *Id.* at 2706 (O'Connor, J., concurring).

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Thompson*, 108 S. Ct. at 2707 (O'Connor, J., concurring).

³¹⁹ *Id.* at 2708 (O'Connor, J., concurring).

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

juvenile offenders.³²⁵ She argued that there was insufficient evidence to conclude that the possibility of execution would not deter some 15-year-olds.³²⁶ Hence, she reasoned, the state legislatures, rather than the "subjective" judgment of the Court, were better equipped to determine where to draw a line.³²⁷ Nevertheless, Justice O'Connor agreed with the *Thompson* plurality that the defendant's sentence should be vacated because she believed that there was a "considerable risk" that the Oklahoma legislature, without setting a minimum age for the imposition of the death penalty, had not considered the issue.³²⁸

Justice Scalia, joined by Chief Justice Rehnquist and Justice White, authored the dissenting opinion in *Thompson*.³²⁹ Justice Scalia framed the question before the Court as whether there was a national consensus that no criminal under 16 was mature enough to receive the death penalty for any crime, even after the individual consideration of the criminal's circumstances, and the overcoming of the presumption that the criminal should be tried as a minor.³³⁰ Justice Scalia prefaced his opinion by stating that there were no plausible reasons for answering that question in the affirmative.³³¹

In his analysis, Justice Scalia began with an historical approach to the determination of the constitutionality of executing minors.³³² He noted that historical practice in the United States, in conformance with the common law, did not support the argument that persons 15 years old at the time of their offense were immune from capital punishment.³³³ Hence, Justice Scalia argued, the *Thompson* plurality was forced to rest its holding on the conclusion that the "evolving standards of decency that mark the progress of a maturing society" made the defendant's punishment unconstitutional.³³⁴ Before taking a contemporary consensus approach to the assessment of society's standards of decency, Justice Scalia stated that state legislation was the most reliable indicator of society's views.³³⁵

³²⁵ *Id.* at 2708-09 (O'Connor, J., concurring).

³²⁶ *Id.*

³²⁷ *Id.* at 2709 (O'Connor, J., concurring).

³²⁸ *Thompson*, 108 S. Ct. at 2711 (O'Connor, J., concurring).

³²⁹ *Id.* at 2711 (Scalia, J., dissenting).

³³⁰ *Id.* at 2712 (Scalia, J., dissenting).

³³¹ *Id.*

³³² *Id.* at 2714 (Scalia, J., dissenting).

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.* at 2715 (Scalia, J., dissenting).

Justice Scalia interpreted state death penalty legislation differently than the *Thompson* plurality had.³³⁶ For instance, he argued that the legislation of all of the states retaining the death penalty, and not only those setting a minimum age, were relevant.³³⁷ He noted that a majority of the states that maintain the death penalty had not set a minimum age for its imposition.³³⁸ Hence, Justice Scalia argued, it was impossible for the plurality to find any evolved consensus against the execution of minors in the legislation of this society.³³⁹

Continuing his attack on the *Thompson* plurality's contemporary consensus approach, Justice Scalia criticized the plurality for focusing upon capital execution statistics, rather than upon jury sentencing behavior.³⁴⁰ He found the small number of juvenile executions unsurprising, and was unpersuaded that this evidence showed the existence of a relevant trend.³⁴¹ He argued that individualized sentencing determinations and the general reduction of public support for the death penalty were more likely the factors contributing to the rarity of juvenile executions.³⁴²

Finally, Justice Scalia criticized the *Thompson* plurality's proportionality and utilitarian excessiveness analysis.³⁴³ He stated that the plurality had misread the Court's prior decisions as standing for the proposition that the Court sat as the ultimate arbiter of the eighth amendment.³⁴⁴ Prior judicial interpretation of the eighth amendment, he argued, stood for the proposition that a punishment was cruel and unusual if the framers of the eighth amendment or our current national society considered it cruel and unusual.³⁴⁵ He contended that the plain meaning of the phrase cruel and unusual mandated that the evolving standards appropriate for consideration were those entertained by society as a whole, and not

³³⁶ *Id.* at 2716 (Scalia, J., dissenting) (Scalia reasoned that the states that had not set a minimum age for capital punishment had left their general rules concerning juvenile criminal responsibility to govern that issue).

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.* The dissent also criticized the plurality's reliance on the laws of other countries. *Id.* at 2716 n.4 (Scalia, J., dissenting) ("We must never forget that it is a Constitution for the United States of America we are expounding.").

³⁴⁰ *Thompson*, 108 S. Ct. at 2717 (Scalia, J., dissenting).

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.* at 2719 (Scalia, J., dissenting).

³⁴⁴ *Id.*

³⁴⁵ *Id.*

those dictated by the Justices' personal consciences.³⁴⁶ Therefore, Justice Scalia rejected the *Thompson* plurality's proportionality and utilitarian excessiveness analysis as well as the plurality's treatment of empirical data concerning societal views upon the execution of persons who committed crimes before age 16.³⁴⁷

Nevertheless, the *Thompson* plurality's interpretation of the Court's prior decisions was that the Court had a duty to consider the constitutionality of the death penalty for a particular class of offenders under the independent proportionality and utilitarian excessiveness approaches.³⁴⁸ Under these approaches, and the contemporary consensus approach, the plurality held that the execution of offenders below the age of 16 was cruel and unusual punishment within the meaning of the eighth amendment.³⁴⁹ The *Thompson* plurality's analysis therefore reaffirmed the propriety of the proportionality and utilitarian excessiveness strands of eighth amendment jurisprudence.

2. *Stanford v. Kentucky*

In the 1989 case of *Stanford v. Kentucky*, one year after its decision in *Thompson*, the United States Supreme Court considered the constitutionality of the death penalty when the convicted offender was 16 or 17 years of age at the time of the offense.³⁵⁰ In *Stanford*, a plurality of the Court held that this punishment did not offend the cruel and unusual punishments clause of the eighth amendment.³⁵¹ As in *Thompson*, however, the Court was divided on the proper mode of determining the constitutionality of the offenders' death sentences, as well as on the proper result.

Stanford involved two consolidated cases.³⁵² The first case involved Kevin Stanford, who with an accomplice, raped, sodomized, and murdered a young woman after robbing a gas station where she worked.³⁵³ Kevin Stanford was approximately 17 years and 4 months of age at the time of his crime.³⁵⁴

³⁴⁶ *Id.*

³⁴⁷ See *id.* at 2716-19 (Scalia, J., dissenting).

³⁴⁸ *Id.* at 2698 (plurality opinion).

³⁴⁹ *Id.* at 2691-92.

³⁵⁰ *Stanford v. Kentucky*, 109 S. Ct. 2969, 2972 (1989) (plurality opinion).

³⁵¹ *Id.* at 2980.

³⁵² *Id.* at 2972.

³⁵³ *Id.* at 2972-73.

³⁵⁴ *Id.* at 2972.

After Stanford's arrest, the juvenile court conducted hearings to determine whether he should be tried as an adult.³⁵⁵ The juvenile court found that, in the best interests of Stanford and the community, trial as an adult was proper.³⁵⁶ In reaching its decision, the court stressed the juvenile system's prior lack of success at treating Stanford for delinquency, as well as the seriousness of his offenses.³⁵⁷

At trial, a jury convicted Stanford of murder, first-degree sodomy, first-degree robbery, and receiving stolen property.³⁵⁸ For his offenses, the jury sentenced Stanford to death and 45 years in prison. The Kentucky Supreme Court affirmed his sentence, stating that an appropriate program of treatment did not exist for Stanford in the juvenile system and that it was for the jury to consider mitigating factors such as Stanford's age and possible rehabilitation.

The second case involved Heath Wilkins, who with an accomplice, stabbed to death a woman working behind the counter of a convenience store she owned and operated with her husband.³⁵⁹ Wilkins explained that he had planned to murder the person working behind the counter because "a dead person can't talk." Wilkins was approximately 16 years and 6 months of age at the time of his offenses.

After his arrest, the juvenile court held a hearing to determine whether Wilkins should be tried as an adult.³⁶⁰ The juvenile court granted the necessary certification. The court's decision rested on the brutality of the alleged crime, Wilkins' maturity, and the juvenile justice system's prior failures at rehabilitating him.

After the Circuit Court of Clay County found Wilkins competent to stand trial, he waived his right to counsel, intending to plead guilty and to seek the death penalty.³⁶¹ The circuit court accepted the waiver and guilty plea.³⁶² At sentencing, Wilkins told the court that he wished to receive the death penalty rather than life imprisonment.³⁶³ The trial court granted Wilkins's wish.³⁶⁴ Although Wilk-

³⁵⁵ *Id.* at 2973.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Stanford*, 109 S. Ct. at 2991 (Brennan, J., dissenting).

³⁶² *Id.*

³⁶³ *Id.* Wilkins's explanation for his desire to receive the death penalty rather than life imprisonment was: "[O]ne I fear, the other one I don't." *Id.*

³⁶⁴ *Id.*

ins did not attempt to appeal his death sentence, the Missouri Supreme Court ordered an evaluation to determine Wilkins's competency, and determined that he was incompetent to waive his right to appellate counsel.³⁶⁵ On mandatory review, however, the Missouri Supreme Court affirmed Wilkins's death sentence by rejecting the argument that his punishment was cruel and unusual under the eighth amendment.³⁶⁶ The United States Supreme Court granted certiorari to decide whether the eighth amendment barred capital punishment for persons who committed crimes at 16 or 17 years of age.³⁶⁷

Justice Scalia delivered the plurality opinion in *Stanford*, in which Chief Justice Rehnquist and Justices White and Kennedy joined.³⁶⁸ In holding that the eighth amendment does not prohibit the execution of a 16 or a 17-year-old offender, the *Stanford* plurality began with an historical approach, and noted that neither of the petitioners could argue that the ratifiers of the Bill of Rights had considered such executions cruel and unusual.³⁶⁹ To support this contention, the plurality noted that under the common law, capital punishment could theoretically be imposed on persons aged 7 and above.³⁷⁰ Additionally, it stated that this country had executed at least 281 persons under the age of 18.³⁷¹ Consequently, the plurality noted, the petitioners' remaining argument was that their sentences were in opposition to the "evolving standards of decency that mark the progress of a maturing society."³⁷²

The *Stanford* plurality prefaced the next phase of its analysis by reasoning that the Court should determine the "evolving standards of decency" under a contemporary consensus approach.³⁷³ It stated that the members of the Court had not in the past found these "evolving standards" within their own conceptions of decency, but rather that the Court had previously found these standards in the views of the entire society.³⁷⁴ Hence, it reasoned, when deter-

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 2974 (plurality opinion).

³⁶⁸ *Id.* at 2972. Justice O'Connor joined in part. *Id.* at 2980. See *infra* notes 398-401 and accompanying text for a discussion of Justice O'Connor's opinion.

³⁶⁹ *Stanford*, 109 S. Ct. at 2974. Neither of the petitioners had argued that the ratifiers of the Bill of Rights had considered the execution of juveniles cruel and unusual. *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

³⁷³ *Id.* at 2974-75.

³⁷⁴ *Id.*

mining society's views, the Court should utilize objective factors as much as possible.³⁷⁵ The language of the eighth amendment, with its prohibition of punishments that are both cruel *and* unusual, the plurality stated, as well as the deference the Court owed to the state legislatures, dictated this approach.³⁷⁶

The *Stanford* plurality's contemporary consensus approach to the constitutionality of the execution of minors began with a consideration of state death penalty legislation.³⁷⁷ It noted that of the thirty-seven states permitting capital punishment, fifteen states did not authorize capital punishment for 16-year-old offenders, and twelve states did not authorize capital punishment for 17-year-old offenders.³⁷⁸ This did not, the plurality reasoned, establish that the nation found it cruel and unusual to execute persons aged 16 or 17 at the time of their crime because a majority of the states that permitted capital punishment authorized it for crimes the offender committed at these ages.³⁷⁹

In considering prosecutorial and jury sentencing behavior, the *Stanford* plurality noted that juries had sentenced to death far fewer offenders under 18 than over 18.³⁸⁰ Nevertheless, the plurality reasoned, the "undisputed fact" that persons over 18 commit more crimes than those under 18 accounted for this discrepancy.³⁸¹ Furthermore, the plurality reasoned, juries sentenced persons under 18 to death with enough frequency to support strongly the possibility that they believed it should be imposed in rare instances.³⁸² Therefore, the *Stanford* plurality reasoned that this evidence was also not supportive of the conclusion that a societal consensus against the execution of 16 and 17-year-old offenders existed.³⁸³

³⁷⁵ *Id.* at 2975 (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)).

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 2975-79.

³⁷⁸ *Id.* at 2975.

³⁷⁹ *Stanford*, 109 S. Ct. at 2975-76. Justice Scalia noted that in *Coker*, Georgia was the sole jurisdiction imposing the death penalty for rape, and in *Enmund*, only eight jurisdictions authorized capital punishment for a defendant who neither killed, attempted to kill, or intended to kill. *Id.* at 2976. The plurality also noted that although the federal government had recently passed a statute providing for capital punishment for drug offenders over age 18, there also was a federal statute allowing juveniles to be tried as adults for all federal offenses. *Id.* The plurality reasoned that this latter statute contained, "if apparent at all," the broader congressional judgment. *Id.*

³⁸⁰ *Id.* at 2977.

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *Id.* at 2979.

The plurality completed its contemporary consensus analysis by noting the irrelevancy of statutes setting an age limit of 18 for activities like driving, voting, and drinking alcoholic beverages.³⁸⁴ It reasoned that it was absurd to think that a person needed to be mature enough to engage in activities like voting before he or she was mature enough to know that murder is wrong.³⁸⁵ The plurality also reasoned that those statutes merely represented a societal judgment that the vast majority of persons under 18 were not mature enough to engage in those activities.³⁸⁶ Unlike those activities, the plurality noted, the criminal justice system provided for individualized judicial treatment.³⁸⁷

The *Stanford* plurality completed its analysis by rejecting a number of the dissent's arguments against the imposition of the death penalty on persons aged 16 or 17 at the time of their offense.³⁸⁸ First, it stated that public opinion polls, the views of interest groups, and the positions of professional associations were irrelevant to the determination of the "evolving standards of decency."³⁸⁹ To support this contention, the plurality reasoned that before the views of these groups could constitute a true national consensus against the death penalty, society's endorsement of these views must have appeared in society's legislation and application of that legislation.³⁹⁰

Second, the *Stanford* plurality reasoned that the dissenters were incorrect to argue that the execution of 16 and 17-year-old offenders did not serve the legitimate goals of penology.³⁹¹ It reasoned that "socioscientific" evidence concerning the emotional and psychological development of 16 and 17-year-olds did not demonstrate that these persons always lacked the moral culpability necessary to satisfy the goal of retribution. The plurality also reasoned that such evidence did not establish that the death penalty failed to deter these persons.

Third, the *Stanford* plurality argued that it had not left political majorities to define the eighth amendment.³⁹² The plurality reasoned that its analysis was sound because the Constitution was in-

³⁸⁴ *Id.* at 2977.

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 2977-78.

³⁸⁸ *Id.* at 2979-80.

³⁸⁹ *Stanford*, 109 S. Ct. at 2979.

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² *Id.* at 2980.

tended to limit the Court, as well as the other governmental branches.³⁹³ It also reasoned that the Court's prior cases did not stand for the proposition that the Justices sat as a "committee of philosopher-kings."³⁹⁴ Finally, the plurality noted that although some of the Court's prior cases had engaged in proportionality analysis, that sort of analysis, by itself, had never invalidated a punishment.³⁹⁵ Therefore, unable to find a societal consensus against the execution of 16 or 17-year-old offenders under either an historical or contemporary consensus approach, the *Stanford* plurality held that the eighth amendment did not forbid the executions of these persons.³⁹⁶

In *Stanford*, Justice O'Connor concurred in the judgment of the Court, but disagreed with parts of the *Stanford* plurality's analysis.³⁹⁷ She did agree with the plurality that there was no national consensus against allowing the states to impose the death penalty on persons 16 or 17 at the time of their offense.³⁹⁸ She did not, however, agree with the plurality that the Court's inquiry was complete after assessing state death penalty legislation.³⁹⁹ She argued that the Court had a "constitutional obligation" to conduct proportionality analysis by considering how directly related a punishment was to a defendant's blameworthiness.⁴⁰⁰ Nevertheless, Justice O'Connor was unconvinced that proportionality analysis would resolve the issue, and therefore she concurred with the judgment of the *Stanford* plurality.⁴⁰¹

Justice Brennan delivered the *Stanford* dissent, joined by Justices Marshall, Blackmun, and Stevens.⁴⁰² Justice Brennan agreed with the *Stanford* plurality that a determination of the "evolving standards of decency" should begin with a review of state death penalty legislation and jury sentencing behavior.⁴⁰³ He argued, however, that the Court should also consider additional state legislation, as well as ethicoscientific evidence of the psychological and emo-

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 2980 (O'Connor, J., concurring in part).

³⁹⁸ *Stanford*, 109 S. Ct. at 2981 (O'Connor, J., concurring in part).

³⁹⁹ *Id.* Justice O'Connor also argued that state statutes other than those pertaining to the death penalty were relevant. *Id.* at 2982 (O'Connor, J., concurring in part).

⁴⁰⁰ *Id.* at 2981 (O'Connor, J., concurring in part).

⁴⁰¹ *Id.* at 2982 (O'Connor, J., concurring in part).

⁴⁰² *Id.* at 2982 (Brennan, J., dissenting).

⁴⁰³ *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

tional development of juveniles.⁴⁰⁴ This additional evidence, he contended, was necessary to determine whether the punishment was excessive, disproportionate, or failed to serve the legitimate goals of penology.⁴⁰⁵

In performing his contemporary consensus analysis in *Stanford*, Justice Brennan first argued that the plurality had manipulated the evidence of state death penalty legislation by failing to include the fifteen "states," including the District of Columbia, not authorizing the death penalty at all.⁴⁰⁶ He then noted that of the states authorizing the death penalty, eighteen had not set a minimum age at which the state could impose it.⁴⁰⁷ These eighteen states, Justice Brennan argued, might not have considered whether the death penalty would apply to persons under 18 years of age.⁴⁰⁸ Hence, he argued, by combining these eighteen states with the fifteen that had completely rejected the death penalty, a majority of the states had rejected the death penalty for juveniles.⁴⁰⁹

Justice Brennan also argued that juries sentenced juveniles to death so rarely that for juveniles, the death penalty was "unusual."⁴¹⁰ In support of this argument, he noted that in other cases in which the Court had declared the death penalty unconstitutional, juries had also rarely imposed the sentence.⁴¹¹ To support this contention, he cited statistics showing that juveniles make up only about 1.4% of the nation's death row population.⁴¹² Furthermore, Brennan argued that the rejection of the death penalty for juveniles by "respected" organizations, including the American Bar Association, and by other countries, were relevant indicators of contemporary standards of decency.⁴¹³

The *Stanford* dissent continued its analysis by considering the proportionality of the death penalty to the blameworthiness of juvenile offenders.⁴¹⁴ It reasoned that state statutes defining 18 as the legal age for certain activities, such as voting and purchasing pornographic materials, reflected society's view that juveniles were not

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at 2982-83 (Brennan, J., dissenting).

⁴⁰⁷ *Stanford*, 109 S. Ct. at 2983 (Brennan, J., dissenting).

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 2983, 2986 (Brennan, J., dissenting).

⁴¹⁰ *Id.* at 2984 (Brennan, J., dissenting).

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.* at 2984-85 (Brennan, J., dissenting).

⁴¹⁴ *Id.* at 2987-93 (Brennan, J., dissenting).

as mature or responsible as adults.⁴¹⁵ Justice Brennan then cited a number of factors contributing to the lesser maturity of juveniles, such as their susceptibility to peer pressure, and their lack of "experience, perspective, and judgment."⁴¹⁶ These factors, Justice Brennan reasoned, indicated that persons under 18 generally do not have the same level of responsibility for their actions as do adults, and thus, that juveniles do not possess the degree of culpability necessary to uphold the constitutionality of their death sentences under proportionality principles.⁴¹⁷

Finally, the *Stanford* dissent considered whether the death penalty measurably furthered the goals of retribution and deterrence when it was imposed on juveniles.⁴¹⁸ Justice Brennan reasoned that the death penalty did not adequately serve the goal of retribution because juvenile offenders generally lack the same degree of culpability as adults.⁴¹⁹ He also reasoned that the death penalty had little deterrent value to juvenile offenders because of the unlikelihood that they would consider the possibility of execution, and because of the tendency of juveniles not to fear death.⁴²⁰ Hence, by utilizing the contemporary consensus approach, and the independent proportionality and utilitarian approaches, the *Stanford* dissent argued that the execution of persons who committed their offenses before they reached the age of 18 was excessive and unconstitutional because it was "nothing more than the purposeless and needless imposition of pain and suffering."⁴²¹

B. The Death Penalty for the Mentally Retarded

On the same day in 1989 that the United States Supreme Court decided *Stanford v. Kentucky*, it also considered the constitutionality of executing a mentally retarded offender with the alleged reasoning capacity of a 7-year-old in *Penry v. Lynaugh*.⁴²² As in both *Thompson* and *Stanford*, the members of the Court were divided on the appropriate method of resolving the eighth amendment issue. In

⁴¹⁵ *Id.* at 2988 (Brennan, J., dissenting).

⁴¹⁶ *Id.* at 2988-89 (Brennan, J., dissenting) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

⁴¹⁷ *Stanford*, 109 S. Ct. at 2989, 2992-93 (Brennan, J., dissenting).

⁴¹⁸ *Id.* at 2993 (Brennan, J., dissenting).

⁴¹⁹ *Id.*

⁴²⁰ *Id.* at 2993-94 (Brennan, J., dissenting).

⁴²¹ *Id.* at 2994 (Brennan, J., dissenting) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)).

⁴²² 109 S. Ct. 2934, 2952 (1989).

Penry, a plurality of the Court adhered to a contemporary consensus approach and held that the eighth amendment did not categorically prohibit the execution of mentally retarded offenders.⁴²³

In *Penry*, the defendant confessed to brutally raping, beating, and stabbing with a pair of scissors, a woman in her home.⁴²⁴ He was charged with capital murder, and a hearing was held to determine his competency. At this hearing, a clinical psychologist testified that Penry was mentally retarded, had an IQ of 54, and had been diagnosed as having organic brain damage as a child, a condition the psychiatrist testified was probably caused by a trauma to his brain at birth. This psychologist also testified that Penry had the mental age of a 6 1/2-year-old, and that his ability to function in the world was that of a 9 or 10-year-old. Nonetheless, a jury found Penry competent to stand trial.

At the guilt-innocence phase of the trial, Penry raised an insanity defense and presented the testimony of a psychiatrist who testified that Penry suffered from organic brain damage, but that beatings and multiple injuries to his brain as a child may have caused this condition rather than a trauma to his brain at birth.⁴²⁵ In this psychiatrist's opinion, Penry's organic brain damage made it impossible for him to understand the wrongfulness of his acts or to conform with the law. Additionally, Penry's sister testified that their mother had beaten Penry over the head with a belt on numerous occasions when he was a child, and that their mother had frequently locked him in his room for long periods of time without access to a toilet.

To rebut the testimony of the defendant's witnesses, the state offered the testimony of two other psychiatrists.⁴²⁶ One psychiatrist testified that Penry did not suffer from any mental illness or defect at the time of his crime, that he could distinguish right from wrong, and that he possessed the ability to honor the law.⁴²⁷ The other psychiatrist testified that Penry was legally sane at the time of his crimes, and that he had a "full-blown antisocial personality." Both of these psychiatrists testified that Penry's mental ability was ex-

⁴²³ *Id.* at 2958 (opinion of O'Connor, J.); *see id.* at 2964 (Scalia, J., concurring in part). Justice O'Connor, although writing for the various majorities, also reasoned that proportionality and utilitarian excessiveness analysis did not invalidate the defendant's sentence, although no one joined her in this part of her opinion. *Id.* at 2940, 2955-58.

⁴²⁴ *Id.* at 2941.

⁴²⁵ *Id.*

⁴²⁶ *Id.* at 2942.

⁴²⁷ *Id.*

tremely limited, and that he was incapable of learning from his mistakes.

The jury found Penry guilty of capital murder.⁴²⁸ At the penalty phase of the trial, the jury sentenced Penry to death.⁴²⁹ On direct appeal, the Texas Court of Criminal Appeals affirmed Penry's conviction and death sentence.⁴³⁰ The United States Supreme Court granted certiorari to consider, among other issues, whether the execution of mentally retarded persons violated the cruel and unusual punishments clause of the eighth amendment.⁴³¹

Justice O'Connor delivered the Court's opinion in *Penry*.⁴³² The Court's analysis first took an historical approach to the question presented.⁴³³ It noted that the common law had prohibited the punishment of "lunatics" and "idiots."⁴³⁴ It concluded, however, that because a jury had found the defendant competent to stand trial, and had rejected his insanity defense, that this common law prohibition against punishing "idiots" did not apply categorically to mentally retarded persons.⁴³⁵

The *Penry* Court next took a contemporary consensus approach to determine whether there was any objective evidence of a national consensus against the execution of the mentally retarded.⁴³⁶ It noted that only one state, Georgia, explicitly banned the execution of such persons.⁴³⁷ It reasoned that this one state, even if added to the 14 states rejecting capital punishment completely, was not sufficient evidence to reflect a national consensus against this punishment.⁴³⁸

⁴²⁸ *Id.*

⁴²⁹ *Id.* at 2943.

⁴³⁰ *Id.*

⁴³¹ *Id.* at 2943-44. The other eighth amendment issue in *Penry* was whether the defendant's sentence was improper because the trial judge did not instruct the jury that it could consider and give effect to mitigating evidence of the defendant's background and mental retardation. *Id.* The Court reasoned that the jury's instruction was inadequate and, given its holding of the principal eighth amendment issue, the Court remanded the case for resentencing. *Id.* at 2952, 2958.

⁴³² *Penry*, 109 S. Ct. at 2940. Chief Justice Rehnquist, and Justices White, Scalia, and Kennedy, joined Justice O'Connor in her historical and contemporary consensus approaches to the eighth amendment issue. *Id.* at 2940. No one, however, joined Justice O'Connor's treatment of the issue under the proportionality and utilitarian excessiveness approaches. *Id.*

⁴³³ *Id.* at 2953-54.

⁴³⁴ *Id.* at 2954. Under the common law, the term "idiot" was a general description for persons totally lacking the ability to reason, understand, or distinguish between good and evil. *Id.*

⁴³⁵ *Id.*

⁴³⁶ *Id.* at 2955.

⁴³⁷ *Id.* (citing GA. CODE ANN. § 17-7-131(j) (Supp. 1989)).

⁴³⁸ *Id.*

The Court also noted that public opinion polls and the resolutions of professional organizations, such as the American Association on Mental Retardation ("AAMR"), reflected strong public opposition to the execution of the mentally retarded.⁴³⁹ These sentiments, however, had not yet found expression in legislation, and hence, the Court reasoned, they were not sufficient evidence upon which it could find a national consensus against capital punishment of the mentally retarded.⁴⁴⁰ The *Penry* Court therefore concluded that it could not hold that the execution of the mentally retarded violated the eighth amendment because there was insufficient evidence of a national consensus against it.⁴⁴¹

Justice O'Connor, now writing only for herself in *Penry*, completed her analysis by considering the constitutionality of the execution of mentally retarded offenders under the utilitarian excessiveness and proportionality strands of eighth amendment analysis.⁴⁴² She noted that although mental retardation would diminish a person's criminal culpability, virtually all states authorizing the death penalty listed as a mitigating factor the defendant's mental capacity to appreciate his or her criminal acts.⁴⁴³ She also argued that the abilities and experiences of mentally retarded persons vary greatly.⁴⁴⁴ Hence, she reasoned that the possibility that some mentally retarded persons were incapable of acting with the level of culpability necessary to justify the death penalty made it improper to invalidate the defendant's sentence under either proportionality or utilitarian excessiveness analysis.⁴⁴⁵

Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Kennedy, concurred in part and dissented in part in *Penry*.⁴⁴⁶ Justice Scalia agreed with Justice O'Connor that neither an historical approach nor a contemporary consensus approach rendered the execution of the mentally retarded unconstitutional.⁴⁴⁷ He did not, however, agree that the Court should perform proportionality and utilitarian excessiveness analysis to determine the

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² *Penry*, 109 S. Ct. at 2955-58 (opinion of O'Connor, J.).

⁴⁴³ *Id.* at 2956 (opinion of O'Connor, J.).

⁴⁴⁴ *Id.* at 2957 (opinion of O'Connor, J.).

⁴⁴⁵ *Id.* at 2956-57 (opinion of O'Connor, J.).

⁴⁴⁶ *Id.* at 2963 (Scalia, J., concurring in part). Justice Scalia dissented on the Court's holding that the trial judge's instructions to the jury were unsatisfactory. *Id.* at 2964 (Scalia, J., dissenting in part).

⁴⁴⁷ *Id.* at 2963 (Scalia, J., concurring in part).

eight amendment issue.⁴⁴⁸ Justice Scalia argued that these approaches were improper for the reasons that he had set forth in *Stanford*, and stated that the Justices' theories of penology were irrelevant.⁴⁴⁹

Justice Brennan, along with Justice Marshall, also concurred in part and dissented in part in *Penry*.⁴⁵⁰ Justice Brennan agreed with Justice O'Connor that in determining the constitutionality of the execution of mentally retarded offenders, the Court should engage in proportionality and utilitarian excessiveness analysis.⁴⁵¹ He disagreed, however, with Justice O'Connor's analysis regarding these two eighth amendment principles.⁴⁵² Justice Brennan's reasoning led him to the conclusion that under both strands of analysis, the execution of the mentally retarded was unconstitutional.⁴⁵³

In performing his proportionality analysis in *Penry*, Justice Brennan first noted that it was inappropriate to treat all mentally retarded people as a homogeneous group because of the danger of stereotyping and discrimination associated with such broad generalizations.⁴⁵⁴ He also noted, however, that according to the AAMR's clinical definition of mental retardation, all mentally retarded persons had an IQ under 70, and suffered considerable limitations in learning, personal independence, maturation or social responsibility.⁴⁵⁵ Justice Brennan argued that these impairments, as well as the mentally retarded's marked handicaps in cognitive ability and adaptive behavior, limited the culpability of these persons.⁴⁵⁶ Hence, Justice Brennan concluded that the execution of the mentally retarded was a punishment disproportionate to their crimes.⁴⁵⁷

In *Penry*, Justice Brennan also argued that the execution of the mentally retarded was unconstitutional because it failed to further the penal goals of retribution or deterrence.⁴⁵⁸ He reasoned that

⁴⁴⁸ *Id.* at 2964 (Scalia, J., concurring in part).

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.* at 2958 (Brennan, J., concurring in part and dissenting in part).

⁴⁵¹ *Id.* at 2959 (Brennan, J., dissenting in part).

⁴⁵² *Penry*, 109 S. Ct. at 2960 (Brennan, J., dissenting in part).

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.* at 2961 (Brennan, J., dissenting in part). Justice Brennan also argued that even if some mentally retarded persons had an exceptional degree of responsibility, the individualized sentencing considerations still failed to ensure that only these persons received the death penalty because mental retardation was only one factor that the sentencer considered during sentencing. *Id.* at 2961-62 (Brennan, J., dissenting in part).

⁴⁵⁷ *Id.* at 2961 (Brennan, J., dissenting in part).

⁴⁵⁸ *Id.* at 2962 (Brennan, J., dissenting in part).

because the mentally retarded lack the requisite degree of culpability necessary to satisfy the proportionality strand of eighth amendment analysis, the punishment would not effectively serve the goal of retribution.⁴⁵⁹ Additionally, Justice Brennan argued that the execution of these persons would not satisfy the goal of deterrence because nonretarded potential offenders would still be subject to the death penalty, and the "intellectual impairments" of retarded potential offenders made it unlikely that the possibility of execution would deter them.⁴⁶⁰ Thus, in his *Penry* dissent, Justice Brennan concluded under both the proportionality and utilitarian excessiveness strands of eighth amendment analysis that the execution of the mentally retarded was cruel and unusual punishment.⁴⁶¹

In sum, the members of the United States Supreme Court in *Thompson*, *Stanford*, and *Penry* were unable to agree on the proper mode of determining the constitutionality of the execution of juveniles and of the mentally retarded. Some of the Justices argued that the Court should only engage in historical and contemporary consensus approaches, while others argued that the Constitution obligated the Court to consider also the validity of these executions under proportionality and utilitarian excessiveness approaches. The *Thompson*, *Stanford*, and *Penry* Courts, therefore, have left subsequent challengers of the constitutionality of the death penalty to ponder over what mode of analysis will ultimately prevail in the Court.

III. ANALYSIS OF PRESENT JUDICIAL INTERPRETATION OF THE "EVOLVING STANDARDS OF DECENCY" AS APPLIED TO MINORS AND THE MENTALLY RETARDED

The United States Supreme Court first interpreted the cruel and unusual punishments clause under an historical approach by reading the clause as only prohibiting the infliction of punishments that the framer's of the eighth amendment deemed torturous.⁴⁶² For example, the Court in *Wilkerson v. Utah* held that the eighth amendment did not prohibit the sentence of death by public shooting because this mode of execution was historically acceptable.⁴⁶³ In 1910, however, in *Weems v. United States*, the Court expanded the

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* at 2962-63 (Brennan, J., dissenting in part).

⁴⁶¹ *Id.* at 2962 (Brennan, J., dissenting in part).

⁴⁶² See Granucci, *supra* note 1, at 842.

⁴⁶³ 99 U.S. 130, 134-35 (1879).

clause's scope by stating that the clause was "not fastened to the obsolete but may acquire new meaning as public opinion becomes enlightened by humane justice."⁴⁶⁴ Forty-eight years later, in *Trop v. Dulles*, the Court stated that the eighth amendment was defined according to the "evolving standards of decency that mark the progress of a maturing society."⁴⁶⁵ The Court has subsequently adopted this notion and rejected the historical approach as its sole interpretive guide to the cruel and unusual punishments clause.⁴⁶⁶

The Court's adoption of the "evolving standards of decency" doctrine has resulted in several distinct strands of eighth amendment analysis. These strands of analysis include the contemporary consensus approach, and the independent proportionality and utilitarian excessiveness approaches.⁴⁶⁷ Combined, these approaches suggest that a punishment may be constitutionally invalid if popular sentiment abhors it, if the punishment is disproportionate to the offender's crime, or if the punishment inadequately serves legitimate penal purposes.⁴⁶⁸ None of these approaches, however, completely remedies the problem of the Court's appropriate role in eighth amendment analysis.

For example, the Court's heavy reliance on the contemporary consensus approach in *Gregg v. Georgia* rendered the eighth amendment a meaningless prohibition on the states because it allowed the Court to avoid almost completely any independent role in considering the constitutionality of capital punishment.⁴⁶⁹ By allowing state death penalty legislation to determine whether the death penalty was cruel and unusual, the *Gregg* Court allowed political majorities to determine the scope of one of the protections constitutionalized in the Bill of Rights.⁴⁷⁰ This must be improper, for the Constitution contemplates that the judiciary will act as a check upon the legislative branches of government.⁴⁷¹ Moreover, by taking this approach, the *Gregg* Court avoided its constitutional duty, mandated

⁴⁶⁴ *Weems v. United States*, 217 U.S. 349, 378 (1910).

⁴⁶⁵ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

⁴⁶⁶ See Granucci, *supra* note 1, at 842.

⁴⁶⁷ See *supra* notes 96-193 and accompanying text for a discussion of the Court's contemporary consensus, proportionality, and utilitarian excessiveness approaches.

⁴⁶⁸ See *Furman v. Georgia*, 408 U.S. 238, 330-33 (1972) (Marshall, J., concurring); Berkman, *supra* note 8, at 72.

⁴⁶⁹ See *Gregg v. Georgia*, 428 U.S. 153, 174-76, 179-81 (1976) (opinion of Stewart, Powell, & Stevens, JJ.); Berkman, *supra* note 8, at 49.

⁴⁷⁰ See Berkman, *supra* note 8, at 49.

⁴⁷¹ See Radin, *supra* note 24, at 1036.

by the eighth amendment, to protect the individual from the subjugation of the masses.

On the other hand, when the Court has engaged in the independent proportionality and utilitarian excessiveness approaches, it has actively accepted its role as guardian of constitutional values.⁴⁷² The reason for this is that these independent approaches do not allow the judgments of the states solely to define the proscriptions of the eighth amendment.⁴⁷³ These approaches also ensure that criminal defendants are not punished more severely than their acts warrant, or more than is necessary to contribute to the acceptable goals of penology.⁴⁷⁴

For instance, in *Enmund v. Florida*, the Court's proportionality and utilitarian excessiveness analyses played important roles in the Court's decision that death was an unconstitutional punishment for a robber who neither took life, attempted to take life, or intended to take life.⁴⁷⁵ Under a pure contemporary consensus approach, the *Enmund* Court might not have reached the same conclusion because the states had not unanimously rejected the death penalty for such a defendant.⁴⁷⁶ But by giving serious consideration to the disproportionality of the death penalty to the defendant's crime of robbery, and the unlikelihood that this punishment for a robber would serve to further society's legitimate penal goals, the *Enmund* Court established that the eighth amendment's cruel and unusual punishments clause had substantive meaning beyond that encompassed in the views of state legislatures and juries.

Nevertheless, the independent proportionality and utilitarian excessiveness approaches have their own shortcomings. Consider for example the *Coker* decision, in which the Court held that the sentence of death was grossly disproportionate to the crime of rape.⁴⁷⁷ One may argue that the *Coker* decision is unprincipled because the *Coker* Court based its proportionality analysis on the subjective views of its individual Justices rather than on traditional constitutional principles such as deference to the legislature.⁴⁷⁸ In addition, the major problem with the Court's utilitarian excessiveness analysis is the inherent difficulty in measuring the deterrent

⁴⁷² See Berkman, *supra* note 8, at 66-67.

⁴⁷³ See *id.*

⁴⁷⁴ See *id.* at 70; *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

⁴⁷⁵ See *Enmund v. Florida*, 458 U.S. 782, 797-801 (1982).

⁴⁷⁶ See *id.* at 792-93.

⁴⁷⁷ *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

⁴⁷⁸ See *Coker*, 433 U.S. at 619 (Burger, C.J., dissenting).

and retributive value of capital punishment. Legions of scholarly works debate the subject, and it is probably impossible for the Court independently to decide this issue correctly when the vast literature on the subject is so inconclusive.⁴⁷⁹ Hence, although the Court's independent proportionality and utilitarian excessiveness approaches are an important and justified attempt by the Court to acknowledge its role as guardian of the eighth amendment, these approaches do not provide the Court with an approach to eighth amendment analysis that is free from significant criticism.

In sum, the United States Supreme Court's adoption of the "evolving standards of decency" doctrine was an improvement over the early Court's adherence to the historical interpretation of the cruel and unusual punishments clause. The "evolving standards of decency" doctrine, however, does not contain a single approach that by itself allows the Court to interpret the eighth amendment in a way that does not place too much emphasis on the views of the individual Justices or depend too much on exactly the sort of state power that the framers of the eighth amendment intended to limit. The remainder of this note will consider these problems in light of the present Court's consideration of the death penalty for juveniles and the mentally retarded, two groups of offenders who are arguably most in need of the eighth amendment's protection because the views of these groups do not ordinarily find a voice in legislation or in courts. These cases clearly illustrate that the Court continues to divide over the scope of the Court's role in eighth amendment analysis. Moreover, these cases illustrate the need for a more consistent mode of analysis. Hence, this note will consider the Court's opinions in *Thompson*, *Stanford*, and *Penry* and their possible implications to the future of eighth amendment jurisprudence. This note will then propose that to remedy the conflicting views of the members of the Court on interpreting the "evolving standards of decency," and to sustain the life of the eighth amendment, the Court should apply a compelling state interest/least restrictive means analysis, at least in considering the constitutionality of the death penalty for juveniles and the mentally retarded.

⁴⁷⁹ See, e.g., T. SELLIN, *THE PENALTY OF DEATH* 6 (1980) (author concluded that the death penalty had no deterrent value); Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397, 416 (1975) (empirical evidence not inconsistent with theory that capital punishment reduces murder rate); Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 STAN. L. REV. 61, 79 (1975) (author concluded it was impossible to prove with empirical social science whether executions deter murderers). For a synopsis of the debate surrounding the utility of executions, see D. HOOK & L. KAHN, *DEATH IN THE BALANCE* 41-53 (1989).

A. *Criticism of the Present Court's Treatment of Juveniles and the Mentally Retarded Under the Eighth Amendment*

From the foregoing, one might easily conclude that the most consistent aspect of the United States Supreme Court's view on its role in interpreting the eighth amendment and the "evolving standards of decency" is that its members cannot agree. As the Court's decisions concerning the constitutionality of the death penalty for juveniles and the mentally retarded illustrate, this division has continued to plague the present Court. Consequently, one may criticize the present Court for ignoring precedent as well as reducing the constitutional significance of the eighth amendment's prohibition against cruel and unusual punishments. Hence, it is an understatement to suggest that the Court is sorely in need of a more defined method of eighth amendment analysis.

For example, consider the analytical inconsistencies in the Court's two juvenile death penalty decisions, *Thompson v. Oklahoma* and *Stanford v. Kentucky*.⁴⁸⁰ In *Thompson*, a plurality of the Court, by relying on the contemporary consensus approach, and the independent proportionality and utilitarian excessiveness approaches, held that the execution of persons who committed their offenses before age 16 was unconstitutional.⁴⁸¹ One year later in *Stanford*, a plurality of the Court, relying solely on the historical and contemporary consensus approaches, held that the execution of persons who committed crimes while age 16 or 17 did not violate the Constitution.⁴⁸² Although the precise issues in *Thompson* and *Stanford* differed only slightly, the *Stanford* plurality failed to explain adequately why it was giving the defendants in that case less of a chance to prove the unconstitutionality of their sentences than did the *Thompson* plurality.

The *Stanford* plurality reduced the possibility that the defendants could prove the invalidity of their sentences in part by refusing to consider the independent proportionality approach to eighth amendment adjudication that the Court had used in the past.⁴⁸³ For example, in *Coker v. Georgia* and *Enmund v. Florida*, the Court relied on proportionality analysis to invalidate the death penalty for a rapist and for a robber who did not kill, attempt to kill, or intend

⁴⁸⁰ See *Stanford v. Kentucky*, 109 S. Ct. 2969 (1989); *Thompson v. Oklahoma*, 108 S. Ct. 2687 (1988).

⁴⁸¹ *Thompson*, 108 S. Ct. at 2691-92, 2700.

⁴⁸² *Stanford*, 109 S. Ct. at 2980.

⁴⁸³ See *id.*

to kill.⁴⁸⁴ Although in *Coker* all the states but Georgia did not authorize the death penalty for rape, and in *Enmund* all the states but eight did not sentence felony murderers to death, the Courts in those cases stated that this empirical data did not decide the controversy.⁴⁸⁵ Instead, the *Coker* and *Enmund* Courts recognized their constitutional duties to consider independently the proportional relation between these crimes and the death penalty, a consideration that ultimately led both Courts to invalidate the defendants' sentences.⁴⁸⁶ Therefore, by refusing to engage in independent proportionality analysis, the *Stanford* plurality was ignoring precedent, as well as making it easier for itself to uphold the defendants' sentences.

In stark contrast to the *Stanford* plurality, the *Thompson* plurality engaged in proportionality analysis to determine whether the execution of persons only one year younger than one of the defendants in *Stanford* was unconstitutional.⁴⁸⁷ Citing *Coker* and *Enmund*, the plurality in *Thompson* recognized that the import of those cases was that the Court cannot interpret the eighth amendment solely under a contemporary consensus approach because otherwise that amendment may not adequately protect offenders.⁴⁸⁸ The *Thompson* plurality, therefore, was loyal to the Court's precedents in a way that the *Stanford* plurality was not.

Another way that the *Stanford* plurality diverged from the reasoning of the *Thompson* plurality was by refusing to consider the independent utilitarian excessiveness approach.⁴⁸⁹ *Coker* and *Enmund* stand for the proposition that a punishment is excessive and unconstitutional if it fails to serve society's valid penal goals of deterrence and retribution.⁴⁹⁰ *Thompson*, which involved essentially the same issue as *Stanford*, also stands for this proposition.⁴⁹¹ Without adequate explanation, the *Stanford* plurality reduced the Court's eighth amendment doctrine so that it encompassed only the historical and contemporary consensus approaches. Consequently, the *Stanford* plurality failed to give the defendants the same chance at

⁴⁸⁴ See, e.g., *Enmund v. Florida*, 458 U.S. 782, 797-98 (1982); *Coker v. Georgia*, 433 U.S. 584, 597-98 (1977) (plurality opinion).

⁴⁸⁵ *Enmund*, 458 U.S. at 792-93; *Coker*, 433 U.S. at 596-97 (plurality opinion).

⁴⁸⁶ See *Enmund*, 458 U.S. at 797-98; *Coker*, 433 U.S. at 597-98 (plurality opinion).

⁴⁸⁷ See *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2698-99 (1988).

⁴⁸⁸ See *id.* at 2698 & n.40.

⁴⁸⁹ See *Stanford v. Kentucky*, 109 S. Ct. 2969, 2979 (1989).

⁴⁹⁰ See *Enmund v. Florida*, 458 U.S. 782, 798 (1982); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

⁴⁹¹ See *Thompson*, 108 S. Ct. at 2700 (plurality opinion).

avoiding their penalties that the Court had given similarly situated offenders.

The *Thompson* and *Stanford* plurality opinions are also analytically inconsistent in their treatments of the "evolving standards of decency" under the contemporary consensus approach. In *Thompson*, the plurality considered a number of different types of state legislation, including statutes specifying the legal age for activities such as driving a car and voting, as well as statutes concerning the death penalty.⁴⁹² The *Thompson* plurality also reasoned that jury sentencing behavior and the views of professional organizations and foreign countries were relevant.⁴⁹³ The *Stanford* plurality, on the other hand, refused to consider state legislation other than capital punishment statutes.⁴⁹⁴ Additionally, it reasoned that the views of foreign countries were irrelevant.⁴⁹⁵ Hence, the *Stanford* plurality, by confining its contemporary consensus approach to an examination of state death penalty legislation and jury sentencing behavior, again reduced the possibility that the defendants' sentences were inconsistent with the "evolving standards of decency."

If nothing else, these inconsistencies indicate that the Court is sorely in need of a more defined method of eighth amendment analysis. Regardless of one's views on the constitutionality of the execution of juveniles, this inconsistency is undesirable because it diminishes the legitimacy of the Court.⁴⁹⁶ For example, commentators suggest that the Court's legitimacy turns in part upon its respect for precedent.⁴⁹⁷ The *Stanford* plurality, however, specifically rejected proportionality and utilitarian excessiveness analysis without adequately distinguishing cases like *Thompson* and *Coker*.⁴⁹⁸ Although the *Stanford* plurality noted that in those prior cases, the objective indicia were more in favor of the Court's proportionality analysis, the *Stanford* plurality refused even to consider the proportionality of the crimes and offenders at issue.⁴⁹⁹ Hence, the *Stanford* plurality's opinion is objectionable and damaging to the Court's legitimacy because the *Stanford* plurality neither considered these strands of analysis, nor squarely confronted them.

⁴⁹² *Id.* at 2692-96.

⁴⁹³ *Id.* at 2696-97.

⁴⁹⁴ *Stanford*, 109 S. Ct. at 2977-79.

⁴⁹⁵ *Id.* at 2975 n.1.

⁴⁹⁶ See Berkman, *supra* note 8, at 65 (legitimacy and persuasiveness of Court's decisions rests on their reasoning in published opinions).

⁴⁹⁷ Goldberg & Dershowitz, *supra* note 5, at 1777.

⁴⁹⁸ See *Stanford v. Kentucky*, 109 S. Ct. 2969, 2980 (1989).

⁴⁹⁹ See *id.*

The *Stanford* plurality also damaged the legitimacy of the Court with its adoption of a completely positivist approach to the interpretation of the eighth amendment.⁵⁰⁰ Allowing states that authorized the execution of juveniles essentially to define the meaning of the cruel and unusual punishments clause made the eighth amendment's protection meaningless for 16 and 17-year-old offenders.⁵⁰¹ Although the remaining five Justices in *Stanford* (O'Connor, Brennan, Marshall, Blackmun, and Stevens) all acknowledged that cases like *Coker*, *Enmund* and *Thompson* spoke of the Court's constitutional obligation to perform proportionality and utilitarian excessiveness analysis, their inability to persuade the plurality indicates that the eighth amendment is in jeopardy of becoming a meaningless provision of the Bill of Rights.

Admittedly, Justice Scalia's plurality opinion in *Stanford* did contain strong justifications for the plurality's revisionist approach. For instance, he argued that a literal reading of the cruel and unusual punishments clause dictated that a punishment was invalid only if society as a whole rejected it.⁵⁰² Justice Scalia also argued that because elected representatives pass legislation, state death penalty statutes reflect society's "evolving standards of decency" in relation to the execution of juveniles.⁵⁰³ Additionally, Justice Scalia correctly noted that in cases like *Coker*, where the Court condemned a punishment under proportionality analysis, the objective indicia of society's views were more in favor of the invalidity of the death penalty than were the objective indicia in *Stanford*.⁵⁰⁴

Nevertheless, these arguments are inadequate justification for allowing the acts of political majorities to define the scope of the eighth amendment's protection.⁵⁰⁵ For example, it is unclear whether state death penalty legislation is an accurate reflection of how the vast majority of citizens feel about executing juvenile offenders. Perhaps, as Justice Marshall suggested under his normative approach in *Furman*, citizens who were informed of all the facts concerning the death penalty would find this punishment unacceptable.⁵⁰⁶ Under the *Stanford* plurality approach, however, any punishment is acceptable as long as enough state statutes say it is.

⁵⁰⁰ See *id.* at 2987 (Brennan, J., dissenting).

⁵⁰¹ See Berkman, *supra* note 8, at 49; Goldberg & Dershowitz, *supra* note 5, at 1782.

⁵⁰² *Stanford*, 109 S. Ct. at 2979-80.

⁵⁰³ *Id.* at 2979.

⁵⁰⁴ *Id.* at 2980.

⁵⁰⁵ See *id.* at 2986-87 (Brennan, J., dissenting).

⁵⁰⁶ See *Furman v. Georgia*, 408 U.S. 238, 369 (1972) (Marshall, J., concurring).

The Constitution also makes Justice Scalia's arguments in *Stanford* inadequate justifications for taking a completely positivist approach to interpreting the cruel and unusual punishments clause. Under the Constitution, the judiciary is to act as a check on the legislature. Assuming that the framers of the Bill of Rights intended to "withdraw certain subjects from the vicissitudes of political controversy," the *Stanford* plurality shirked this duty by returning the task of defining cruel and unusual punishments to the very majorities the framers distrusted.⁵⁰⁷ Taken to the extreme, the plurality's interpretation of the eighth amendment would uphold any sort of punishment as long as enough states were in favor of it. Therefore, by revising eighth amendment doctrine, the *Stanford* plurality failed to fulfill its role as guardian of the Bill of Rights and of individual interests.

In *Penry v. Lynaugh*, the plurality's analysis of the constitutionality of executing mentally retarded offenders shares the same defects as the *Stanford* plurality's analysis. Although Justice O'Connor's plurality opinion examined the "evolving standards of decency" under the independent proportionality and utilitarian excessiveness approaches, the other members of the plurality, by ignoring the import of cases like *Coker* and *Enmund*, argued that these strands of analysis were improper.⁵⁰⁸ These Justices reasoned that the phrase "cruel and unusual" precluded the Court from injecting the views of its Justices into eighth amendment analysis, and if legislation and jury determinations did not reflect society's disapproval of executing mentally retarded offenders, the Court had no choice but to hold that such executions were constitutional.⁵⁰⁹ Consequently, most of the Justices concurring in the result of the *Penry* decision confined their analysis to the historical and contemporary consensus approaches. By confining their analysis to these approaches, these Justices endorsed their view that a completely positivist approach was proper under the eighth amendment. For the reasons discussed above, this approach is an assault on the Court's legitimacy as well as on the vitality of the eighth amendment. Hence, the *Penry* plurality's analysis is as defective as the *Stanford* plurality's analysis

⁵⁰⁷ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); see *Stanford v. Kentucky*, 109 S. Ct. 2969, 2986-87 (1989) (Brennan, J., dissenting); Radin, *supra* note 24, at 1036.

⁵⁰⁸ *Penry v. Lynaugh*, 109 S. Ct. 2934, 2955-58 (1989) (opinion of O'Connor, J.); *id.* at 2964 (Scalia, J., concurring in part).

⁵⁰⁹ See *id.* at 2964 (Scalia, J., concurring in part).

because it too ignored precedent as well as the Court's duty to guard the Bill of Rights and the interests of individuals.

In sum, the present Court's eighth amendment jurisprudence lacks consistency as well as justification. Even more disturbing, however, is that *Thompson*, *Stanford*, and *Penry* involved the executions of persons to whom society owes a fiduciary obligation—juveniles and the mentally retarded. In light of these decisions, juvenile and mentally retarded offenders may never get a chance at rehabilitation. Whether they should have this chance is open to debate. Nonetheless, this debate should be carried out under the Court's "evolving standards of decency" precedents unless the Court advances a persuasive argument to justify the revisionist approach of the *Stanford* and *Penry* pluralities.

B. *Proposal For Reconsideration*

This note has focused on the present Court's treatment of the constitutionality of the death penalty for juveniles and the mentally retarded because these offenders, with their obvious immaturity and lack of participation in the political process, are most deserving of careful attention under the eighth amendment. As illustrated above, the present Court has not applied a consistent standard of review to the sentences of these offenders.⁵¹⁰ Perhaps the reason for this is that each of the Court's prior approaches to eighth amendment adjudication possesses deficiencies and the Court is not satisfied that any of the approaches sufficiently resolves the meaning of the cruel and unusual punishments clause. Thus, to remedy the deficiencies in current eighth amendment jurisprudence, the Court should adopt a compelling state interest/least restrictive means approach to consider the constitutionality of executing juveniles and the mentally retarded.

If the Court was to take such an approach in these contexts, it would be able to protect these individuals from execution if that protection was warranted. The compelling state interest/least restrictive means approach would also allow the members of the Court to refrain from injecting their independent views into eighth amendment interpretation, and hence, avoid the concern of the *Stanford* and *Penry* pluralities that the independent approaches, like proportionality and utilitarian excessiveness analysis, allow the

⁵¹⁰ See *supra* notes 480–509 and accompanying text for an analysis of the Court's treatment of the execution of juveniles and the mentally retarded.

Court to sit as a "committee of philosopher-kings."⁵¹¹ Furthermore, this approach would allow the Court to fulfill its constitutional role as the protector of the Bill of Rights in a way that adherence to a pure contemporary consensus approach does not.⁵¹² Under this approach, the states could continue to execute juveniles and the mentally retarded as long as they could prove that this most severe punishment was necessary to accomplish the legitimate goals of penology.⁵¹³

The Court could justify imposing this burden on the states by reasoning that execution is an irrevocable deprivation of the fundamental right to life guaranteed by the fifth and fourteenth amendments.⁵¹⁴ Then, in a manner similar to the Court's strict scrutiny analysis in *Skinner v. Oklahoma*, the Court could require the state to prove an interest in the execution of juveniles and the mentally retarded that a lesser punishment, like life imprisonment, did not serve as effectively.⁵¹⁵ In *Skinner*, the Court reasoned that the irrevocable effect of Oklahoma's Habitual Criminal Sterilization Act on the fundamental rights of marriage and procreation dictated such an approach.⁵¹⁶ If strict scrutiny was appropriate in *Skinner*, a compelling state interest/least restrictive means approach is similarly the appropriate approach for the Court to take given the irrevocable effect of the death penalty on juveniles and the mentally retarded. Hence, the Court would not be overstepping its bounds by adopting this analysis.

Moreover, the two cases in which the Court established the "evolving standards of decency" doctrine contained aspects of strict scrutiny analysis. In *Weems v. United States*, the Court supported its conclusion that a 15-year sentence of *cadena temporal* was cruel and unusual punishment for the falsification of a single public document by suggesting that a less severe sentence would adequately serve the government's interest in punishing the offender.⁵¹⁷ In *Trop v. Dulles*, the Court justified its holding that denationalization was cruel and unusual punishment for war-time desertion by stating that there was a fundamental right to citizenship and that this mandated the

⁵¹¹ See *Stanford*, 109 S. Ct. at 2980.

⁵¹² See *id.* at 2987 (Brennan, J., dissenting).

⁵¹³ See *Furman v. Georgia*, 408 U.S. 238, 359 n.141 (1972) (Marshall, J., concurring).

⁵¹⁴ See *id.*; Radin, *supra* note 24, at 1023.

⁵¹⁵ See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

⁵¹⁶ *Id.*

⁵¹⁷ See *Weems v. United States*, 217 U.S. 349, 381 (1910). See *supra* notes 75-80 and accompanying text for a discussion of *Weems*.

Court to examine the safeguard of the eighth amendment with "special diligence."⁵¹⁸ Thus, the Court could find additional justification for placing the burden on the states to prove the necessity of sentencing juvenile and mentally retarded offenders to death by noting the strict scrutiny aspects of *Weems* and *Trop*.

As discussed above, Chief Justice Tauro of the Massachusetts Supreme Judicial Court adopted a compelling state interest/least restrictive means approach in determining the constitutionality of the death penalty.⁵¹⁹ In *Commonwealth v. O'Neal*, Chief Justice Tauro correctly placed the burden of justifying capital punishment on the state by reasoning that execution was an irrevocable deprivation of a person's fundamental right to life.⁵²⁰ Although the state ultimately failed to sustain this burden,⁵²¹ a compelling state interest/least restrictive means approach allowed Chief Justice Tauro to give meaning to the state constitution's proscription against cruel or unusual punishments without overstepping his judicial role or allowing political majorities complete control in deciding the issue.

Admittedly, if the United States Supreme Court were to follow the lead of Chief Justice Tauro in *O'Neal*, the state would have difficulty justifying the execution of juveniles and the mentally retarded under a compelling state interest/least restrictive means approach. The states legitimate penal interests are in retribution, deterrence, and incapacitation. The state could probably prove that executing these offenders best serves society's interest in retribution. But as is evident from the Court's difficulties under utilitarian excessiveness analysis,⁵²² it may be virtually impossible for the state to prove that executing these offenders serves as a superior deterrent.⁵²³ Furthermore, life imprisonment obviously incapacitates these offenders as well as execution as long as jails are secure and the state does not release prisoners prematurely.⁵²⁴ Therefore, the

⁵¹⁸ See *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (plurality opinion). See *supra* notes 81-88 and accompanying text for a discussion of *Trop*.

⁵¹⁹ See *supra* notes 238-51 and accompanying text for a discussion of the *O'Neal* court's application of a compelling state interest/least restrictive means approach to the validity of the death penalty.

⁵²⁰ See *Commonwealth v. O'Neal*, 369 Mass. 242, 245-46 & n.2, 339 N.E.2d 676, 678 & n.2 (1975) (Tauro, C.J., concurring).

⁵²¹ *Id.* at 263, 339 N.E.2d at 687-88 (Tauro, C.J., concurring).

⁵²² See *supra* notes 185-88 and accompanying text for a discussion of the problems associated with utilitarian excessiveness analysis.

⁵²³ See, e.g., Goldberg & Dershowitz, *supra* note 5, at 1796; Comment, *supra* note 211, at 1353-54.

⁵²⁴ Goldberg & Dershowitz, *supra* note 5, at 1796.

state's argument under a compelling state interest/least restrictive means approach would probably have to rest on the notion that executing juveniles and the mentally retarded is the best way to accomplish the compelling state interest of retribution.

One can argue, however, that it is inherent in the logic of the eighth amendment that a penalty is cruel and unusual if it does not serve a societal goal other than retribution more effectively than a lesser penalty.⁵²⁵ For example, if the states were to boil juvenile and mentally retarded murderers in oil, this would probably satisfy society's desire for retribution more effectively than sentencing these persons to life imprisonment.⁵²⁶ But almost everyone would agree that the eighth amendment and the "evolving standards of decency" doctrine prohibit this sort of punishment, regardless of the offender's crime. Moreover, given the lesser culpability of juvenile and mentally retarded offenders, and the fiduciary obligations society owes to these persons, retribution alone should not be enough to justify the execution of juveniles and the mentally retarded. Hence, one may argue that even the state's interest in retribution should not be enough to satisfy the Court under a compelling state interest/least restrictive means test that the execution of juveniles and the mentally retarded is necessary.

In sum, the United States Supreme Court should adopt a compelling state interest/least restrictive means approach when considering the constitutionality of executing juvenile and mentally retarded offenders. This approach, by placing the burden on the state to justify these executions, would allow the Court to refrain from the inherently subjective independent approaches to eighth amendment adjudication such as proportionality analysis. This approach would also allow the Court to give substantive meaning to the cruel and unusual punishments clause that a pure contemporary consensus approach, with its emphasis on the views of political majorities, cannot. Moreover, this approach would prevent the execution of juvenile and mentally retarded offenders if that punishment is an unjustified infringement upon the fundamental right to life. Consequently, this approach would preserve the Court's legitimacy as well as protect the constitutional rights of these individuals, whose obvious immaturity and lack of participation in the political process render them most in need of judicial protection.

⁵²⁵ See *id.* at 1797; *O'Neal*, 369 Mass. at 261-62, 339 N.E.2d at 687 (Tauro, C.J., concurring).

⁵²⁶ See Goldberg & Dershowitz, *supra* note 5, at 1797.

IV. CONCLUSION

Throughout its history, the United States Supreme Court has struggled with the meaning of the cruel and unusual punishments clause, particularly in the context of the constitutionality of the death penalty. This struggle has generated a number of different approaches to eighth amendment death penalty analysis, most notably the historical, contemporary consensus, proportionality, and utilitarian excessiveness approaches. None of these approaches by itself, however, has allowed the Court to interpret the cruel and unusual punishments clause in a manner that gives substantive meaning to the clause, while still maintaining the legitimacy of the Court.

The Court's analysis concerning the constitutionality of executing juvenile and mentally retarded offenders has developed no differently. The Court's reasoning in these cases is inconsistent and it reflects the Court's continuing difficulties with the "evolving standards of decency" doctrine. Most significant in these cases, however, is the Court's move towards a pure application of the historical and contemporary consensus approaches. If the Court is to adopt the *Stanford* and *Penry* plurality's interpretations of the eighth amendment, the strength of the amendment's protection may be entirely lost because the states will be defining the proscriptions of the eighth amendment rather than the courts.

If, on the other hand, the Court was to adopt a compelling state interest/least restrictive means approach to determining the constitutionality of executing juvenile and mentally retarded offenders, the Court could refrain from basing its analysis on the inherently subjective independent approaches to eighth amendment adjudication. This approach would also allow the states to continue to execute these offenders if those executions were necessary for the accomplishment of the state's legitimate penal interests. Moreover, this approach would give substantive meaning to the cruel and unusual punishments clause. Thus, the Court's adoption of a compelling state interest/least restrictive means approach to cruel and unusual punishments analysis, at least in these contexts, would allow the Court to regain its legitimacy because under this approach, the Court could fulfill its constitutional role as the guardian of the Bill of Rights.

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